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DISTRICT COURT

CLARK COUNTY, NEVADA

RUBY DUNCAN, AN INDIVIDUAL; RABBI MEL HECHT, AN INDIVIDUAL; HOWARD WATTS III, AN INDIVIDUAL; LEORA OLIVAS, AN INDIVIDUAL; ADAM BERGER, AN INDIVIDUAL, *Plaintiffs*, v. 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, *Defendants*.	Case No. A-15-723703-C Dept. No. XX **BRIEF OF AMICUS CURIAE FOUNDATION FOR EXCELLENCE IN EDUCATION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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INTERESTS 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 God-given potential. ExcelinEd designs and promotes student-centered education policies, makes available model legislation, and provides rule-making expertise, implementation assistance, and public outreach.

INTRODUCTION

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 all parents to choose the best educational options for their children. This court should accordingly reject Plaintiffs' contention that Article 11 bars the ESA Program.

ARGUMENT

1. 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 . . . 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.

A. 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 are 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. The common schools remain in place (as constitutionally mandated) and they will continue to serve the vast majority of Nevada children.

What Plaintiffs instead contend is that Section 2 implicitly prohibits the legislature from making funds available for *other* educational options in the State, beyond the system of public schools. But nothing in the text of Section 2 supports that contention. In fact, 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). 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 understanding 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 (Nev. 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 history of the Nevada Constitution indicates that the framers 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). Indeed, 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). Although the constitutional debate 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 only to regulate public school administration.

Moreover, given the existence of private schools at the time of the Nevada Constitution's enactment, the Nevada framers could have included a provision such as the one found in the Washington Constitution, which mandates that "the entire revenue derived from the common school fund and the state tax for common schools shall be *exclusively* applied to the support of the common schools." Wash. Const. art. IX, § 2 (emphasis added). Instead, the Nevada framers merely included a provision mandating establishment of a common system of schools. Section 2 accordingly was designed to empower the legislature to maintain a system of public schools, but left private educational institutions unaffected.

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[1] have constitutional provisions that require a uniform common school system. 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

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[1] *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.

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 (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).

A 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 provision clearly enables the legislature to use a variety of measures to promote education in the State. Plaintiffs' contention, in effect, is that Section 2 *implicitly* removes 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 done "by all suitable means" and then in the next section as having limited the legislature to just one means. Nothing in the text or structure of Article 11 suggests such an 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").

In arguing that the ESA Program nevertheless violates Section 2 because it allegedly diverts public funds to bolster a "non-uniform and competing system of private and religious schools," Compl. ¶ 91, Plaintiffs appear to fundamentally misapprehend both Section 2 and the program. First, the 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, Plaintiffs' argument that the legislature may not provide a funding mechanism for this diverse array of 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 Plaintiffs' interpretation would effectively nullify Section 1's mandate to promote education "by all suitable means." *See We the People*, 124 Nev. at 881, 192 P.3d at 1171 (court must interpret constitution "to avoid unreasonable or absurd results").

Indeed, accepting Plaintiffs' argument would force the courts into the difficult and awkward position of having to scrutinize any educational funding outside the traditional public school system to determine whether such funding somehow "undermines" the public schools. For example, Plaintiffs' contention would mean that the legislature could not choose to appropriate money to Nevada children with special needs to use for behavioral therapy outside the public schools, fund private tutoring for a newly transplanted military family, or provide for a student with visual

impairments to receive specialized instruction from a teacher not employed by the traditional public schools.

By mandating the promotion of intellectual improvements "by all suitable means," 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 has no bearing on whether the legislature has fulfilled its 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* at 939 (noting that state educational provisions were never meant to "empower judges to overturn legislative judgments with regard to the equity, adequacy, and uniformity of school financing").

B. 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.

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 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 of 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.[2] *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 court

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[2] The Indiana Supreme Court correctly rejected any application of the Florida Supreme Court's reasoning to the interplay between an encouragement clause and a clause requiring a uniform system of schools. The Indiana court noted that 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.

further noted that instead of an "adequate provision" clause, the Indiana Constitution had an encouragement clause 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.

The Nevada Constitution also includes nothing resembling an "adequate provision" requirement. Indeed, reading the Nevada Constitution to bar expenditures on anything other than public schools would have the absurd result of rendering superfluous the legislature's mandate to promote education "by all suitable means." The Nevada Constitution's provisions are critically distinct from the Florida provisions at issue in *Holmes*, and the Florida Supreme Court's decision in *Holmes* is therefore not relevant here.

2. The Unique Benefits of the ESA Program Fulfill the Legislature's Mandate to Encourage Education

The ESA Program broadly fulfills Article 11's mandates to encourage the education and improvement of Nevada residents "by all suitable means" and to provide for the common schools, which simply acts as a floor—not a ceiling—for the legislature's funding decisions. 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 only available to families with financial means. 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.

As explained more fully in the State's motion to dismiss, 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. *See* Defendants' Motion to Dismiss at 2. Parents can opt to use the funds for tutoring services, books or curriculum, specialized services for children with disabilities, tuition at approved private schools, universities, or community colleges, and other similar expenses. *Id.* 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: they can select the options that provide the best value for their child's unique needs. And unlike the more one-dimensional *school*-choice programs that came before it, Nevada's *educational*-choice program will improve academic achievement by empowering parents to select educational programs and services beyond 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 more than doubled between 1990 and 2005. *See* United States Census Bureau, Nevada QuickFacts (2014), *available at* 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), *available at*

https://nces.ed.gov/programs/digest/d13/tables/dt13_203.20.asp. Coping with the current level of enrollment growth has already proven incredibly challenging. For example, Robert Forbuss Elementary School in Clark County was designed with a maximum capacity of 780 students, but now serves 1,230 students. Eric Westervelt, *What Happens in Vegas Includes Crowded, Struggling Schools*, National Public Radio (May 6, 2015), *available at* http://www.npr.org/sections/ed/2015/05/06/402886741/what-happens-in-vegas-includes-crowded-struggling-schools. The 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 is not alone; overcrowding is a statewide problem. In fact, from 1998 to 2013, the number of portable classrooms used in Clark County more than doubled, from 771 to 1,663. Paul Takahashi, *At 1,663 and Counting, Portable Classrooms a Fact of Life at CCSD Schools*, Las Vegas Sun (Oct. 15, 2013), *available at* http://lasvegassun.com/news/2013/oct/15/1663-and-counting-portable-classrooms-fact-life-cc/.

The enrollment growth challenges are not limited to merely 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 last year found itself 650 teachers short just two weeks prior to the beginning of the 2014-2015 academic year. Denisa Superville, *Interested in Teaching? Nevada's Clark County School District* Really *Wants You*, Education Week (April 10, 2015), http://blogs.edweek.org/edweek/District_Dossier/2015/04/are_you_

a_certified_teacher_cl.html. By providing parents with the ability to choose educational options in addition to those provided by their overcrowded local public school, the ESA Program serves as a relief valve for students in schools facing capacity problems.

Finally, 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 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: The Empirical Evidence on School Choice*, The Friedman Foundation for Educational Choice 11 (April 2013), *available at* http://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf. 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 undermining the common public schools, the introduction of education reforms that expand choice benefits the students who enroll in the new programs, without hurting those who continue to be educated in their local public schools.

3. Conclusion

The Foundation for Excellence in Education respectfully requests that this Court grant the State's motion to dismiss, as the ESA Program accords with Article 11

of the Nevada Constitution and fulfills the legislature's mandate to encourage education.

DATED this 26th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2015, the foregoing **BRIEF OF AMICUS CURIAE FOUNDATION FOR EXCELLENCE IN EDUCATION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** were sent by electronic mail, per order of the Court, upon the following parties:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Madelyn B. Carnate-Peralta
An employee of Hutchison & Steffen, LLC