IN THE SUPREME COURT OF THE STATE OF NEVADA

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RUBY DUNCAN, an individual; RABBI MEL HECHT, an individual; HOWARD WATTS III, an individual; LEORA OLIVAS, an individual; ADAM BERGER, an individual,

Appellants,

vs.

STATE OF NEVADA ex rel, THE OFFICE OF THE STATE TREASURER OF NEVADA AND THE NEVADA DEPARTMENT OF EDUCATION; DAN SCHWARTZ, NEVADA STATE TREASURER, in his official capacity; STEVE CANAVERO, INTERIM SUPERINTENDENT OF PUBLIC INSTRUCTION, in his official capacity,

Respondents,

AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; AND TRINA SMITH,

Respondent-Intervenors.

Case No.: 70648

Appeal from the Eighth Judicial District Court, the Honorable Eric Johnson Presiding

BRIEF OF AMICUS CURIAE FOUNDATION FOR EXCELLENCE IN EDUCATION IN SUPPORT OF RESPONDENTS' ANSWERING BRIEF AND AFFIRMANCE

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Docket 70648 Document 2016-23051

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.

Amicus Curiae Foundation for Excellence in Education is a non-profit, tax-exempt organization incorporated in the State of Florida. The Foundation has no parent corporation, and no publicly held company has 10% or greater ownership in the Foundation.

Before the district court, *amicus curiae* was represented by Todd Zubler, Daniel P. Kearney, Alyssa DaCunha, Daniel Hartman, and Kevin Gallagher of Wilmer Cutler Pickering Hale and Dorr LLP, and Mark A. Hutchison of Hutchison & Steffen, LLC. Before this Court, *amicus curiae* is represented by the undersigned counsel.

Dated this 22nd day of July, 2016.

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I. **STATEMENT OF AMICUS CURIAE**

The Foundation for Excellence in Education ("ExcelinEd") is a 501(c)(3) nonprofit, nonpartisan organization founded in 2008 whose mission is to build an American education system that equips every child to achieve his or her individual potential. ExcelinEd designs and promotes student-centered education policies and provides model legislation, rule-making expertise, implementation assistance, and public outreach.

II. **SUMMARY OF CASE**

The Nevada Constitution mandates that the legislature "shall 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 Nevada Constitution separately requires the legislature to "provide for a uniform system of common [*i.e.*, public] schools" throughout the State. *Id.* § 2. Plaintiffs contend that the Educational Savings Account ("ESA") Program violates this latter provision because (they argue) it allows parents to direct program funds to "a non-uniform and competing system of private schools." Compl. ¶ 90. But nothing in Article 11 prohibits the legislature from making funds available to support other educational options *in addition to* the uniform system of public schools established by the State. To the contrary, the legislature is under a

constitutional obligation to promote education "by all suitable means," and the plain meaning and history of Section 2 of Article 11 make clear that this provision gives the legislature the authority and duty to establish a system of public schools but imposes no restriction on funding *other* educational options in the State. Indeed, Plaintiffs' position has been rejected by every state court to have confronted challenges based on substantially identical constitutional language.

In enacting the ESA Program, the Nevada legislature properly exercised its broad constitutional authority and discretion to promote the education of its residents "by all suitable means," including by empowering parents to choose the best educational options for their children. Indeed, research from other states indicates that expanding educational choices for children improves outcomes for the students that participate, *with no detriment to those students that continue their education in their local public schools*.

The district court therefore properly granted the State's motion to dismiss, and this Court should affirm the district court's decision.

III. LEGAL ARGUMENT

A. The ESA Program Comports with Article 11 of the Nevada Constitution

Article 11 of the Nevada Constitution contains two provisions requiring the legislature to foster and promote the education of its citizens: Section 1 requires that the legislature "encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements," Section 2 states that the "legislature shall provide for a uniform system of common schools." Notwithstanding Plaintiffs' arguments to the contrary, the legislature's reasoned decision to enact the ESA Program to provide parents with funds to use toward educational alternatives accords with the plain meaning and history of Section 2 and fulfills its broad mandate under the encouragement clause of Section 1.

1. Nothing in the Text, Purpose, or Structure of Article 11 Prohibits the Legislature From Promoting a Variety of Educational Options for Nevada Residents

The text of Article 11, § 2 requires the legislature to create and maintain a system of "common [*i.e.*, public] schools" that is open to all residents of the State. Section 2 mandates:

> 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.

Nev. Const. art. 11, § 2. There is no question that the legislature has satisfied these requirements by establishing a statewide system of public schools for the education of Nevada children. *See* Dist. Ct. Op. at 27 ("[S]o long as there is a 'uniform' public school system, open to the 'general attendance' of all, the Legislature has fulfilled the duty imposed by Article XI, section 2."). The common schools remain in place (as constitutionally mandated), and they will continue to serve the vast majority of Nevada children.

Plaintiffs, however, contend Section 2's requirement that the Legislature establish a uniform system of common schools is an implicit *prohibition* on the legislature's making funds available for *other* educational options in the State, beyond the system of public schools. Nothing in the text of Section 2 supports that contention. The provision is entirely silent as to what the legislature may or may not do beyond the maintenance of a system of common schools. When interpreting a constitutional provision, Nevada courts must "first look to the language itself" and, absent ambiguity, "will give effect to its plain meaning." *In*

re Contested Election of Mallory, 128 Nev. Adv. Op. 41, 282 P.3d 739, 741 (2012) (en banc). The meaning of Section 2 is plain: it requires the legislature simply to create and maintain a uniform system of common (public) schools open to all Nevada students. It does not include any mandate that the legislature provide *only* for common schools. The provision is a floor—not a ceiling—for the legislature.

This plain meaning of the text of Article 11 accords with the essential purpose of Article 11, as reflected in "the provision's legislative history and the constitutional scheme as a whole." *We the People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). The purpose of Section 2 was to authorize and require the legislature to provide, at a minimum, a uniform system of public schooling in the State. Nothing in the history of the provision's enactment suggests that it was intended to *restrict* the legislature from promoting other educational programs.

The framers of the Nevada Constitution envisioned a Nevada public school system that would exist side-by-side with other educational options. Education outside the public school system has long existed in Nevada; in fact, it predates the creation of the common schools. "[T]he school system in the early days of Nevada was not of a public but private character." Thomas Wren, *A History of the State of Nevada* 206 (1904). Although the state constitutional convention did not

specifically address what educational options the legislature could fund in addition to the common public school system, the history of Section 2 indicates that the constitutional framers understood the provision to regulate only public school administration. While debating Section 2 during the constitutional convention, John A. Collins of Storey County assured his colleagues that the section "has reference only to public schools, organized under the general laws of the State." *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada* 568 (1866).[1] There is no evidence that the framers intended

[1] The history of similar provisions in other states further supports the plain-meaning understanding that Section 2 is addressed only to the maintenance of a system of public schools. Fourteen states besides Nevada have constitutional provisions that require a uniform common school system. *See* Ariz. Const. art. XI, § 1; Colo. Const. art. IX, § 2; Fla. Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ind. Const. art. 8, § 1; Minn. Const. art. XIII, § 1; N.M. Const. art. XII, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 2; Ore. Const. art. VIII, § 3; S.D. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3. These clauses mandated a "limited concept of uniformity" *within* the public school system, which encompassed "requiring districts to operate schools and for a minimum period of time each year." John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 Albany L. Rev. 927, 962 (2007); *see also Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort, on the Eighth Day of September, 1890, to Adopt, Amend or Change the Constitution of the State of Kentucky* 4536 (1890) (noting support for a "system of common schools" entitling every child "to the same number of months' instruction in each school-year"). Early Nevada case law interpreting the "common schools" clause comports with this history: Nevada courts treated the requirement as pertaining to the administration of the public schools. *See, e.g.*, *State v. Duffy*, 7 Nev. 342, 347

Section 2's requirement of uniformity to extend beyond the public school system or inhibit the State's ability to support private educational efforts.

The fundamental problem with Plaintiffs' argument based on Section 2 of Article 11 is that it eviscerates the legislature's separate constitutional authority and mandate under Section 1 of Article 11 to encourage the education and advancement of Nevada residents "by all suitable means." Nev. Const. art. 11, § 1. That language—"all suitable means"—clearly enables the legislature to use a variety of measures to promote education in the State. Plaintiffs' contention, however, is that Section 2 *implicitly* removes the authority that Section 1 *expressly* grants. That makes little sense—it would be exceedingly strange to interpret the Nevada framers as having told the legislature in one section to do something "by all suitable means" and then in the next section as having limited the legislature to just one means.[2] Nothing in the text or structure of Article 11 suggests such an

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(1872) (requiring that African-American students be permitted to attend public schools based in part on Section 2); *State v. Tilford*, 1 Nev. 240, 245 (1865) (legislature's abolition of county public school board was supported by its Section 2 authority).

[2] Indeed, as the district court noted, the Nevada framers intended to do just the opposite. Faced with a situation with "less than 40,000 people living in [a State] comprised of over 110,000 square miles and with an economy based largely on mining, which historically was a boom or bust industry," the Nevada framers "reasonably intended to provide the Legislature broad powers going forward into

interpretation, and basic principles of statutory construction require that the mandate of Section 2 not be read to remove the mandate of Section 1. *See, e.g.*, *Pa. Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret provisions "so as to render superfluous other provisions in the same enactment").

Plaintiffs' primary argument on appeal is that the specific requirements of Sections 2 through 10 of Article 11 are effectively the outer limits of the State's authority under Section 1. To be sure, the requirements of Sections 2 through 10 must be followed: the State must, for example, establish "a uniform system of common schools," Nev. Const. art. 11, § 2, and "a State University," *id.* § 4. But there is absolutely nothing in Article 11 to suggest that the only "suitable means" for the "promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements" are the specific mandates provided in the rest of Article 11. Indeed, Plaintiffs' interpretation would lead to absurd results: it would suggest that because Article 11 mandates the establishment of "a State University" but mentions no other university or college, the State can fund the

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the future to take whatever actions it believed appropriate to encourage education and the improvement of a population to take on any potential new opportunities." Dist. Ct. Op. at 23-24.

University of Nevada, Reno but not the University of Nevada, Las Vegas or Nevada State College. *See We the People*, 124 Nev. at 881, 192 P.3d at 1171 (court must interpret constitution "to avoid unreasonable or absurd results")

Plaintiffs also cite the canon of construction *expressio unius est exclusion alterius*, or "the expression of one thing is the exclusion of another," to argue that "the constitutional directive that the State fund and maintain a public, uniform school system necessarily means that it cannot simultaneously fund and maintain a nonpublic, non-uniform, and competing school system." Appellant Br. at 48-49. But that canon applies when a statue authorizes or prohibits only a list of particular things and therefore may plausibly be read, in the absence of other guidance, to exclude other unenumerated things. The canon does not apply here, where the relevant constitutional provision expressly authorizes "***all*** suitable means." *See, e.g.*, *State ex rel. U.S. Lines Co. v. Second Judicial Dist. Court*, 43 P.2d 173, 174, 177 (Nev. 1935) (declining to apply *expressio unius* maxim to exclude certain steamships from taxation where statute "directs that *all* property of every kind, character, and nature, not specifically exempted, is subject to taxation" (emphasis added)). The district court, therefore, rightfully rejected Plaintiffs' argument, holding that Plaintiffs' reading "would ignore the framers' specific use of the word

‘all,’ granting the Legislature the authority to use ‘all suitable means,’ not just the ones stated in the subsequent sections of the article.” Dist. Ct. Op. at 24.

Plaintiffs also argue that a plain reading of Section 1 “in its entirety”[3] demonstrates that Section 1 was meant to encourage only public education. Appellant Br. at 46. They argue that although the first clause of Section 1 requires the legislature to promote education by all suitable means, the second clause—which requires the legislature to create the office of “superintendent of *public* instruction—means that the entirety of Section 1 must refer only to public instruction. *Id.* The plain language of Section 1, however, refutes Plaintiffs’ theory. Section 1 provides that 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.” Nev. Const. art. 11, § 1 (emphasis added). The use of the

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[3] The portion of legislative history quoted by Plaintiffs (Appellant Br. at 47) does not support Plaintiffs’ position that Section 1 permits funding only for education within the required uniform system of public schools. The discussion quoted in their brief addressed a different issue—whether the state could encourage moral instruction even while it may not teach sectarian doctrines. *See Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada* 566 (1866) (“It was the view of the chairman, and I think the committee generally agreed with him, that the State may properly encourage the practice of morality, in contradistinction to sectarian doctrines.”).

word "also" shows that the two clauses of Section 1 were meant to create independent duties and must be read separately. *See, e.g.*, *Liteky v. United States*, 510 U.S. 540, 566 (1994) ("Congress' inclusion of the word 'also' indicates that subsections (a) and (b) have independent force."). The discussion of a public superintendent in the second clause therefore does not limit the first clause—the clause at issue in this case—in any way.

Plaintiffs also argue that Article 11 prohibits the State from "promot[ing] a competing system of non-uniform private or parochial schools" and from "enacting a program that undercuts its duty to provide a uniform public-school system." Appellant Br. at 48, 51. Plaintiffs, however, appear to fundamentally misapprehend both the ESA Program and Section 2. First, the ESA Program does not create or fund a "competing system" of private and religious schools. Rather, the program merely provides funding to parents to allow them to choose from a wide range of educational alternatives to customize their child's education, including tutoring, speech-language therapy, and dual enrollment in college, in addition to traditional private schools. Second, as explained in Section B below, the ESA does not undercut the public schools and, in fact, provides many benefits to Nevada's currently overcrowded public school system.

Third, Plaintiffs' argument that the legislature may not provide a funding mechanism for diverse educational alternatives amounts to a sweeping theory that Section 2 prohibits state funding for anything but public schooling. That cannot be right—not least because, as discussed above, Plaintiffs' interpretation would effectively nullify Section 1's mandate to promote education "by all suitable means." Plaintiffs' contention would mean that the legislature could not appropriate money to Nevada children with special needs for behavioral therapy outside the public schools, fund private tutoring for a newly transplanted military family, or provide a student with visual impairments with specialized instruction from a teacher not employed by the traditional public schools. Moreover, Plaintiffs' argument that the State may not do anything that "undermine[s]" the public school system, Appellant Br. at 43, 45, 51, would force the courts into the difficult and awkward position of having to scrutinize any non-traditional educational funding to determine whether such funding somehow "undermines" the public schools. That type of policy inquiry is neither authorized by Article 11 nor something that the courts are well positioned to perform.

By mandating that "[t]he legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements," Section 1 empowered *the legislature* to determine how

to spend state dollars on education. Section 2 requires the legislature to create the constitutionally mandated "uniform system of common schools." But providing educational options in addition to that system is not inconsistent with the legislature's Section 2 obligation. Furthermore, there is absolutely no basis in the text or history of Section 2 to suggest it was intended to empower *the courts* to flyspeck the legislature's decisions with respect to educational funding outside the common school system. *See, e.g.*, Dinan, *supra* note 1, at 939 (state educational provisions were never meant to "empower judges to overturn legislative judgments with regard to the equity, adequacy, and uniformity of school financing").

2. Decisions by Courts in Other States Confirm that Article 11 Does Not Prohibit the ESA Program

Fifteen states include provisions very similar or substantially identical to Section 2 in their constitutions. Of the state courts that have decided challenges to education reforms based on such provisions, no court has held that the provision, without more, bars the legislature from promoting educational options in addition to the public school system.

a. Nearly All State Courts That Have Considered the Issue Have Rejected Challenges Similar to Plaintiffs'

Indiana provides an instructive example. The state has an almost identical constitutional framework to that of Nevada, including provisions virtually identical

to Section 2, *see* Ind. Const. art. 8, § 1, and Section 1 of Article 11 of the Nevada Constitution, *compare* Ind. Const. art. 8, § 1 ("[I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement."), *with* 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."). When a group of taxpayers challenged Indiana's school-choice program on the basis of this provision, the Indiana Supreme Court rejected the challenge, holding that the duties to provide for public schools and to promote education were "*two distinct duties* on the General Assembly" and that the legislature had complied with each. *Meredith v. Pence*, 984 N.E.2d 1213, 1224 (Ind. 2013) (emphasis in original). First, the court held that the legislature had fully carried out its constitutional mandate to provide "for a general and uniform system of Common Schools" when it enacted laws for public schooling, and that funding additional educational options did not violate that mandate. *Id.* Next, the court explained that the promotion of education "is . . . delegated to the sound legislative discretion of the General Assembly." *Id.* at 1222. Relying on the "by all suitable means" language, the court concluded that because the school-choice program "does not alter the structure or components of the public school system . . . [the school-choice

program] appears to fall under the first imperative ('to encourage') and not the second ('to provide')." *Id.* at 1224. The court therefore held that the legislature's "exercise of [its] discretion does not run afoul of the Constitution, [and] it is not for the judiciary to evaluate the prudence of the chosen policy." *Id.* at 1222.[4]

Nearly every court to consider a challenge based on similar constitutional language has reached the same conclusion. For instance, the Wisconsin Supreme Court noted that the mandate to provide common schools is satisfied when the legislature provides for public schooling in some manner. *Davis v. Grover*, 480 N.W.2d 460, 473 (Wis. 1992). Beyond that, the legislature is "free to act as it deems proper," including by providing funding for non-public educational alternatives. *Id.* The court noted that Wisconsin's school-choice program "in no way deprives any student the opportunity to attend a public school with a uniform character of education." *Id.* at 474.

Similarly, the North Carolina Supreme Court rejected an argument that North Carolina's school-choice program created an "alternate system" of publicly funded education and, instead, characterized the program as providing "modest

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[4] Because of the similarity in language between the Indiana and Nevada Constitutions, the Indiana Supreme Court's reasoning is persuasive here. Indeed, the conclusion that the clauses create two distinct duties is even stronger in Nevada, where the clauses are found in different sections of the education article.

scholarships." *Hart v. State*, 774 S.E.2d 281, 289 (N.C. 2015). The court noted that the state constitution required only that "provision be made for public schools of like kind throughout the state" and that the clause "applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system." *Id.* at 289-90. The court therefore concluded that the legislature's decision to fund educational initiatives outside the public school system was entirely constitutional. *Id.*

b. The Only State Court to Reach a Contrary Result Confronted Provisions that Differed Substantially from the Nevada Constitution

The only state court to strike down a school-choice program in the face of a similar constitutional provision did so based on textual provisions that are wholly absent from the present case. In *Bush v. Holmes*, the Florida Supreme Court held that the Florida Constitution "does not allow the use of state monies to fund a private school education." 919 So. 2d 392, 413 (Fla. 2006). Critically, however, the court relied on certain language that is not present in the Nevada Constitution. The Florida Constitution contains a general mandate stating that it is "a paramount duty of the state to make *adequate provision* for the education of all children residing within its borders." *See* Fla. Const. art. IX, § 1(a) (emphasis added). The next sentence of the Florida Constitution explicitly equates this "adequate

provision" duty to the creation and maintenance of a uniform public school system: "*Adequate provision* shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools . . . ." *Id.* (emphasis added). The Florida court expressly relied on this adequate-provision clause to limit the legislature's ability to fund non-public school options. *Holmes*, 919 So. 2d at 407. Indeed, the court distinguished the Wisconsin Supreme Court's *Davis* decision on these grounds, stating that the "education article of the Wisconsin Constitution . . . does not contain language analogous to the statement in article IX, section 1(a) that it is 'a paramount duty of the state to make *adequate provision* for the education of all children residing within its borders.'" *Id.* at 407 n.10 (emphasis added). Likewise, the Indiana Supreme Court, in declining to follow *Holmes*, relied on the different language of the Indiana Constitution, which "contains no analogous 'adequate provision' clause." *Meredith*, 984 N.E.2d at 1224. The Indiana court further noted that instead of an "adequate provision" clause, the Indiana Constitution had a clause encouraging moral, intellectual, scientific, and agricultural improvement "by all suitable means," and, thus, the common schools clause "cannot be read as a restriction." *Id.* To do so would transform the phrase

"all suitable means" into "by this means alone," which flips the phrase's meaning on its head.[5]

The Nevada Constitution includes nothing resembling an "adequate provision" requirement. The Nevada Constitution's provisions are, thus, critically distinct from the Florida provisions at issue in *Holmes*, and the Florida Supreme Court's decision in *Holmes* is not relevant here.

B. **The ESA Program Provides Unique Benefits That Fulfill the Legislature's Mandate to Encourage Education**

The ESA Program fulfills Article 11's mandate to encourage the education and improvement of Nevada residents "by all suitable means." By empowering parents to provide the best mix of educational options for their child, the ESA Program promotes and encourages the education of Nevada children and makes available to all families the same kinds of educational opportunities traditionally available only to families with financial means. Indeed, research from other states indicates that expanding educational choices for children improves outcomes for

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[5] As noted above, the Indiana Supreme Court also correctly determined the two clauses, rather than conflicting with each other, impose "*two distinct duties* on the General Assembly." *Meredith*, 984 N.E.2d at 1224 (emphasis in original). Because of the similarity in language between the Indiana and Nevada Constitutions, the Indiana Supreme Court's reasoning is persuasive. Its conclusion about the clauses creating two distinct duties is even stronger in Nevada, where the clauses are found in different sections of the education article.

the students that participate, *with no detriment to those students that continue their education in their local public schools*.

1. The Education Savings Account Program Brings Many Benefits to Nevada Families and Students, Without Harming the Common Public Schools

The ESA Program allows parents to choose the educational options best suited to their child and family by providing a per-student grant to cover approved expenses. Parents can opt to use the funds for tutoring services, books, specialized services for children with disabilities, tuition at approved private schools, universities, or community colleges, and other similar expenses. ESA programs, thus, "expand[] the options to meet the individual needs of children." *Niehaus v. Huppenthal*, 310 P.3d 983, 989 (Ariz. Ct. App. 2013). Parents without financial means are no longer limited only to those options and services available at their local school. Instead, all Nevada parents can tailor their child's education by selecting the options that best meet their child's needs. And, unlike the more one-dimensional school-choice programs that came before it, Nevada's ESA Program empowers parents to select educational programs and services in addition to simply enrolling their children in private schools.

The ESA Program also lessens the strain on the overcrowded Nevada school system. Prompted by years of above-average population growth, registration at

Nevada's public schools increased more than 118% between 1990 and 2010, and is projected to increase by another 21% between 2011 and 2023.[6] Coping with the current level of enrollment growth has proven incredibly challenging. To take just one example, Robert Forbuss Elementary School in Clark County was designed with a maximum capacity of 780 students, but in 2015 served 1,230 students. Eric Westervelt, *What Happens in Vegas Includes Crowded, Struggling Schools*, National Public Radio (May 6, 2015 4:31 AM ET), http://www.npr.org/sections/ed/2015/05/06/402886741/what-happens-in-vegas-includes-crowded-struggling-schools. That overcrowding has necessitated 16 trailer classrooms and a portable bathroom and lunchroom. *Id.* The school district's chief financial officer has stated that the district would need to build 32 new elementary schools to match current enrollment, before even beginning to account for future enrollment growth. *Id.* Robert Forbuss Elementary School is not alone; overcrowding is a statewide problem. In fact, from 1998 to 2013, the

[6] *See* United States Census Bureau, Nevada QuickFacts (2014), http://quickfacts.census.gov/qfd/states/32000.html (noting that from 2010 to 2014, the state of Nevada's population grew 5.1%, well above the nationwide average of 3.3%); *see also* National Center for Education Statistics, Digest of Education Statistics Table 203.20: Enrollment in public elementary and secondary schools (2013), https://nces.ed.gov/programs/digest/d13/tables/ dt13_203.20.asp.

number of portable classrooms used throughout Clark County more than doubled, from 771 to 1,663.[7]

And, the enrollment growth challenges are not limited to merely inadequate facilities; Nevada also is experiencing a teacher shortage. To address population growth, Clark County alone requires a 5,000-person pool of long-term substitute teachers and recently found itself 650 teachers short just two weeks prior to the beginning of the 2014-2015 academic year.[8] By providing parents with educational options in addition to those provided by their overcrowded local public school, the ESA Program will serve as a relief valve—both for the students who use the ESA Program to attend private schools and for those students who remain in the less-crowded public schools.

Opponents of the ESA Program argue that the relief that the ESA Program provides to Nevada's public schools will be limited because it will drain state funding from those schools. The opponents argue that even though the program

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[7] Paul Takahashi, *At 1,663 and Counting, Portable Classrooms a Fact of Life at CCSD Schools*, Las Vegas Sun (Oct. 15, 2013), http://lasvegassun.com/news/2013/oct/15/1663-and-counting-portable-classrooms-fact-life-cc/.

[8] Denisa R. Superville, *Interested in Teaching? Nevada's Clark County School District Really Wants You*, Education Week (April 10, 2015 9:31 am), http://blogs.edweek.org/edweek/District_Dossier/2015/04/are_you_a_certified_teacher_cl.html.

will lower the public schools' variable costs (because the school will have fewer students to educate), the schools will still have fixed costs (e.g., heating costs, building costs, etc.) and will have less state funding to cover those costs. These opponents, however, fail to recognize that the public schools will retain much of their federal and local funding, almost all of which does not vary with enrollment. According to the U.S. Department of Education, 76% of Nevada's federal funding for elementary and secondary level education comes from two programs—Grants to Local Educational Agencies under Title I of the Elementary and Secondary Education Act (47%) and federal aid for special education (29%)[9]—both of which are predominantly not based on public school enrollment. *See* Greg Forster, *A Win-Win Solution*, *infra* note 11, at 15.[10] Furthermore, local funding for public schools depends on local property taxes, which also do not vary by public-school

[9] *See* U.S. Department of Education, *Funds for State Formula-Allocated and Selected Student Aid Programs*, at 65, http://www2.ed.gov/about/overview/budget/statetables/17stbystate.pdf.

[10] *See, e.g.*, 20 U.S.C. § 6333(c)(1) (providing that for federal elementary and secondary education funding the "number of children to be counted for purposes of this section" depends on "the number of children aged 5 to 17, inclusive, in the school district of the local educational agency from families below the poverty level," as well as various children in foster care, and certain children above the poverty level).

enrollment.[11] So those federal and local funds, amounting to roughly 30-40% of current funding, can stay when students leave.[12] Thus, despite claims that school choice "drains" money from local schools, the public schools may well benefit from the ESA Program because they may end up with more money to spend per student in classrooms with lower student-teacher ratios. Indeed, choice programs historically have made public schools better off financially; one study estimates

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[11] *See* Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE 15 (3d ed. Apr. 2013) ("[L]ocal funding typically comes from property taxes. Small amounts of federal and local funding do vary with enrollment, but these are too complex and too small as a percentage of education spending to be worth tracking.").

[12] According to 2014 Census Bureau data, 10% of Nevada's education funding comes from the federal government, and 28% comes from local taxes. Thus, the public schools will retain roughly 38% of their current funding, even though they will have fewer students to educate, fewer teachers to hire, and fewer portable classrooms to rent. *See* U.S. Census Bureau Public Elementary-Secondary Education Finance Data, Table 1 (Summary of Public Elementary-Secondary School System Finances by State: Fiscal Year 2014), http://www2.census.gov/govs/school/elsec14_sttables.xls. Moreover, a recent empirical study of schools nationwide shows that 64% of the money spent per student in public schools consists of variable costs that disappear if students leave the schools. Benjamin Scafidi, *The Fiscal Effects of School Choice Programs on Public School Districts*, THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE (Feb. 2012), at 1.

that school-choice programs nationwide have helped local district finances by more than $421 million.[13]

Moreover, the Nevada legislature was sensitive to these concerns when it enacted the ESA Program. At the same time that it sought to alleviate the overcrowding and teacher shortage problems through the ESA Program, the legislature specifically buttressed the public schools with substantial new funding exceeding $1 billion.[14]

Finally, the empirical evidence about how school-choice programs actually work contradicts the fevered speculation of the ESA Program's opponents. Empirical studies about the effect of school-choice programs in other states indicate that such reforms improve outcomes for students who enroll in the school-choice programs, *while having no negative impact on public schools*. In fact, not one of the 23 studies conducted on the effect of school-choice programs on

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[13] *See* Susan Aud, *School Choice by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006*, FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE (Apr. 2007), at 37.

[14] Specifically, just a few days after passing SB 302, the legislature passed a $1.3 billion tax increase designed to "initiate far-reaching reforms in Nevada'[s] struggling K-12 education system." Ray Hagar & Anjeanette Damon, *"Historic" Tax Hike for Education Heads to Governor*, RENO GAZETTE-JOURNAL (June 1, 2015), http://www.rgj.com/story/news/politics/2015/05/31/nevada-legislature-final-days/28264109/.

academic outcomes in public schools has shown a negative impact on public schools; rather, 22 studies found a positive impact on public schools, while the remaining study found no impact. Greg Forster, *A Win-Win Solution*, *supra* note 11, at 11. Similarly, not one of the 12 studies conducted on how school-choice programs impact academic outcomes in private schools has shown a negative outcome at private schools. *Id.* at 7. Far from helping certain students at the expense of the common public schools, school choice benefits the students who enroll in the new programs without harming those who continue to be educated in their local public schools.

2. The ESA Program Creates Opportunities for Low-Income Nevada Students

One of the ESA Program's major benefits is the opportunity it provides to low-income parents and students who are stuck in a failing public school. ESA funds, which are projected to be about $5,700 for students meeting the low-income threshold, are enough for low-income students to pay for the full cost of tuition at many of Nevada's private schools. But, that is only one of many ways in which the ESA funds can be utilized to expand opportunities for low-income children.

ESA funds may be combined with family savings or private scholarships to allow students to attend private schools even with tuitions greater than $5,700.

Private schools, for example, will be able to leverage their existing scholarship funds more broadly to allow more low-income students to attend. Instead of providing one $7,000 scholarship to pay for one student's tuition, for instance, a school could potentially give five low-income ESA students $1,300 partial scholarships to help cover the difference between their tuition and the ESA amount.

Obviously, no empirical data is available yet from Nevada because the ESA Program has not yet been implemented, but reliable data from a similar program established in Florida shows that school-choice programs with the same funding amount as the Nevada ESA Program can succeed in placing a large number of low-income students in private schools. The most recent data available from the Florida Department of Education shows that 78,353 students in the state with an income of no more than 185% of the poverty level ($44,863 for a family of four in 2015-16) are attending a private school of their choice while receiving a scholarship of $5,677, just under the amount available by the ESA Program. *See* Florida Department of Education, Florida Tax Credit Scholarship Program February 2016 Quarterly Report. The Nevada program can be just as successful, particularly because of the state's separate Nevada Educational Choice Scholarship Program. That program is a $5 million tax-credit scholarship program that allows

low- and middle-income families to apply for a scholarship worth up to $7,755 which can be combined with funds from the ESA Program, allowing even more low-income families to have educational choices. NRS 363A.139, 363B.119 and 388D.250 to 388D.280.[15]

Opponents of the ESA program have argued against the program on the grounds that its benefits may go to non-poor families that do not need the State's assistance. The opponents cite a November 2015 report that only about 20% of ESA applications were submitted by families who indicated qualification for the low-income option under the program, which required an income below 185% of the poverty line.[16]

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[15] There is nothing in either law that prohibits families from applying for both programs. The organizations that award tax credit scholarships to families can prioritize partial scholarships for students who meet the definition of low-income under the ESA Program. So, instead of using the $5 million in credits to award 600 full scholarships, this would allow up to 2,500 partial scholarships of $2,000, which would increase a low-income child's total choice spending to more than $7,500—more than enough for the vast majority of private schools in the state. *See* Andrew D. Catt, *Exploring Nevada's Private Education Sector*, THE FRIEDMAN FOUNDATION FOR EDUCATION CHOICE (Aug. 2015), at 11 (showing that median tuition at Nevada's private elementary schools is $6,375 and the median tuition at Nevada's private middle schools is $7,180).

[16] *See* Neal Morton & Adelaide Chen, *Most Applicants for School-Choice Program are from Wealthy Neighborhoods*, LAS VEGAS REVIEW JOURNAL (Oct. 29, 2015), http://www.reviewjournal.com/news/education/most-applicants-school-choice-program-are-wealthy-neighborhoods.

The opponents' argument is flawed for multiple reasons. First, the ESA Program will have the significant benefit of relieving overcrowding in the public schools regardless of whether the students leaving are wealthy or low-income.

Second, the data about the Nevada ESA Program that the opponents cite is premature because the program has yet to be implemented. Indeed, there are good reasons to believe that the 20-percent figure in the November 2015 data understates the program's potential long-term benefit for low-income families. Many low-income families likely do not yet even know about the program, particularly because it is currently enjoined by the courts. Nevada's Treasurer's Office is not yet spending funds on a communications campaign to target low-income students because it is prohibited from implementing the program until the injunction is lifted. Moreover, given the legal uncertainty surrounding the ESA Program, low-income families have likely been more hesitant to sign up because of the fear that they might receive ESA funding, enroll in a new private school, and then have to disenroll if the courts were to permanently enjoin the ESA Program. Wealthier families, by contrast, are less subject to such risks because they have money to ride out such financial uncertainties. In this difficult environment, the fact that 20% of ESA applications are coming from low-income families is an *encouraging* sign, not a sign of any problem with the program.

In short, the state of Nevada can expect the share of low-income applicants to grow so long as the Court gives the ESA Program a chance to be implemented, leaving the ESA Program where it belongs: in the control of the political branches.

IV. CONCLUSION

The Court should affirm the district court's dismissal order because the ESA Program accords with Article 11 of the Nevada Constitution and fulfills the legislature's mandate to encourage education by all suitable means.

Dated this 22nd day of July, 2016.

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1. 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 2007 in 14-point Times New Roman font.

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3. 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 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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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **BRIEF OF AMICUS CURIAE FOUNDATION FOR EXCELLENCE IN EDUCATION IN SUPPORT OF RESPONDENTS' ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 22nd day of July, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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