IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents,

and

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

Respondent-Intervenors.

Supreme Court Case No. 70648

On Appeal from a Final Judgment of the District Court for Clark County, Nevada
Case No. A-15-723703-C
Hon. Eric Johnson

Respondent-Intervenors' Answering Brief

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

Attorneys for Respondent-Intervenors.

Timothy D. Keller* (AZ Bar No. 019844)
Keith E. Diggs* (WA Bar No. 48492)
INSTITUTE FOR JUSTICE
398 S. Mill Ave., Ste. 301
Tempe, Arizona 85281
Telephone: (480) 557-8300
Facsimile: (480) 557-8305
TKeller@ij.org
kdiggs@ij.org
**Pro Hac Vice* applications pending

Attorneys for Respondent-Intervenors.

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, 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 disqualifications or recusal:

1. There are no corporations or entities subject to disclosure;

2. Respondent-Intervenors are Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith.

3. Respondent-Intervenors are all individuals and thus have no parent corporations and no publicly held company owns 10% or more of its stock. None of Respondent-Intervenors are using a pseudonym.

4. Attorneys from the Institute for Justice and Kolesar & Leatham are expected to appear in this Court as counsel for the above-referenced parties.

Respectfully submitted this 21st day of July, 2016 by:

KOLESAR & LEATHAM

/s/ Matthew T. Dushoff, Esq.

Matthew T. Dushoff, Esq.
Nevada Bar No. 004975
400 S. Rampart Blvd., Ste. 400
Las Vegas, Nevada 89145
Telephone: (702) 362-7800
Facsimile: (702) 362-9472
mdushoff@klnevada.com

-and-

Timothy D. Keller* (AZ Bar No. 019844)
Keith E. Diggs* (WA Bar No. 48492)
Institute For Justice
398 S. Mill Ave., Ste. 301
Tempe, Arizona 85281
Telephone: (480) 557-8300
Facsimile: (480) 557-8305
TKeller@ij.org
kdiggs@ij.org
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Attorneys for Respondent-Intervenors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

This case presents a state constitutional challenge to Nevada's Education Savings Account ("ESA") program, enacted as Senate Bill (SB) 302, 78th Reg. Sess. (2015). Respondent-Intervenors (hereafter "Parents") are five parents whose children are eligible for, and who have been approved to participate in, the ESA program. Parents were defendant-intervenors below.

The ESA program is a voluntary educational choice program that allows students to withdraw from full-time attendance at their public school and instead receive approximately $5,000 in education funding deposited into a parent-controlled flexible spending account. Parents are then authorized to customize their child's educational program by spending their student's ESA funds on any mix of permissible educational goods and services. Authorized expenditures include, but are not limited to, private school tuition, tutoring services, educational therapies, distance learning, community college courses, and home education materials. Appellants' myopic focus on the fact that the program does not exclude religious private schools, or prohibit families from choosing religious educational service providers and purchasing religious home school curricula, obscures the fact that the ESA program relies on a flexible spending account mechanism to provide ESA participants with an extensive menu of educational options in an *à la carte* manner.

Appellants allege that the ESA program violates Article 11, § 10 and Article 11, § 2 of the Nevada Constitution.

Article 11, § 10 states that "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." The ESA program is consistent with (1) Article 11, § 10's plain text; (2) this Court's only case interpreting and applying the provision; and (3) the provision's history as a Blaine amendment, discussed in-depth below. Moreover, accepting Appellants' interpretation of Article 11, § 10 would require this Court to discriminate against religion in violation of the neutrality requirements of both the Nevada and U.S. Constitutions.

Article 11, § 2 directs the Legislature to "provide for a uniform system of common schools." Appellants' claim ignores Article 11, § 1's direction to encourage education "by all suitable means." The ESA program does not violate section 2 because Nevada's public schools remain open and available to all students. The ESA program also does not establish a so-called separate, non-uniform system of public education. Rather, private entities offer parents their educational services and parents make independent decisions about where and how to spend their ESA funds.

The District Court dismissed Appellants' Complaint for failing to state a claim upon which relief could be granted and entered judgment in favor of the

State Respondents and Parents. The District Court's judgment should be affirmed.

STATEMENT OF THE ISSUES

1. Does Nevada's ESA program, which allows parents to use the funds deposited in their child's flexible spending account to pay for a wide array of educational goods and services (including tuition at private and religious schools), violate Article 11, § 10 of the Nevada Constitution, which prohibits government actors from using public funds "for sectarian purpose?"

2. Does Nevada's ESA program, which provides education funding to parents who voluntarily opt their children out of the public school system, while permitting all parents who prefer a public school education to enroll their children in that system, violate Article 11, § 2's mandate to "provide for a uniform system of common schools?"

STATEMENT OF FACTS

I. THE ESA PROGRAM.

Nevada enacted its ESA program on June 2, 2015, when Governor Sandoval signed SB 302. Nevada's ESA program is one of the nation's most inclusive educational choice programs. Any child who has attended a public school for at least 100 days may participate in the program. RA Vol. 2, at 274–75 (SB 302, § 7). The program requires parents of a participating student not to enroll their student full-time in a public school and to establish an education savings account with a

financial management firm qualified by the State Treasurer. RA Vol. 2, at 274–75 (SB 302, § 7). The Treasurer then deposits into that account, in quarterly installments, an annual amount equal to "90 percent of the statewide average basic support per pupil." RA Vol. 2, at 276 (SB 302, § 8(2)(b)). For pupils with disabilities and for very low-income families, the amount deposited is equal to 100 percent of the statewide average basic support per pupil. RA Vol. 2, at 276 (SB 302, § 8(2)(a)). The estimated statewide average basic per pupil support amount for fiscal year 2016 is $5,669. RA Vol. 1, at 6, ¶ 21.

The ESA program requires participating students to receive instruction from one or more "participating entities." RA Vol 2, at 274, 277–78 (SB 302, §§ 5, 9). Participating entities include private schools, post-secondary institutions, private online schools, tutors, and parents themselves. RA Vol 2, at 278–79 (SB 302, § 11). The ESA program also allows public schools to be paid, on a *pro rata* basis, for providing part-time instruction to ESA participants. RA Vol. 2, at 276–77 (SB 302, § 8(3)). Parents must use the funds deposited in their student's ESA "only to pay for" the educational expenses authorized by the program.[1] RA Vol. 2, at 277

[1] Money deposited in an education savings account must be used *only* to pay for:

(a) Tuition and fees at a school that is a participating entity in which the child is enrolled;

(b) Textbooks required for a child who enrolls in a school that is a participating entity;

(c) Tutoring or other teaching services provided by a tutor or tutoring facility that is a participating entity;

(SB 302, § 9(1)). Allowable expenditures include, *inter alia*, tuition and fees at private schools, tutoring or other teaching services provided by a tutor or tutoring facility, curriculum and required supplemental materials for home education, distance learning programs, and even transportation costs. RA Vol. 2, at 278–79 (SB 302, § 9). The program defines a qualified private school as one that is "licensed pursuant to chapter 394 of NRS or exempt from such licensing pursuant to NRS 394.211."[2] RA Vol. 2, at 278 (SB 302, § 11(1)(a)). "Elementary and

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> (d) Tuition and fees for a program of distance education that is a participating entity;
> (e) Fees for any national norm-referenced achievement examination, advanced placement or similar examination or standardized examination required for admission to a college or university;
> (f) If the child is a pupil with a disability, as that term is defined in NRS 388.440, fees for any special instruction or special services provided to the child;
> (g) Tuition and fees at an eligible institution that is a participating entity;
> (h) Textbooks required for the child at an eligible institution that is a participating entity or to receive instruction from any other participating entity;
> (i) Fees for the management of the education savings account, as described in section 10 of this act;
> (j) Transportation required for the child to travel to and from a participating entity or any combination of participating entities up to but not to exceed $750 per school year; or
> (k) Purchasing a curriculum or any supplemental materials required to administer the curriculum.

RA Vol. 2, at 277 (SB 302, § 9(1)) (emphasis added).

[2] The ESA program thus defines which entities may provide goods and services to program participants *without reference to religion*. It is only existing state statutes exempting some private schools from the state's general private-school licensing act that make reference to religion.

secondary educational institutions operated by churches, religious organizations and faith-based ministries" are exempt from certain provisions of Nevada education law (though not state curricular guidelines). NRS 394.211(1)(d). Exempt schools must still receive licenses to operate and are regularly inspected "to ensure that the institution operates in accordance with the provisions of all laws, regulations and ordinances that are applicable to the educational institution." NRS 394.211(3), 394.221(2), 394.251. No state actor, at any time, exercises any influence over the parents' spending choices or educational placement decisions. The ESA program thus allows parents to tailor their participating child's education to match their child's unique learning needs.

Parents are not required to enroll their participating student in a private school in order to take advantage of Nevada's ESA program. Parents agree to take responsibility for their child's education and, to accomplish that task, they are permitted the flexibility to use the funds in their student's ESA to pay for any combination of educational goods and services authorized by the program. Thus, one parent might use all of her daughter's ESA funds to purchase curricula and educate her daughter at home. Another parent may choose to use all of her son's ESA money to pay for tuition and fees at a private school. Yet another parent may pick and choose courses for her child based on his or her preferred learning styles or the best available teachers. For example, a high school student participating in

the ESA program could take calculus from a renowned instructor at her local public high school; learn Spanish online in an interactive classroom setting; buy a home-study history curriculum and pay for an AP history exam; simultaneously satisfy both her high school and college English requirements by taking courses at a nearby community college; and study chemistry at a private school with a reputation for fun and engaging lab work.

The ESA program thus allows parents to choose from among a wide variety of educational options, including part-time instruction from public schools, without requiring families to use their ESA funds at a private school.

II. THE PARENTS AND THEIR CHILDREN.

Parents' children illustrate the maxim that there is no one-size-fits-all approach to educating children. Some of the Parents' children are their natural children. RA Vol. 1, at 113 (¶ 1), 118 (¶ 1), 125 (¶ 1). Parents Hairr and Smiths have adopted children. RA Vol. 1, at 105 (¶ 1), 134 (¶ 1). Parents Hairr, Robbins, Allen, and Smiths have children with learning or physical disabilities. RA Vol. 1, at 107–09 (¶¶ 21–30), 120–21 (¶¶ 20–23), 125 (¶ 7), 136–41 (¶¶ 16, 21–24, 29, 34–36, 44). The Allens have children who are gifted. RA Vol. 1, at 126 (¶ 9), 128 (¶ 18).

Parents Hairr, Robbins, and Allen do have children whose educational needs are being met in their current public or charter school. RA Vol. 1, at 108 (¶ 23),

120 (¶ 18), 127 (¶¶ 12–13). They do not worry that the ESA program will impair those schools' ability to educate their children, and plan to keep those children enrolled in their public schools. *Id.*

Rather, they hope the ESA program will provide alternatives for those of their children whose learning challenges have been ignored by their public schools. *See* RA Vol. 1, at 108–09 (¶¶ 27–29), 119 (¶¶ 15–16), 127–29 (¶¶ 15, 18, 26), 136–41 (¶¶ 16–18, 24–26, 35–37, 46–50). Parents Hairr and Espinoza have children who never want return to a traditional public school because of the bullying and abuse they received at the hands of their fellow classmates. RA Vol. 1, at 105 (¶¶ 6–7), 114–15 (¶ 20). Parent Robbins has three children (two of whom are now adults) who suffer from a degenerative tissue disorder called EDS. RA Vol. 1, at 118–20 (¶¶ 8, 13, 20). One of her adult daughters, who underwent brain surgery her senior year, was asked to give up AP classes as a condition of accepting the only instruction her school district provided for students on medical leave. RA Vol. 1, at 119 (¶¶ 14–17). Parent Robbins does not want her rising eighth-grader, whose EDS will soon begin to affect his attendance, to face the same Hobson's choice. RA Vol. 1, at 120–21 (¶¶ 20–23). Parent Allen has gifted children who aren't challenged enough in school. RA Vol. 1, at 128–29 (¶¶ 17–27). In the case of two of Parents Smiths' children, their teachers repeatedly failed to

implement their federal IEP-mandated writing aids. RA Vol. 1, at 137, 139 (¶¶ 26, 35).

Between them, Parents have 21 children who are eligible to participate in the ESA program. The Hairr, Robbins, and Allen families each have at least one student who will likely remain in their current public or charter school. RA Vol. 1, at 108 (¶ 23), 120 (¶ 18), 127 (¶ 12). All of the Parents believe that some of their children would do well in a private school, RA Vol. 1, at 106–09 (¶¶ 12, 15, 20, 34), 115 (¶ 23), 121–22 (¶¶ 29–35), 129 (¶¶ 23, 27), 138–42 (¶¶ 32, 41, 51). The Hairr, Espinoza, and Smith families have nine children who would most likely enroll in various religiously affiliated private schools, RA Vol. 1, at 106–09 (¶¶ 15, 20, 34), 115 (¶ 23), 136–42 (¶¶ 19, 32, 41, 51), while the Allens and Robbins have children who would attend a private school that is not affiliated with any particular sect, but that opens the day with prayer and expresses a general belief in the existence of God. RA Vol. 1, at 121–22 (¶¶ 29–35), 129–30 (¶¶ 29–34). The Smiths' oldest adopted daughter may look for a technical or vocational school to finish her high school education. RA Vol. 1, at 135 (¶ 13). Parents Hairr, Robbins, and Smith all have children who might be educated outside of a traditional classroom, using a mixture of online or distance learning tools, private tutoring, and curricula purchased for home education—options available to them under the ESA program. RA Vol. 1, at 109 (¶ 30), 121 (¶ 23), 137–39 (¶¶ 27, 37). The

variety of choices Parents may make for their children—even children in the same family—confirm that Nevada's ESA program is distinct from traditional "school choice" programs, which typically only offer parents the opportunity to use their benefits to pay for tuition at private schools.

SUMMARY OF THE ARGUMENT

The ESA program does not violate Article 11, § 10 as a matter of the provision's plain language because the program authorizes parents to spend their student's ESA funds for educational, not sectarian, purposes. And nothing about a parent's independent decision to send their child to a religious school alters that fact. The program is also consistent with this Court's only case interpreting and applying Article 11, § 10 because ESA funds only reach religious schools or institutions as an incident of parental choice, not as a result of any state official's decision, influence, or control. Moreover, Appellants' asserted interpretation of Article 11, § 10, which shares a sordid and bigoted history with the proposed federal "Blaine" amendment, would revive and expand the anti-Catholic animus that originally motivated the provision's adoption and simultaneously violate the Nevada and federal Constitutions' demands that the government remain neutral on matters of religion. In sum, parents exercise a genuine and independent decision as to how and where to use their student's ESA funding, thus severing any connection

between the state and any religious school or institution. The ESA program therefore passes muster under Article 11, § 10.

The ESA program is also consistent with Article 11, § 2 of the Nevada Constitution, which directs the Legislature to provide for a uniform system of "common" or public schools. As an initial matter, the ESA program fits comfortably within Article 11's separate mandate to the Legislature in section 1 to encourage learning by "all suitable means." While Article 11, § 2 sets the minimum requirements for establishing and maintaining a public school system, nothing in the provision's text limits the Legislature's discretion to provide families with additional educational options as a means to improve the state's overall educational environment. The program also does nothing to change the fact that Nevada's public schools remain fully funded, on a per-pupil basis, and thus open and available for all Nevada schoolchildren to attend (or not). The ESA program also does not establish, promote, or maintain a separate, non-uniform school system. The entities that provide educational services to ESA participants remain private and independent. Parents choose where and how to spend their student's ESA funds without any influence or control from state officials.

Appellants' claims are legally flawed and there are no facts they could adduce that would save their claims. As such, Appellants' Complaint was properly dismissed and the District Court's judgment should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews the grant of a motion to dismiss *de novo*. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (en banc). This Court considers all well-pled factual allegations in the Appellants' Complaint to be true[3] and draws all inferences from those facts in Appellants' favor. *Id.* However, if it appears beyond a reasonable doubt that Appellants could prove no set of facts which would entitle them to relief, as is the case here,[4] then their Complaint was properly dismissed. *Id.*

II. PRINCIPLES OF CONSTITUTIONAL INTERPRETATION.

"The rules of statutory construction apply to the interpretation of a constitutional provision." *We the People Nevada ex. rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008) (en banc). When construing constitutional

[3] Parents take no position on the trial court's determination that Appellants lack standing to assert "as-applied" claims. Rather, Parents argue here, as they did below, that the Court may accept Appellants' factual assertions as true and dismiss their Complaint in its entirety as a matter of law. RA Vol. 12, at 2590–2616; RA Vol. 13, at 2834–2848; RA Vol. 13, at 2855–2861.

[4] To the extent Appellants' Complaint does plead as-applied claims under Article 11, § 2, such as their assertions that the ESA program will have deleterious effects on Nevada's public schools, such claims are not susceptible to any proof because the ESA program has not gone into effect. As such, dismissal is still the appropriate remedy, even if it is a dismissal without prejudice to re-filing an as-applied challenge in the future after the program's impact on public schools can be clearly seen.

provisions, this Court seeks to ascertain the intent of those who enacted the provisions at issue and "to adopt an interpretation that best captures their objective. [This Court] must give words their plain meaning unless doing so would violate the spirit of the provision." *Nev. Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001) (en banc). Whenever possible, this Court construes provisions so that they are in harmony with each other, *see Bowyer v. Taack*, 107 Nev. 625, 627–28, 817 P.2d 1176, 1178 (1991) (per curiam), and specific provisions take precedence over general provisions. *SIIS v. Surman*, 103 Nev. 366, 368, 741 P.2d 1357, 1359 (1987) (per curiam). This court also construes the provisions of the constitution to give all parts meaning. *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (en banc).

Applying these principles to the provisions of Article 11 at issue here, and taking the allegations in Appellants' Complaint as true, as this Court must, the ESA program easily passes constitutional muster.

III. THE ESA PROGRAM DOES NOT VIOLATE ARTICLE 11, § 10.

The ESA program does not violate Article 11, § 10 for the following four reasons. *First*, the program is perfectly consistent with the plain language of Article 11, § 10, which states that "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." The funds deposited in each student's ESA are set aside for the purpose of education—

not for any "sectarian purpose." *Second*, the program comports with this Court's *only* decision interpreting and applying Article 11, § 10, *State ex rel. Nev. Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), which struck down a direct appropriation to a Catholic orphanage. That holding, however, does not extend to student assistance programs that may provide, as the result of the independent and private choices of individual aid recipients, incidental benefits to religious schools. *Third*, Article 11, § 10 is a Blaine amendment, meaning that its enactment was rooted in anti-Catholic bigotry. That history makes it clear that Article 11, § 10 does not prohibit student assistance programs governed by genuine private choice because Blaine amendments were designed to prohibit direct aid to Catholic institutions. *Finally*, both the Nevada and federal constitutions demand religious neutrality. In the context of a student assistance program, this neutrality requirement prohibits the state from denying aid to families based on religion. Accepting Appellants' interpretation of Article 11, § 10, to require discrimination against religion, would thus run afoul of the Nevada Constitution's liberty of conscience provision and the federal Constitution's First and Fourteenth Amendments.

A. The ESA program is consistent with Article 11, § 10's plain text.

The ESA program does not offend Article 11, § 10's plain language for two reasons. *First*, the provision plainly deals with, and constrains the action of, government officials. It does not constrain the private choices of private

individuals. *Second*, the funds deposited in each student's ESA are statutorily restricted for educational purposes, such as tuition or curriculum. As a result, the state does not—and could not—approve ESA expenditures for any "sectarian purpose." Thus, parents use ESA funds to pay for educational goods and services, even when they obtain educational goods and services from religious schools and religiously-affiliated education service providers. Nothing about using a government grant to pay for tuition, fees, or textbooks at a religious school, rather than using strictly private dollars, changes the fact that either way parents are paying for an education.

1. Article 11, § 10's plain language constrains government actors, not private citizens.

Article 11, § 10 constrains government actors. It does not hinder the private choices of private individuals. This is most readily apparent in the context of government-paid salaries. There is no dispute that government employees are paid with public funds, whether they be "State, County or Municipal." Nev. Const. art. 11, § 10. And there is no dispute that government employees may, consistent with Article 11, § 10, use their publicly funded salaries to tithe to their church, financially support a religious missionary, or donate to a charity whose mission is to win religious converts. The relevant distinction is private choice.

Consider, for example, the implications of Appellants' argument for programs like Nevada Medicaid, which is funded with both federal and state

dollars. *See Financing & Reimbursement*, Medicaid.gov, http://www.medicaid.gov/medicaid-chip-program-information/by-topics/financing-and-reimbursement/financing-and-reimbursement.html (last visited July 20, 2016). Appellants claim that the fact that parents will spend ESA funds at religious schools is the equivalent of the state spending money for a sectarian purpose. But under Nevada Medicaid, indeed in all state Medicaid programs, state dollars pay for medical services at religious hospitals. Many of those hospitals have historically operated as ministries of the sponsoring church, just as Appellants assert many of the private schools parents may choose are operated as ministries of churches. Opening Br. 35. And yet, everybody understands that, under Medicaid, the state is not spending money for a sectarian purpose. Rather, the state is providing individuals with the means to purchase medical services. And it is those individuals who select the healthcare facilities and hospitals of their choice—religious or non-religious.

Similarly, under the ESA program, the state provides parents with the means to purchase educational goods and services, including services from private schools—religious or non-religious—of the parents' choice. Just as no one suggests that Medicaid unconstitutionally spends public funds for a sectarian purpose, Appellants cannot show that the ESA program spends public funds for a sectarian purpose.

The key to ensuring that public money is not used for a sectarian purpose when the government provides individuals with financial assistance is private choice coupled with religious neutrality. Here, the ESA program takes no cognizance of religion. This is as it should be. The U.S. Supreme Court requires that religion be exempt "from the cognizance of [c]ivil power." *McDaniel v. Paty*, 435 U.S. 618, 624 (1978) (plurality op.) (quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904)); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (holding that state governments "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation"). Thus, consistent with Article 11, § 10's restraint on government actors using public funds for a sectarian purpose, and the federal Constitution's demand for religious neutrality, no government official chooses where—or how—parents use ESA funds.

2. ESA funds must be used for educational purposes.

Every dollar deposited in an ESA is restricted, by the plain terms of the program, for use "only" on educational services. RA Vol. 2, at 277 (SB 302, § 9). Parents are prohibited from making any other type of expenditure. Nevada's ESA program, like every constitutional student assistance program, does not preordain a single dollar for use at any sectarian school. Indeed, the text of SB 302 reveals that

it has nothing to do with religion—and everything to do with education. Yes, it permits families to use their student's ESA funds to pay for educational goods and services provided by religiously affiliated individuals, groups, and institutions. But simply including religious groups in a public welfare program is not evidence of the Legislature acting with a sectarian purpose. *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (finding "it important that [state] aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution"). The parents' choice to provide their student with a religious education does not change the fact that they are providing their student with an *education*. Because parents decide how and where to spend their student's ESA funds, it cannot be said that the government is spending money for a sectarian purpose. The religious (or non-religious) nature of the schools (or other education service providers) that parents choose, and any religious activities that occur therein, are simply irrelevant because the state has not made any placement or educational decisions for the children.

The Arizona Court of Appeals found the exercise of private choice amongst many options dispositive in its decision upholding Arizona's similar education savings account program under an Arizona constitutional provision prohibiting appropriations "in aid of any . . . private or sectarian school." Ariz. Const. art. 9, § 10. Given the wide range of options afforded to parents, Arizona's appellate

court upheld the program because "none of the ESA funds [we]re preordained for a particular destination." *Niehaus v. Huppenthal*, 310 P.3d 983, 988, ¶ 17 (Ariz. Ct. App. 2013). Nevada's ESA program, with a similarly wide range of options and much less restrictive constitutional language, easily passes muster by this reasoning.

Neither is Arizona alone in adopting and applying such reasoning. Numerous state supreme courts, construing constitutional language similar to Article 11, § 10, have found that parental choice renders student aid programs perfectly consistent with provisions that prohibit appropriations of public funds "for the benefit of" or "in aid of" "sectarian" schools and institutions.[5]

Appellants, however, focus not on *who* decides, but rather on *where* parents may choose to spend their student's ESA funds. Opening Br. 31-32. Appellants claim that, as of today, the majority of private schools in Nevada are affiliated

[5] *E.g.*, *Meredith v. Pence*, 984 N.E.2d 1213, 1229 (Ind. 2013) ("Any benefit to program-eligible schools, religious or non-religious, derives from the private, independent choice of the parents of program-eligible students, not the decree of the State . . . ."); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) ("Sectarian schools receive money that originated in the School Voucher Program only as the result of independent decisions of parents and students."); *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998) ("[T]he language 'for the benefit of' in art. I, § 18 'is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant . . . within the prohibition of the section.'") (citation omitted); *see also Bd. of Educ. v. Allen*, 228 N.E.2d 791, 794 (N.Y. 1967) ("Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.").

with, or at least accommodating to, religion—and that in some counties there are no non-religious private schools.[6] Opening Br. 8-9, 34-38. Their argument that students in those counties would be "forced to attend" a religious school, *id*. at 10, ignores the fact that participation in the ESA program is both *voluntary* and affords parents plenty of educational placement options—besides private schools—that would be available to students in those counties. RA Vol. 2, at 277–78 (SB 302, § 9). Parents make genuine and independent decisions under the program, and those decisions break the link between government and religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (holding that so long as a student assistance program is religiously neutral, private choice breaks the circuit between church and state). The ESA program does not set aside funds for a "sectarian purpose" because the state does not require ESA funds to be spent at sectarian schools. Any benefits that may flow to religious schools are an incident of private choice, and not government action. *See Corp. of Presiding Bishop of Church of*

[6] The U.S. Supreme Court has wisely rejected such geographic tests, emphasizing that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Zelman*, 536 U.S. at 658. "To attribute constitutional significance to" such figures "would lead to the absurd result that a neutral school-choice program might be permissible in some parts of" of a state, "where a lower percentage of private schools are religious schools," but not in other parts of the state "where the preponderance of religious schools happens to be greater." *Id*. at 657.

Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987) (holding that there can be no violation of the federal Establishment Clause unless "the *government itself* has advanced religion through its own activities and influence").

Finally, Appellants raise concerns about how religious schools will use ESA funds—that a school will be able to take the revenue generated by tuition payments and use it to engage in other religious activities. Opening Br. 35. But this is irrelevant. The objective of the ESA program is to provide funding to parents so those parents can pay to educate their children. Once parents pay for tuition to provide a child with an education, so long as the education is provided, it does not matter if the school later uses those funds to buy Bibles or build a chapel. When a private entity is paid for services rendered, whether with a government subsidy or not, the funds unquestionably become private funds after the exchange of goods and/or services.

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The ESA program does not offend Article 11, § 10's plain language because ESA funds are set aside for educational purposes. Every dollar deposited in an ESA is restricted, by the plain terms of the program, for use "only" on educational services. RA Vol. 2, at 277 (SB 302, § 9). Moreover, no state actor—the only actors bound by § 10—decides how or where to spend ESA funds. The religious (or non-religious) nature of the private schools (or other educational goods or

services provider) that parents choose, and any religious activities that occur therein, are irrelevant because the state does not make any decisions for the children and the state is not responsible for the activities of the private schools (beyond ensuring that they comply with the ESA law and their educational duties). The ESA program does not restrict a single dollar for use at any sectarian school or institution, unlike the appropriation to the religious orphanage at issue in *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), discussed next.

B. The ESA program is consistent with this Court's *Hallock* decision.

The cornerstone of Appellants' Article 11, § 10 argument is Nevada's sole case interpreting Article 11, § 10, *State v. Hallock*.[7] Opening Br. 24. But *Hallock* cannot bear the load Appellants place upon it. The case speaks only to direct, unrestricted legislative appropriations to sectarian institutions, not individual aid programs based on true private choice.

Hallock involved an unrestricted appropriation of public funds from the state treasury directly to the Nevada Orphan Asylum, a Catholic-run orphanage.

[7] Appellants also claim that a series of opinions by the Nevada Attorney General support their reading of § 10. These opinions are not binding on Nevada courts. *Goldman v. Bryan*, 106 Nev. 30, 42, 787 P.2d 372, 380 (1990). Moreover, the State Respondents convincingly demonstrated below that these opinions merely followed whatever federal Establishment Clause jurisprudence existed at the time of each opinion rather than applying any independent reading or authoritative interpretation of Article 11, § 10. RA Vol. 8, at 1627–28 & n. 6 (Defs.' Reply Supp. Mot. Dismiss). And there is no question the ESA program passes federal constitutional muster.

Hallock, 16 Nev. at 385. This Court struck down the appropriation because the state itself was choosing to fund a "sectarian" institution. *Id.* at 387. And not just any sectarian institution. The state was appropriating funds to the *same Catholic orphanage* that motivated the adoption of Article 11, § 10 in the first instance. *Id.* at 383 ("[W]e are strongly impressed with the idea that, in the minds of the people, the use of public funds for the benefit of petitioner and kindred institutions, was an evil which ought to be remedied, and that petitioner's continued applications greatly, if not entirely, impelled the adoption of the constitutional amendment.").

While *Hallock*'s reasoning is consistent with the motivation of the electorate that adopted Article 11, § 10, that reasoning does not extend to student assistance programs, like the ESA program. This is because there is a critical difference between (1) programs of true private choice, in which religious institutions may receive incidental aid, but only as the result of the genuine and independent choices of private individuals and not because of any government action; and (2) direct aid programs in which the government provides funds directly to religious institutions. *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) ("[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." (citations omitted)).

In *Hallock*, the state itself provided an unrestricted appropriation to a Catholic orphanage. In striking down the appropriation, this Court said (rightly) that the Legislature could not use public funds "directly or indirectly, *for the building up of any sect*." *Id.* at 387 (emphasis added). It is axiomatic that the government may not favor one religion over other religions—either directly or indirectly. In the context of institutional aid, the prohibition on "indirect" funding means that the State could not have provided *guaranteed aid to the institution* by, for example, paying the salaries of orphanage employees or purchasing food for the orphanage, instead of providing a grant directly to the institution. But the situation here is very different. Under the ESA program, the state funds students, not institutions. It is thus parents, not the state, who decide where to spend ESA funds.

Nowhere in *Hallock* did this Court read Article 11, § 10 to prohibit the government from providing funds to parents—whose participation is purely voluntary—so that they could purchase educational services from a broad range of religious and non-religious providers. All *Hallock* did was interpret Article 11, § 10 to prohibit the government from directly funding a religious institution of the government's sole and exclusive choosing. Stretching *Hallock*'s holding beyond a prohibition on direct institutional aid would produce absurd results. Every program in which public funds could end up being paid to a religious institution (such as

Medicaid) would be unconstitutional. While the state could not choose to fund Catholic hospitals directly, it can allow Medicaid recipients the free choice of where to use their public benefits. Thus, the distinction between an institutional and an individual (or student) aid programs matters a great deal.

An institutional aid program involves the legislature making a direct appropriation to an institution. Individual aid programs give beneficiaries a free choice amongst competing options, meaning that any "aid" that flows to religious institutions is merely an incident of private choice. Because the link between government funds and religion is broken by private choice, there is simply no state anti-establishment interest in excluding them. While Appellants may insist that Nevada has an interest in achieving a *greater* degree of separation than the Establishment Clause requires,[8] Opening Br. 15, the break in the link achieved by each parent's "genuine and independent private choice" is the *ultimate* separation. *Zelman*, 536 U.S. at 652.

[8] Any "state interest . . . in achieving *greater* separation of church and State than is already ensured under the Establishment Clause," is not a compelling governmental interest. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (emphasis added) (rejecting Missouri's reliance on state Blaine amendment to justify excluding religious organizations from using otherwise available state university facilities); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (concluding state university reliance on state Blaine amendment was not a compelling governmental interest justifying the exclusion of a religious organization from using otherwise available student-activity funds).

Appellants mistakenly believe that *Hallock* does address the issue of parental choice. They seize upon the following passage:

> It does not matter that Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. The constitution prohibits the use of any of the public funds for such purposes, whether parents wish it or not. If all the children at the asylum were Catholics, and all their parents or friends wished them taught Catholic dogmas, those facts would not make the institution non-sectarian. *It is what is taught, not who are instructed*, that must determine this question.

Hallock, 16 Nev. at 386. Opening Br. 23-24. However, the "question" that was being answered by that passage was whether or not the orphanage was a sectarian institution. *Id*. Here, there is no such question. Of course some of the schools to which ESA parents can send their children are sectarian, just as some of the hospitals to which Nevada's Medicaid patients may be admitted are sectarian. The sectarian nature of these institutions is irrelevant, though, because, unlike in *Hallock*, the government aid is going to individuals who make free choices, rather than going to particular institutions. The lesson of *Hallock* is simple: Where (as in that case) the government is directly aiding an institution, courts must ask whether that institution is sectarian and, if so, whether there are limits in place to restrict how that institution spends its funds.[9] But where (as here), the government is

[9] In the context of direct institutional aid, constraints need to be placed on how religious institutions use such aid. Direct aid restrictions are necessary because it is

aiding individuals, whether it is helping them to buy education or to buy healthcare, these questions are irrelevant.

In sum, the *Hallock* Court interpreted Article 11, § 10 to prohibit the government from providing direct funding to a religious institution with no safeguards to prevent that institution from funding religious instruction. The *Hallock* Court did not, however, read Article 11, § 10 to prohibit the government from providing aid to individuals who have a genuine choice as to where to use that aid. It is simply unreasonable to stretch *Hallock*'s holding, or Article 11, § 10's plain language, to impose such a prohibition.

C. Article 11, § 10's history demonstrates that it is a Blaine amendment. Thus, it was never intended to apply to individual assistance programs governed by private choice where citizens may freely choose to use their benefits at religious institutions.

Article 11, § 10 is a Blaine amendment. Blaine amendments have their roots in anti-Catholic animus and were aimed at blocking state appropriations directly to

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the government, not private citizens, choosing to spend public funds at a religious institution—thus making the government responsible for any advancement of a religious message. *See Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (upholding construction grants to church-related colleges and universities so long as the buildings and facilities thereby constructed would be restricted to non-religious uses); *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (upholding direct grants to religious charities to provide pregnancy-related services so long as the charities were not using government funding to produce "explicitly religious content"). Here, because religious schools receive ESA funds only as an incident of parental choice, and only in exchange for educational services, it is irrelevant that there are no restrictions on how schools (religious or otherwise) subsequently use the funds.

"sectarian," meaning Catholic, institutions. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) ("Opposition to aid to 'sectarian' schools acquired prominence in the 1870's . . . . and it was an open secret that 'sectarian' was code for 'Catholic.'"); *see also Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) (explaining that anti-Catholic sentiment "played a significant role" in state Blaine provisions and that references to "sectarian schools . . . in practical terms meant Catholic") (internal quotation marks omitted). In light of the discriminatory history underlying the federal Blaine amendment, Blaine's legacy should be "buried now." *Mitchell*, 530 U.S. at 829 (plurality op.).

The name "Blaine" refers to James G. Blaine, who proposed an amendment to the federal constitution in 1875 to prohibit states from appropriating public money to sectarian schools. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992). The proposed federal Blaine amendment arose at a time when public schools were not the secular public institutions we know today. Lloyd P. Jorgenson, *The State and the Non-Public School: 1825-1925*, at 69–72 (Univ. of Mo. Press 1987). Public schools were originally designed to be religious schools, except that their religion was a generic, nondenominational Protestantism that taught doctrines that most Protestant sects could agree upon. *Id*. at 60. Beginning in the mid-1850's, because they were unhappy with the Protestant orientation of the public schools, Catholics began

creating their own schools and campaigning for a proportional share of public school funds. *Id*. at 83–85. These efforts outraged the Protestant majority. Tyler Anbinder, *Nativism & Slavery: The Northern Know Nothings & The Politics of the 1850s*, at 95, 110–15 (Oxford Univ. Press 1992). In response to early Catholic efforts to secure public funding for their schools, several New England states enacted proto-Blaine amendments to ensure that Catholic schools would not receive the same public subsidies that the Protestant public schools received. *Id*. at 135–36.

After the Civil War, the Catholics renewed their demands for a share of the common school funds. In 1875, Blaine, eager to secure the Republican presidential nomination, introduced an amendment to prohibit public funding of "sectarian" schools. Blaine's proposed amendment was a "transparent political gesture against the Catholic Church." Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 671 (1998). It was part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a "Catholic menace." Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y Rev. 113, 146 (1996).

While Blaine's amendment narrowly failed to garner the required supermajority in the U.S. Senate to send it to the states for possible ratification, a

number of states, including Nevada, thereafter adopted similar state constitutional language. As evidenced by its use of the term "sectarian," its introduction in 1877—just six months after Congress considered the federal Blaine amendment—and its adoption in 1880 as a means of blocking support for a Catholic institution, Article 11, § 10 is clearly a Blaine amendment. Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 565–66 (2002). Specifically, Article 11, § 10 was designed to block appropriations to the Catholic orphanage at issue in *Hallock*. 16 Nev. at 383; *see also id.* at 385–86 (emphasizing that both the framers and the people who ratified Article 11, § 10 understood the Catholic Church to be sectarian).

Understanding that Blaine amendments were "born of bigotry," *Mitchell*, 530 U.S. at 829 (plurality op.), should inform the proper interpretation and scope of Article 11, § 10. *See Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999) (stating the court "would be hard pressed to divorce [Arizona's Blaine] amendment's language from the insidious discriminatory intent that prompted it"). Here, as shown above, the ESA program is perfectly consistent with the plain language of Article 11, § 10. Thus, to resolve this case, this Court need not declare Article 11, § 10 null and void. It need only recognize, as other state courts have

recognized,[10] that the language of state Blaine amendments do not prohibit religiously-neutral student assistance programs where any incidental benefits that flow to religious schools do so entirely as the result of private decisions of parents.

However, if Article 11, § 10's reach is expanded from a prohibition on institutional aid to a prohibition against student assistance programs, the anti-religious animus that motivated its adoption will be resurrected and given new life as discrimination against all religions—which in turn would violate both the Nevada and federal constitutions' strict religious neutrality requirements.

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[10] *Meredith v. Pence*, 984 N.E.2d 1213, 1228–29 (Ind. 2013) ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend."); *Niehaus v. Huppenthal*, 310 P.3d 983, 987, ¶ 15 (Ariz. Ct. App. 2013) ("The specified object of the ESA is the beneficiary families, not private or sectarian schools."); *Cain v. Horne* (*Cain* I), 183 P.3d 1269, 1274, ¶ 11 (Ariz. Ct. App. 2008) (upholding voucher program under the Arizona Constitution's analogous Religion Clause, Art. 2, §12, because "parents and children make an independent, personal choice to direct the funds to a particular school, which may be either religious or secular"), *overruled on other grounds by Cain v. Horne* (*Cain* II), 202 P.3d 1178 (Ariz. 2009); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. Ct. App. 2001) ("[T]he Act allows Illinois parents to keep more of their own money to spend on the education of their children as they see fit and thereby seeks to assist those parents in meeting the rising costs of educating their children."); *Toney v. Bower*, 744 N.E.2d 351, 360 (Ill. Ct. App. 2001) (finding persuasive the reasoning in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993), that "[t]he direct beneficiaries of the aid were disabled children; to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries"); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); *Jackson v. Benson*, 578 N.W.2d 602, 626 (Wis. 1998) (describing the vouchers as "life preservers" that have "been thrown" to students participating in the program).

D. Stretching Article 11, § 10's Blaine language to prohibit student assistance programs would run afoul of the neutrality principles required by both the Nevada and federal constitutions.

Accepting Appellants' interpretation of Article 11, § 10 to prohibit the ESA program just because it includes religious options would conflict with both the Nevada and federal constitutions. The Nevada Constitution's Article 1, § 4 requires the state to remain neutral with regard to religion in order to protect the liberty of conscience. And the federal Constitution's Establishment and Free Exercise Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, require the state to neither favor nor disfavor religion.

1. The Nevada Constitution requires neutrality toward religion.

The Nevada Constitution's Article 1, § 4, states, in relevant part, "[t]he free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State . . . but the liberty of [conscience] hereby secured, shall not be so construed, as to excuse acts of licentiousness . . . ." While this provision has received little judicial attention, its text demands neutrality toward religion by simultaneously protecting both religious belief ("profession") *and* religious action ("worship"). Nevada's ESA program is scrupulously religiously neutral because state officials administering the program take no "cognizance" of religion. *McDaniel v. Paty*, 435 U.S. 618, 624 (1978) (plurality op). Thus, consistent with Article 1, § 4's demand for religious

neutrality, the ESA program neither favors religion over non-religion, nor one religion over another.

2. The Federal Constitution also demands religious neutrality.

The U.S. Supreme Court has held that neutrality and private choice are the two criteria for enacting a constitutional individual aid program under the federal Constitution. Thus, the *absence* of those criteria—that is, a *lack* of neutrality, or a *denial* of private choice—is necessarily fatal under the federal Constitution. After all, religious neutrality and private choice are relevant because a law must not have the "the forbidden 'effect' of advancing *or inhibiting* religion." *Zelman*, 536 U.S. at 649 (emphasis added). If neutrality toward religion and provision for individual private choice are necessary to protect against a governmental *advancement* of religion, then excluding religious options from a program of private choice would necessarily "*inhibit*[] religion." *Id.* (emphasis added).

Appellants seek solace for their "it is okay to discriminate against religion" argument in the U.S. Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004). But *Locke* lends their argument no support. In *Locke*, the U.S. Supreme Court permitted a state to prohibit recipients of state-funded scholarships to use those scholarships to pursue degrees in devotional theology. In so doing, the Court identified several critical factors limiting the decision's reach beyond the peculiar facts of the case itself. First, the Court emphasized that the *only* governmental

interest implicated by the prohibition was the "State's interest in not funding the religious training of clergy." *Id*. at 722 n.5. Second, it stressed the fact that, "[f]ar from evincing . . . hostility toward religion," the scholarship program went "a long way toward including religion in its benefits" by, among other things, "permit[ting] students to attend pervasively religious schools." *Id*. at 724. Third, it noted that "Blaine Amendment[s]," which have been "linked with anti-Catholicism," were not at issue in the case. *Id*. at 723 n.7. Given that the state interest identified in *Locke* is not applicable here, the fact that the ESA program is neutral as to religion, and the fact that the Blaine amendment issue is present in this case, *Locke* has no applicability to this case.

As explained below, Appellants' interpretation of Article 11, § 10 would violate the federal Constitution's demand of religious neutrality contained in the First and Fourteenth Amendments. However, rather than confront these thorny issues, this Court may take the jurisprudentially prudent approach and avoid the federal constitutional problems by construing the plain language of Article 11, § 10 to allow religious options in a religiously neutral student assistance programs.

a. Striking down the ESA program because private citizens are allowed to choose religious schools would violate the Establishment Clause.

Interpreting Article 11, § 10 to require the exclusion of religious schools would violate the Establishment Clause, which "prohibit[s] the government from

favoring religion" as well as from "discriminating *against* religion." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring). Striking down the ESA program because it permits families to choose religious options would have the effect of discriminating against religion. *See Everson*, 330 U.S. at 18 ("[The First Amendment] requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."). Appellants' reading of Article 11, §10 thus violates the Establishment Clause by singling out religion for disfavor.

b. Striking down the ESA program because parents may select religious schools would violate the Free Exercise Clause.

The Free Exercise Clause forbids discrimination against "a particular religion or . . . religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Thus, laws—including constitutional provisions—drawn along religious lines or passed with the purpose of, or having the effect of, either advancing or inhibiting religion are subject to heightened scrutiny. *Id*. at 531–32. Distinctions between religion and non-religion are just as offensive to the Constitution as distinctions between religions. *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and non-religion.").

The Free Exercise Clause simply does not permit "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (declaring unconstitutional the exclusion of "pervasively sectarian" post-secondary institutions from student aid program). Other federal courts of appeal have come to the same conclusion. In *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001), the Fourth Circuit said that, "by refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith." *Id*. at 510. Striking down a student assistance program on the ground that it includes both religious and non-religious options is just as much a violation of the Free Exercise Clause as discriminating against only one religion. Increased discrimination does not mean increased constitutionality.

c. Striking down the ESA program because some families can choose religious schools for their children violates the Fourteenth Amendment's Equal Protection Clause.

Striking down the ESA program just because Nevada families are permitted to freely and independently choose to use their ESA funds at religiously affiliated education service providers would also violate the Fourteenth Amendment's Equal Protection Clause. Distinctions drawn on the basis of religion are "inherently suspect" and thus subject to strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S.

297, 303 (1976) (per curiam); *see also United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement based upon an unjustifiable standard such as race [or] religion . . . ." (internal quotation marks omitted)). Moreover, provisions "born of animosity," such as Article 11, § 10, are subject to heightened scrutiny. *See Romer v. Evans*, 517 U.S. 620, 633–34 (1996) (striking down a Colorado constitutional provision that made it "more difficult for one group of citizens than for all others to seek aid from the government"); *Hunter v. Underwood*, 471 U.S. 222, 231–33 (1985) (striking down an Alabama constitutional provision that disproportionately disenfranchised African-Americans where the historical evidence demonstrated the provision was born of "discriminatory motivation" toward that class).

Appellants' interpretation of Article 11, § 10 presents the same equal protection problems that doomed the provisions in *Romer* and *Hunter*. The purpose of Article 11, § 10 was to disadvantage Catholics. If Appellants' argument prevails, the effect would be to expand that disadvantage to all religions.

IV. THE ESA PROGRAM DOES NOT VIOLATE ARTICLE 11, § 2.

Appellants' final claim is that Article 11, § 2 mandates that the public school system is the exclusive means of publicly funding education. This argument suffers three fatal flaws. *First*, it ignores the plain language of Article 11, § 1, which explicitly authorizes the Legislature to pursue educational alternatives outside of

the public school system. *Second*, it ignores the fact that Nevada's public school system remains open and available to all students in the state. And *third*, it wrongly assumes that participating entities become public schools by offering their services to ESA students.

A. Article 11, § 1 vests the Legislature with broad authority to encourage education by "all suitable means."

Article 11, § 1 directs the Legislature to "encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements." Adopting Appellants' interpretation of Article 11, § 2, to require that the exclusive means of publicly funding education is through the public school system, would read § 1 right out of the Constitution. But "[t]he Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision." *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) (quoting *Nevadans for Nev. v. Beers*, 122 Nev. 930, 944, 142 P.3d 339, 348 (2006)).

The duty imposed by Article 11, § 1 is separate from and broader than the Legislature's duty in Article 11, § 2 to "establish and maintain" a system of public schools. The expression of the broader duty to encourage learning "by all suitable means" vests the Legislature with the authority to undertake a variety of educational initiatives—including initiatives outside of the public school system. Indeed, this Court has previously held that the Legislature has discretion to pursue

educational measures outside of the public school system. *State ex rel. Keith v. Westerfield*, 23 Nev. 468, 474, 49 P. 119, 121 (1897) (authorizing expenditures from the general fund for educational expenses outside of the public school system).

Indiana's Supreme Court recently rejected a similar "exclusivity" argument. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013). *Meredith*'s reasoning is worth considering because Indiana's constitution contains language nearly identical to Article 11, § 1.[11] The expression of two distinct duties led the Indiana court to conclude that the duty to encourage education by "'all suitable means' . . . [was] to be carried out *in addition to* provision for the common school system." *Id.* at 1222.

While not popular with Appellants, Nevada's ESA policy simply recognizes that there is no one-size-fits-all approach to educating children. And the adoption of such policies is well within the discretion of the Legislature. *See id.* at 1216 ("In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process."); *Kotterman v. Killian*, 972 P.2d 606, 623–24 (Ariz. 1999) ("Some might argue that the statute in

[11] The Indiana Constitution, Article 8, § 1, adopted in 1851, shortly before the Nevada Constitution's 1864 adoption, states that: "[I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."

question runs counter to these goals by encouraging more students to attend private schools, thereby weakening the state's public school system. But that is a matter for the legislature, as policy maker, to debate and decide.").

In light of the fact that there is no explicit or implicit constitutional limitation on the Legislature's power to encourage education "by all suitable means," and the only relevant precedent allowed the Legislature to pay for educational expenses outside of the public school system, *Westerfield*, 23 Nev. 468, 49 P. 119, Appellants' argument that Nevada's founders intended to curtail the innovative laws of the future and adaptability in an area as challenging and important as education must be rejected. However, even setting aside the discretion granted by Article 11, § 1, Appellants' attempt to derive their preferred policy—no publicly funded educational options outside of the public school system—finds no support in the plain language of Article 11, § 2.

B. The ESA program does not violate Article 11, § 2 because Nevada's public school system remains open and available to all students.

There is no support in Article 11, § 2's plain language for Appellants' argument that it sets out the exclusive means of publicly funding education. Article 11, § 2, states, in relevant part, that the "legislature shall provide for a uniform system of common schools." There is no dispute that Article 11, § 2 imposes a duty on the Legislature to provide for a public school system. Thus, the real

question is whether the ESA program impedes the Legislature's ability to meet that obligation. Here, just like before the passage of the ESA program, the public school system remains firmly in place and fully available to parents who wish to send their children there. Because all students remain free to attend public school if they desire to do so, the state is not violating its duty to provide a uniform, free, and open system of schools.

Appellants cite *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967), to suggest that the interpretative tool *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another," *id.* at 26, 422 P.2d at 246) dictates that the framers' decision to expressly require the establishment of a public school system prohibits the Legislature from providing Nevada families with any educational options outside of that system. Opening Br. 48-49. However, what is prohibited by that tool is not a legislative agenda that includes "public schools plus other options," but rather a legislative agenda that would say "no public school system, only private alternatives." As explained here, the ESA program does not do away with the public school system—or threaten to do away with (or even injure) that system. Indeed, in the same legislative session in which the Legislature enacted the ESA, it also enacted a number of bills aimed at strengthening and reforming the public school system, RA Vol. 2, at 244–45, demonstrating the Legislature's firm commitment to a "public schools plus other options" approach.

It is therefore no surprise that most state supreme courts interpreting similar state constitutional provisions, even those without a separate duty to encourage learning by all suitable means, have rejected "exclusivity" claims that are nearly identical to Appellants' claim here. *Hart v. State*, 774 S.E.2d 281, 289–90 (N.C. 2015) (upholding constitutionality of voucher program and noting that "[t]he uniformity clause applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system"); *Meredith*, 984 N.E.2d at 1223 (holding that "so long as a 'uniform' public school system, 'equally open to all' and 'without charge,' is maintained, the General Assembly has fulfilled the duty imposed" to establish a public school system); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 & n.2 (Ohio 1999) (rejecting claim that "thorough and efficient system of common schools" provision of Ohio constitution prohibited private school voucher program absent showing that the program actually "undermine[d]" or "damage[d]" public education); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) (holding that the challenged school voucher program "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) (same). This Court should join the supreme courts of Indiana, Ohio, North Carolina and Wisconsin and refuse to transform the duty to provide for a

public school system into a prohibition on funding of educational options outside that system.

There is nothing in the language of Article 11, § 2—even if the separate duty in Article 11, § 1 to encourage education by all suitable means could be cast aside—to suggest it meant to set forth the exclusive means of delivering publicly funded education to Nevada's school children.

C. Educational service providers that accept ESA payments from parents, including private schools, do not constitute a separate "non-uniform" system of public education. They remain private entities.

Appellants also argue that the ESA program violates Article 11, § 2 by establishing and maintaining a separate, non-uniform system of public education. Opening Br. 48. To support this claim, Appellants cite *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). *Id*. at 49. The *Bush* decision, however, has no persuasive value here for at least two reasons. First, the Florida Constitution does not impose the separate and distinct duty to encourage knowledge by all suitable means that Nevada's Constitution imposes on the Legislature. As the Indiana Supreme Court noted in rejecting *Bush*, the duty to provide, by law, for a general and uniform system of public schools cannot be read as a restriction on the Legislature's first duty to encourage education "by all suitable means." *Meredith*, 984 N.E.2d at 1224.

Second, the Nevada Constitution lacks the "paramount duty" language of the Florida Constitution that the *Bush* court relied upon so heavily for its conclusion that Florida's education clause actually limits legislative discretion. Indeed, the Florida Supreme Court, in distinguishing the Wisconsin Supreme Court's two decisions upholding school choice programs under the Wisconsin Constitution's education article, which is similar to Nevada's Article 11, § 2,[12] emphasized the fact that the Wisconsin education article did not "contain language analogous to the statement in [Florida's] article IX, § 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.'" *Bush*, 919 So. 2d at 407 n.10; *see also Meredith*, 984 N.E.2d at 1224 ("Like the Wisconsin Constitution, the Indiana Constitution contains no analogous 'adequate provision' clause."). The *Bush* decision is thus of no persuasive value.

Appellants also recite the many ways that private school curricula and admissions standards differ from the public school system in support of this

[12] Wisconsin's Education Clause reads as follows:

> "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years."

Davis, 480 N.W.2d at 473 (quoting Wis. Const. art. 10, § 3).

claim.[13] They do so because Appellants believe the ESA program establishes a parallel, non-uniform public school system. But there can only be a non-uniform system of public schools if the ESA program considers private schools to be public schools. The issue is thus whether the entities that participate in the ESA program become public institutions, rather than private ones. They do not.

Participating entities remain private and may operate as such. *See* RA Vol. 2, at 281 (SB 302, § 14 ("[N]othing in" SB 302 "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.")). Yes, private schools use different curricula than do public schools. It is true that private schools do not have to enroll every student that applies for admission. But as every court to decide this issue has held, private schools, and by extension other participating educational service providers, remain private. *Meredith*, 984 N.E.2d at 1224

[13] Appellants repeatedly characterize private school admissions standards as discriminatory. However, in Nevada, "[a]ny nursery, private school or university or other place of education" is considered a "[p]lace of public accommodation." NRS 651.050(3)(k). And Nevada law states that "[a]ll persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin, disability, sexual orientation, sex, gender identity or expression." NRS 651.070. Nevada law also lays out the penalties, both civil and criminal, for violating the right to equal enjoyment of places of public accommodation. NRS 651.080, 651.090. Appellants do not allege that the ESA program in any way exempts participating entities from Nevada's public accommodations law.

("[T]he voucher-program statute does not alter the structure or components of the public school system . . . ."); *Jackson*, 578 N.W.2d at 627 (holding that a school choice program "does not transform" private schools into district schools). The ESA program respects the private nature of participating entities by not interfering with curricula, creeds, or other matters of operation.

Far from establishing a "non-uniform" public school system, the ESA program empowers parents to exercise their pre-existing fundamental constitutional right to opt out of the public school system and to direct the education and upbringing of their children consistent with their own personal beliefs. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (striking down law requiring every child to attend a public school as "unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"). Under the ESA program, parents and participating entities that accept ESA payments remain free to exercise and express their religious beliefs and fully practice their religion, free from unreasonable government supervision, oversight, and interference. Appellants' concerns about private schools acting like private schools are irrelevant under Article 11, § 2.

CONCLUSION

The District Court's judgment dismissing Appellants' Complaint must be affirmed because Nevada's ESA program violates neither Article 11, §10 nor

Article 11, § 2 of the Nevada Constitution.

Respectfully submitted this 21st day of July, 2016 by:

KOLESAR & LEATHAM

/s/ Matthew T. Dushoff, Esq.
Matthew T. Dushoff, Esq.
Nevada Bar No. 004975
400 S. Rampart Blvd., Ste. 400
Las Vegas, Nevada 89145
Telephone: (702) 362-7800
Facsimile: (702) 362-9472
mdushoff@klnevada.com

-and-

Timothy D. Keller* (AZ Bar No. 019844)
Keith E. Diggs* (WA Bar No. 48492)
Institute For Justice
398 S. Mill Ave., Ste. 301
Tempe, Arizona 85281
Telephone: (480) 557-8300
Facsimile: (480) 557-8305
TKeller@ij.org
kdiggs@ij.org
**Pro Hac Vice* applications pending

Attorneys for Respondent-Intervenors

CERTIFICATE OF COMPLIANCE

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 14 point, double-spaced Times New Roman.

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3. 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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.

Respectfully submitted this 21st day of July, 2016 by:

KOLESAR & LEATHAM

/s/ Matthew T. Dushoff, Esq.
Matthew T. Dushoff, Esq.
Nevada Bar No. 004975
400 S. Rampart Blvd., Ste. 400
Las Vegas, Nevada 89145
Telephone: (702) 362-7800
Facsimile: (702) 362-9472
mdushoff@klnevada.com

-and-

Timothy D. Keller* (AZ Bar No. 019844)
Keith E. Diggs* (WA Bar No. 48492)
Institute For Justice
398 S. Mill Ave., Ste. 301
Tempe, Arizona 85281
Telephone: (480) 557-8300
Facsimile: (480) 557-8305
TKeller@ij.org
kdiggs@ij.org
**Pro Hac Vice* applications pending

Attorneys for Respondent-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 21st day of July, 2016, I caused to be served a true and correct copy of the foregoing **Respondent-Intervenors' Answering Brief** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system.

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Attorney General of the State of Nevada
Adam Paul Laxalt
Lawrence VanDyke
Joseph Tartakovsky
Ketan D. Bhirud
lvandyke@ag.nv.gov
jtartakovsky@ag.nv.gov
kbhirud@ag.nv.gov

Attorneys for Respondents

American Civil Liberties Union of Nevada
Amy Rose, Esq.
rose@aclunv.org

Attorneys for Appellants

I further certify and affirm that I caused this document to be deposited via USPS first class mail, the following parties:

Nitin Subhedar
Samuel Jacob Edwards
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356

Attorneys for Appellants

Anupam Sharma
COVINGTON & BURLING LLP
333 Twin Dolphin Dr., Suite 700

Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW, Ste. 600
Washington, D.C. 20005

Attorneys for Appellants

Richard B. Katskee
AMERICANS UNITED FOR

Redwood Shores, CA 94065

Attorneys for Appellants

SEPARATION OF CHURCH AND STATE
1901 L Street NW, Suite 400
Washington, DC 20036

Attorneys for Appellants

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