FRANCIS C. FLAHERTY
Nevada Bar No. 5303
CASEY A. GILLHAM
Nevada Bar No. 11971
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896 voice
(775) 885-8728 fax
fflaherty@dyerlawrence.com
cgillham@dyerlawrence.com

Attorneys for Proposed Amicus Curiae
NSEA and NEA

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FIRST JUDICIAL DISTRICT COURT
IN AND FOR CARSON CITY, NEVADA

HELLEN QUAN LOPEZ, *et al.*, Plaintiffs, vs. DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA, Defendant.	Case No.: 150C002071B Dept. No.: II

MOTION OF NEVADA STATE EDUCATION ASSOCIATION AND NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW NEVADA STATE EDUCATION ASSOCIATION ("NSEA") and NATIONAL EDUCATION ASSOCIATION ("NEA") by and through their attorneys and move this Court for leave to file the accompanying brief as *Amici Curiae* in support of Plaintiffs HELLEN QUAN LOPEZ, MICHELLE GORELOW, ELECTRA SKRYZDLEWSKI, JENNIFER CARR, LINDA JOHNSON, and SARAH and BRIAN SOLOMON's Motion for Preliminary Injunction. A copy of the proposed *Amicus* brief is attached hereto as Exhibit 1 and has been served upon all parties with a copy of this motion.

NSEA is an employee organization representing more than 24,000 teacher and education support professionals who are employed in public schools throughout Nevada. NEA is NSEA's national affiliate and is a national labor organization representing nearly 3 million education professionals employed by public school districts, colleges and universities. NSEA and NEA believe that public education is the cornerstone of our social, economic, and political structure and that students of all backgrounds have the right to quality public schools. NSEA and NEA also believe that individuals, at their expense, should be free to choose to supplement or substitute education in privately supported, non-segregated, nonpublic schools – but that voucher plans and other funding arrangements that use tax monies to subsidize pre-K through 12 education at private schools undermine public education and public school districts. Thus, NSEA and NEA have an interest in the public school system, the instruction provided thereby and the funding thereof.

Of paramount importance, NSEA and NEA have an expertise in the operation and effect of voucher programs that are similar to the Nevada Education Savings Account Program ("the ESA program") that is the subject of this lawsuit. An *Amicus* brief from NSEA and NEA is desirable to provide the Court with such expertise and perspective on the important public policy issues raised by Plaintiffs in their challenge of the ESA program. Such expertise and perspective will show the Court that, rather than improving the quality of education in Nevada, the ESA program may well have a negative impact on the quality of education in Nevada. Accordingly, NSEA and NEA request that it be allowed to file the attached *Amicus* brief.

RESPECTFULLY SUBMITTED this 23rd day of November, 2015

By: _____

Francis C. Flaherty
Nevada Bar No. 5303
Casey A. Gilham
Nevada Bar No. 11971

Attorneys for Proposed *Amicus Curiae*
NSEA and NEA

AFFIRMATION
Pursuant to NRS 239B.030/603.040
(Initial Appearance)

The undersigned does hereby affirm that upon the filing of additional documents in the above matter, an Affirmation will be provided **ONLY** if the document contains a Social Security number (NRS 239B.030) or "personal information" (NRS 603A.040), which means a natural person's first name or first initial and last name in combination with any one or more of the following data elements:

1. Social Security number.
2. Driver's license number or identification card number.
3. Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.

The term does not include publicly available information that is lawfully made available to the general public.

Dated this 23rd day of November, 2015.

By: _____
Francis C. Flaherty, SBN 5303
Attorneys for Proposed *Amici Curiae*
NSEA and NEA

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRCP 5(b) that, on this 23rd day of November, 2015, I served a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* by causing the same to be deposited in the U.S. Mail, first class postage prepaid and, for those for whom email addresses are indicated below, to be sent electronically to the following persons:

Don Springmeyer
dspringmeyer@wrslawyers.com
Justin C. Jones
jjones@wrslawyers.com
Bradley S. Schrager
bschrager@wrslawyers.com
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

Attorneys for Plaintiffs

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

Attorneys for Plaintiffs

David G. Sciarra
Amanda Morgan
EDUCATION LAW CENTER
60 Park Place, Suite 300
Newark, New Jersey 07102

Attorneys for Plaintiffs

///

///

Adam Paul Laxalt
ATTORNEY GENERAL OF THE STATE OF NEVADA
Ketan D. Bhirud, Esq.
Deputy Attorney General
Grant Sawyer Building
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101

kbhirud@ag.nv.gov

Lawrence VanDyke
Joseph Tartakovsky
Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701

lvandyke@ag.nv.gov
jtartakovsky@ag.nv.gov

Attorneys for Defendant

Paul D. Clement
BANCROFT PLLC
500 New Jersey Ave., NW
Seventh Floor
Washington, DC 20001

pclement@bancroftpllc.com

Attorney for Defendant

Mark A. Hutchison
Jacob A. Reynolds
Robert T. Stewart
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Nevada Counsel of Record for Applicants for Intervention as Defendants
& for *Applicant Amicus Curiae Foundation for Excellence in Education*

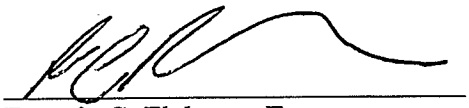
Timothy D. Keller, Esq.
INSTITUTE FOR JUSTICE
398 South Mill Ave., Ste. 301
Tempe, AZ 85281
Attorney for Applicants for Intervention as Defendants

Jeffrey F. Barr, Esq.
ASHCRAFT & BARR, LLP
2300 West Sahara Avenue
Suite 800
Las Vegas, NV 89102

Attorney for Applicant Amicus Curiae, Becket Fund

John P. Sande, Esq.
Brian A. Morris, Esq.
SANDE LAW GROUP
6077 S. Fort Apache Rd., Suite 130
Las Vegas, Nevada 89148

Attorneys for Applicant Amicus Curiae,
The Friedman Foundation for Educational Choice, Inc.



Francis C. Flaherty, Esq.

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EXHIBIT "1"

EXHIBIT "1"

FIRST JUDICIAL DISTRICT COURT
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	)	
Plaintiffs,	)	
	)	Dept. No.: II
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	)	
DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA,	)	
	)	
Defendant.	)	

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BRIEF FOR THE NEVADA STATE EDUCATION ASSOCIATION AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Francis C. Flaherty, Bar No. 5303
Casey A. Gillham, Bar No. 11971
2805 Mountain Street
Carson City, NV 89703
Telephone: (775) 885-1896
E-Mail: fflaherty@dlpfd.com
cgillham@dlpfd.com

Attorney for Amici Curiae *Nevada State Education Association and National Education Association*

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STATEMENT OF THE IDENTITIES AND INTERESTS OF *AMICI*

The Nevada State Education Association ("NSEA") is an organization of education professionals, with more than 24,000 members employed in public schools throughout the State of Nevada. The National Education Association ("NEA") is NSEA's national affiliate, representing nearly three million education professionals employed by public school districts, colleges, and universities.

NSEA and NEA believe that public education is the cornerstone of our social, economic, and political structure, and that students of all backgrounds have the right to quality public schools. NSEA and NEA also believe that individuals, at their expense, should be free to choose to supplement or substitute education in privately supported, non-segregated, nonpublic schools—but that voucher plans and other funding arrangements that use tax monies to subsidize pre-K through 12 private school education undermine public education.

In keeping with these principles, NSEA and NEA submit this brief *amicus curiae* in order to present sound social science research in support of Plaintiffs' claim that, far from improving the state of education in Nevada, SB 302's Education Savings Account Program ("ESA Program" or "the Program") would cause irreparable harm to Nevada's public schools.

INTRODUCTION

Amici NSEA and NEA believe that, in considering whether SB 302 complies with the Nevada Constitution's mandate to provide for and maintain a "uniform system of common schools," Nev. Const. art. XI, § 2, this Court will benefit from a deeper understanding of the research regarding the impacts and outcomes of similar programs and the effects that program design has on those outcomes. This discussion is particularly relevant given that the Defendant and its *amici* have made broad claims that the ESA program will lead to "improvement of the education system in Nevada," and that empirical research shows that school-choice programs like the ESA Program improve student achievement both for program participants and for students who remain in public schools.

NSEA and NEA submit this brief to show that empirical research does *not* support these contentions. In Part A we explain that the empirical research on voucher programs shows that even more thoughtfully-designed programs have had no meaningful positive impacts on student achievement. And, as we explain in Part B, particular features of the Program's design make it especially likely to cause socioeconomic stratification in Nevada's education system by concentrating the least advantaged students—who are also the most expensive to educate—in public schools. Such an outcome would be inconsistent with the Nevada Constitution's decree that the Legislature create and maintain a uniform system of common schools. Nev. Const. art XI, § 2.

ARGUMENT

A. Research Shows That Voucher Programs Do Not Improve Educational Outcomes Either For Program Participants Or Students Who Remain in Public Schools

In its Opposition to Motion for Preliminary Injunction and Countermotion to Dismiss ("State's Motion"), the State cited two claims in the legislative record about voucher programs:[1] (1) that such programs are an effective means of improving educational outcomes for participants, and (2) that such programs improve educational outcomes in the public schools by "enhancing competition in the public education system." State's Motion at 2-3, 27. *Amici* Friedman Foundation for Educational Choice, Inc., and Foundation for Excellence in Education echo and attempt to amplify these assertions, claiming that "the empirical evidence that school choice increases academic achievement is powerful," Brief of the Friedman Foundation for Educational Choice, Inc. as Amicus Curiae in Support of the Defendant ("Friedman Foundation Brief") at 4, and that "expanding educational choices for children improves outcomes for the students who participate, with no detriment to those students that continue their education in their public schools," Proposed Brief Amicus Curiae of Foundation for Excellence in Education in Support of Defendants' [*sic*] Motion to Dismiss ("Foundation for Excellence Brief") at 10-11.

As we show in the following, both claims rest on deeply flawed studies by voucher advocates—notably and primarily a publication from *amicus* Friedman Foundation itself. Rigorous studies conducted by independent researchers on programs similar to the ESA Program reveal just the opposite: that students who participate in voucher programs typically show achievement no different from that of their public school peers with similar prior achievement,

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[1] Notwithstanding Defendant's insistence that the ESA Program "is not a voucher program," State's Motion at 2, n.1, we use the term in this brief both for convenience—given that it is the term used in much of the applicable research—and because it accurately describes the Program according to its primary intent: to use per-pupil monies that would otherwise fund public schools to transfer children to private schools. *Id.* at 3 (citing the legislative record).

mobility, and minority status. And research does not demonstrate any beneficial competitive effect of voucher programs on public schools.

1. In claiming that voucher programs improve the academic performance of program participants, Defendant and its *amici* rely primarily on advocacy literature produced by *amicus* Friedman Foundation for Educational Choice—"the nation's leading advocate for vouchers"[2]—namely, the 2013 version of a Friedman Foundation publication entitled *A Win-Win Solution* by Greg Forster (referred to herein as the "Friedman Foundation Report").[3] *See* State's Motion at 3; Friedman Foundation Brief at 5-9; Foundation for Excellence Brief at 10-15. As we demonstrate below, the Friedman Foundation Report is a deeply flawed document, and its conclusions are not supported by rigorous, peer-reviewed research.

It is important to stress at the outset that—contrary to assertions made by Defendant and its *amici* on the basis of the Friedman Foundation's advocacy literature—the most reputable studies of programs similar to the ESA Program have repeatedly noted the lack of reliable research offering conclusive answers as to their efficacy. In particular, a 2007 review of the

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[2] Editorial Board, *Extra Credit*, The Wall Street Journal (Sept. 5, 2001), *available at* http://goo.gl/VyhQSX. Indeed, the notion that vouchers can improve public schools originated with Milton Friedman, who speculated that competition amongst a variety of schools might have the effect of stimulating the improvement of all schools affected. Milton Friedman, *Capitalism and Freedom* 93 (1962). Friedman later founded the Friedman Foundation for Educational Choice to "promote universal school choice," http://goo.gl/wPbhFY. Greg Forster, author of the Friedman Foundation Report, is a senior fellow at the Friedman Foundation.

[3] *See* Greg Forster, Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence on School Choice* (3d ed. 2013), *available at* http://goo.gl/Buf3TA. The Friedman Foundation has published two earlier iterations of this report. *See* Greg Forster, Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence on School Vouchers* (2d ed. 2011), *available at* https://goo.gl/SqM48Y, and Greg Forster, Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence On How Vouchers Affect Public Schools The Empirical Evidence on School Vouchers* (2009), *available at* http://goo.gl/ZIQOPm. The 2013 version of the study is virtually identical to its predecessors, citing only two additional studies beyond those cited in the previous iteration.

literature by the RAND Corporation ("2007 RAND Study") undertook an "exhaustive review" of studies on voucher programs and concluded that "none of the important empirical questions [on vouchers] has been answered definitively"—including the question of whether vouchers improve the academic performance of participating students.[4] Likewise, a paper just released by the National Bureau of Economic Research ("2015 NBER Paper")[5] reviewed all of the "theoretical, computational, and empirical research on school vouchers" to date, and concluded that many fundamental questions about the merits of vouchers remain essentially unanswered.[6]

The absence of conclusive research stems in part from the fact that voucher programs are inherently difficult to study.[7] Selection bias is difficult to control for under the best of circumstances, and all the more so with voucher studies where programs often attract students who are more socioeconomically advantaged or have parents who are more involved in their

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[4] Brian P. Gill, *et al.*, *Rhetoric Versus Reality: What We Know and Need to Know About Vouchers and Charter Schools* 217 (RAND Corporation 2d Ed. 2007), *available at* http://goo.gl/fsrXIF.

[5] Dennis Epple, Ricard E. Romano, and Miguel Urquiola, National Bureau of Economic Research Working Paper, *School Vouchers: A Survey of the Economics Literature* (Sept. 2015), *available at* http://goo.gl/1u0vlv.

[6] Both the 2007 RAND and 2015 NBER papers are cited extensively herein because these organizations, in contrast to the Friedman Foundation, represent the highest research standards. RAND Corporation is a non-profit institution that has for 70 years focused on "blending scrupulous nonpartisanship with rigorous, fact-based analysis to tackle society's most pressing problems." RAND has been affiliated with 32 Nobel Laureates, including John Nash and Ronald Coase. RAND Corporation, *A Brief History of RAND*, http://goo.gl/bvmwWy (last visited Nov. 2, 2015).The National Bureau of Economic Research is a ninety-five-year-old non-profit economic research organization. Twenty-five Nobel Prize winners in Economics have been researchers at the NBER, including Milton Friedman and Joseph Stiglitz. National Bureau of Economic Research, *About the NBER*, http://goo.gl/uEbYQS (last visited Nov. 2, 2015).

[7] And, as we discuss in Part B, *infra*, variations in program design are such that the outcome of one program says little or nothing about the likely outcome of a program with dissimilar design.

children's education.[8] Longitudinal studies that attempt to follow individual students over time are often disrupted by the tendency of students not to stay in one school for the entire study, while eligibility for programs may change over time.[9] Peer effects—defined as the impact that classmates have on one another's achievement—are poorly understood.[10] Finally, there is simply an overall lack of rigor in existing studies, many of which are not peer-reviewed.[11]

To the extent that rigorous studies have been performed on the impact of particular programs, there has been "no clear consensus that any [voucher programs] are having strong effects on test scores."[12] A 2011 review of voucher studies by the Center on Education Policy "CEP Meta-Study") found that the empirical evidence on vouchers is inconclusive, and further found that any gains in student achievement are modest if they exist at all.[13]

The CEP Meta-Study was exceedingly thorough, having reviewed more than 30 studies of voucher programs, reviews of voucher studies (including the 2011 iteration of the Friedman

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[8] 2007 RAND Study, *supra* note 4, at 75-77 (describing selection bias as "the single thorniest methodological problem in empirical studies of vouchers and charter schools").

[9] This occurred in Milwaukee, which is not only the longest-running voucher program in the country but one of the most extensively-studied. Patrick J. Wolf, *The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Final Reports* 1 (Feb. 2012), *available at* http://goo.gl/Q4yN27.

[10] Angela K. Dills, *Does Cream-Skimming Curdle the Milk? A Study of Peer Effects*, 24 Econ. Educ. Rev 19 (2005) ("[N]o one has been able to isolate the effect of the quality of a student's peers on achievement."), *available at* http://goo.gl/Xo7AJ2; 2015 NBER Paper at 41 ("adequately controlling for peer effects is difficult, given that the literature has not produced a consensus on the functional form of such effects, or even on whether a stable functional form exists.").

[11] 2007 RAND Study, *supra* note 4, at 75-79.

[12] Brookings Institution, 3 *Urban and Regional Policy and Its Effects* 5 (Nancy Pindus, *et al.*, eds. 2008).

[13] Alexandra Usher and Nancy Kober, Center on Education Policy, *Keeping Informed about School Vouchers: A Review of Major Developments and Research* (2011), *available at* http://goo.gl/faCu4s.

Foundation Report), and critiques of such studies.[14] It examined the findings of each study, critiqued its methodology, and offered suggestions as to how future studies can ensure that research is high quality and objective. The authors concluded that "[w]hile some studies have found limited test score gains for voucher students in certain subject areas or grade levels, these findings are inconsistent among studies, and the gains are either not statistically significant, not clearly caused by vouchers, or not sustained in the long run," and overall, "achievement gains for voucher students are similar to those of their public school peers" among students with similar prior achievement, mobility, and minority status.[15]

Another study, published by the Federal Reserve Bank of Chicago in 2008, concluded that "the best research to date finds relatively small achievement gains for students offered education vouchers, most of which are not statistically different from zero."[16] And most recently, the 2015 NBER Paper reached the same conclusion, finding that a "large proportion of the most rigorous studies suggest that being awarded a voucher has an effect that is statistically indistinguishable from zero."[17]

Rigorous studies of particular voucher programs paint a similar picture. A 2010 study of Milwaukee's voucher program—the oldest program in the United States—found "no difference" in performance between achievement gains of private school voucher recipients and a matched

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[14] The CEP Meta-Study's Appendix contains a summary of each study. *Id.* at 49-55.

[15] *Id.* at 9.

[16] Cecilia E. Rouse and Lisa Barrow, Federal Reserve Bank of Chicago, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions* at 20-24 (2008), *available at* http://goo.gl/X4oCld.

[17] 2015 NBER Paper, *supra* note 5, at 3.

sample of public school students.[18] One study—of the District of Columbia's voucher program—does show higher *graduation rates* among some participant subgroups as compared with non-participants, but the key finding of the study was: "*There is no conclusive evidence that the [voucher program] affected student achievement.*"[19] And in any event, graduation rates are a poor measure of school performance even among public schools.[20] Indeed, given that the District of Columbia's program, like virtually all other voucher programs, does not require participating private schools to use the same graduation standards as public schools, the finding that the voucher program increased participants' graduation rates even though "students may not have raised their test scores in reading and math as a result of the [voucher program],"[21] simply suggests that the voucher schools had more lax graduation criteria than did the public schools.

The Friedman Foundation Report completely ignores the absence of any consensus among independent academic researchers that vouchers have positive effects on participants, glibly asserting that the "evidence points clearly in one direction . . . consistently show[ing] that choice improves academic outcomes for participants and public schools."[22] In reaching this conclusion, the Friedman Foundation Report, in the words of one reviewer, simply "selectively

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[18] John F. Witte, *et al.*, *The MPCP Longitudinal Educational Growth Study Third Year Report* 14, 15 (2010), *available at* http://goo.gl/P4lDyx.

[19] Patrick Wolf, *et al.*, U.S. Department of Education, *Evaluation of the D.C. Opportunity Scholarship Program* at pp. xv, xx n.6, xxi. (June 2010), *available at* http://goo.gl/Z5Mzll (emphasis added).

[20] Daria Hall, The Education Trust, *Getting Honest About Grad Rates: How States Play The Numbers And Students Lose* (June 2005), http://goo.gl/3IJjXd.

[21] Wolf, *supra* note19, at xv.

[22] Friedman Foundation Report 2013, *supra* note 3, at 1.The Friedman Foundation Report's conclusion as to voucher programs' effects on public schools is discussed *infra* in Part B.

reads the evidence" and relies on studies that were themselves "produced by voucher advocacy organizations" and that lack "methodology, interpretation, and generalizability."[23]

2. The other popular argument in support of voucher programs cited in the Defendant's Opposition to Motion for Preliminary Injunction and Countermotion to Dismiss is as unfounded as the first. Defendant and its *amici* suggest that, even if vouchers do not improve achievement among students who actually participate in the program, they are still beneficial because they "provide greater educational opportunities by enhancing competition in the public education system" and that some public schools impacted by voucher programs "demonstrated gains in student achievement because of competition." State's Motion at 2-3, 27 (citing *Minutes of the Senate Committee on Education,* 78th Session (Nev. Apr. 3, 2015) and *Minutes of the Assembly Committee on Education*, 78th Sess. 30 (Nev. May 28, 2015)). *See also* Friedman Foundation Brief at 9-13.

As noted above, the Friedman Foundation Report, like many studies by voucher advocates, completely ignores widespread disagreement over the impact of voucher programs. This fundamental flaw is apparent not only with respect to the Report's conclusion on the question of whether such programs increase achievement among participants, but also its conclusion on the question of whether they improve public schools through a competition effect. As to the latter, the report asserts that there is consensus among studies that "vouchers improve outcomes for both participants and public schools."[24] But there is in fact no such consensus.

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[23] Christopher Lubienski, *Review of a Win-Win Solution* at 5 (Nat'l Educ. Policy Ctr. 2009), *available at* http://goo.gl/UCxSAm. Dr. Lubienski's paper reviews the 2009 version of the Friedman Foundation's Report. However, as noted *supra* note 3, the 2011 and 2013 versions of the report contain virtually all of the same flaws in methodology and analysis that are found in the 2009 paper.

[24] Friedman Foundation Report 2011, *supra* note 3, at 1.

The lack of consensus on the competitive effects of voucher programs, as with the lack of consensus on participant impacts, stems in part from the fact that determining their effects is an exercise fraught with statistical difficulties even in the best of circumstances.[25] Rather than acknowledge these complexities, the Friedman Foundation Report, as noted above, "selectively reads the evidence."[26]

For example, the Friedman Foundation Report cites articles from voucher advocate Jay Greene that have been thoroughly debunked by academic studies.[27] In a peer-reviewed journal, Rutgers researchers Gregory Camilli and Katrina Bulkley catalogued serious flaws in the study design and conclusions in Greene's work on Florida's A+ Program. As Camilli and Bulkley explained, Greene vastly overstates the competition effect because he computed aggregate school gains rather than individual gains, fails to account for an average trend in score growth that has nothing to do with the competition effect, and declines to account for the regression to the mean[28] that one expects when observing the extreme low end of any statistical distribution.[29]

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[25] *See supra* notes 7-11 and accompanying text.

[26] Lubienski, *supra* note 23, at 5.

[27] *See* Friedman Foundation Report 2011, *supra* note 3, at 18-19 (citing Winters and Greene, *infra* note 40; and Jay Greene, Manhattan Institute, *An Evaluation of the Florida A-Plus Accountability and School Choice Program*, (2001), *available at* http://goo.gl/XgnGkk).

[28] "Regression to the mean" is a statistical phenomenon whereby natural variations in repeated measurements look like real change because the initial measurement was at one extreme of the bell curve. Adrian Barnett, *et al.*, *Regression to the Mean: What it is and How to Deal with It*, 34 Int'l J. of Epidemiology 215 (2004), *available at* http://goo.gl/n9GYFZ. In such situations, subsequent measurements are likely to be relatively less extreme, regardless of causative factors. *Id.* This effect can be minimized by good sampling methods and by performing control studies before the real "intervention" study takes place. It also tends to dissipate with repeated measurements, which may explain why positive effects may be observed in the first year or two of voucher programs but then disappear the longer the program is in place. *See* CEP Meta-Study, *supra* note 13, at 9.

Offering an alternative reading of the evidence that takes those factors into account, Camilli and Bulkley concluded that Greene's results "were implausible and should have been submitted to additional methodological scrutiny."[30] Indeed, even the Friedman Foundation Report acknowledges that the Greene study was "methodologically simple" and did not account for other possible causes of improvement for low-performing public schools that are part of voucher programs.[31]

In those instances in which the Friedman Foundation Report does cite more rigorous independent studies, it often distorts or misrepresents the findings of those studies.[32] For example, the Report misrepresents a 2007 case study of the Milwaukee voucher program. That study, written by Martin Carnoy and his colleagues, actually describes two analyses undertaken by the researchers.[33] The first was a replica of an earlier study by Caroline Hoxby. Such replicas are often done by researchers in order to check a study's data and methods. The replica study essentially confirmed the short-term gains seen in the first two years of the program among public school students, and it is this portion of the Carnoy study that the Friedman Foundation Report quotes. But the Carnoy paper also documented a lack of student progress in subsequent years, even while the number of voucher students increased, and it raised questions about "whether traditional notions of competition among schools explain these increased scores in the

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[29] *See* Gregory Camilli and Katrina Bulkley, *Critique of "An Evaluation of the Florida A-Plus Accountability and School Choice Program,"* 9 Educ. Pol'y Analysis 7 (2001), *available at* http://goo.gl/hRisgN.

[30] *Id.* at 13.

[31] Friedman Foundation Report 2011, *supra* note 3, at 18-19.

[32] *See* Lubienski, *supra* note 23, at 5-6.

[33] Martin Carnoy, *et al.*, Economic Policy Institute, *Vouchers and Public School Performance: A Case Study of the Milwaukee Parental Choice Program* (2007), *available at* http://goo.gl/foVjtQ.

two years immediately after the voucher plan was expanded."[34] In addition, the second Carnoy analysis consisted of an independent—and more sophisticated—original analysis of the program, which revealed that "test score gains are generally *not* significantly related to various indicators of direct competition associated with families' increased potential choice of schools."[35] The Friedman Foundation Report essentially glosses over these latter two findings.[36]

Rather than addressing the flaws in the studies that it cites or the lack of reliable evidence for its conclusions, the Friedman Foundation Report downplays these factors and cavalierly insists—without citing any research in support—that the lack of empirical support for voucher programs is in fact evidence of a need for more *expansive* voucher programs.[37] This bizarre conclusion is premised, in part, on the notion that voucher programs at least do not *hurt* our system of public education.[38] Like many of the other assertions in the Friedman Foundation Report, this point is hotly debated among scholars not on the payroll of voucher advocacy organizations. And in any event, the notion that transferring public education funds to private schools (with all the administrative costs involved) on the ground that doing so at least does no harm is—even if true—hardly a sound basis for good public policy.

Beyond the Friedman Foundation Report, voucher advocates advancing the "competitive effects" theory frequently cite a pair of sources discussing Florida's A+ program[39]—neither of

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[34] *Id.* (executive summary).

[35] *Id.* (emphasis in original).

[36] *See* Friedman Foundation Report 2011, *supra* note 3, at 17.

[37] *Id.* at 27-29.

[38] *Id.* at 8.

[39] As explained in these two sources, the A+ program assigned letter grades to public schools and then used a system of carrots and sticks—giving $100 per pupil to schools that improved their ratings by a full letter grade while allowing students attending "F" schools to switch to private

which is sound. The first is essentially an adaptation of the same study, written by Marcus Winters and Jay Greene, that even the Friedman Foundation Report considered "methodologically simple."[40]

As it turns out, describing this paper as "methodologically simple" is generous. In essence, the authors of the article compared Florida test scores on the 2002-03 administrations of the FCAT and Stanford-9 standardized tests to scores from the prior school year, and noted that "F" schools under threat of losing students to vouchers made the greatest test score gains. The authors then concluded that these gains must be attributable to the competitive effects of the A+ program. It is hardly necessary to point out that one year of test score data is virtually meaningless for purposes of drawing any statistical conclusions.

Moreover, the authors also fail even to mention the possibility that any number of other factors—including other reform measures underway at the time, not least of these being the state's implementation of the landmark No Child Left Behind legislation—could have accounted for the changes. Indeed, one factor is especially likely to have done so: the State of Florida undertook an aggressive effort to end "social promotion"—the advancement of students to the next grade, regardless of academic performance, in order to keep them with their peers—beginning in the late 1990's,[41] which culminated in a statute passed in 2002. Fla. Sess. Law Ch. 2002-387. As retention rates increased due to these policies, Florida ensured that increasing

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school via vouchers—in an attempt to provide incentives for school administrators to improve test scores.

[40] Marcus A. Winters and Jay P. Greene, *Competition Passes the Test*, Education Next (Summer 2004), *available at* http://goo.gl/hYQUZJ.

[41] U.S. Department of Education, *Taking Responsibility for Ending Social Promotion: A Guide for Educators and State and Local Leaders* 13 (1999) (describing how several states, including Florida, had "stepped up their efforts to end social promotion"), *available at* http://goo.gl/gU4FFi.

numbers of underperforming students would retake standardized tests rather than advancing to more challenging material on which they were more likely to perform poorly.

Aside from these glaring problems with the Winters and Green paper, the basic statistical principle of "regression to the mean" teaches that one should expect schools with nowhere to go but up to make the largest gains.[42] Indeed, the authors vaguely admitted that "regression to the mean could be influencing our results."

The second study of the A+ program suffers from similar defects, and it nevertheless found only miniscule gains for subsets consisting of African-American students and students receiving free and reduced lunches, and no statistically significant gains for other students.[43]

In short, if there is any consensus on the competition effect touted by the Friedman Foundation Report, it is that there is no reliable evidence that such an effect exists. A 2009 RAND study on charter schools examined data from eight different geographic areas and found a "near-complete absence of positive competitive effects" on traditional public schools.[44] The 2009 RAND study noted that this finding was "consistent with the predictions of political scientist Frederick Hess . . . who has extensively chronicled the inability of local school districts to respond productively to competitive pressure."[45] Studies of voucher programs have likewise found no reliable evidence of the alleged competitive effect that the Friedman Foundation Report insists is widespread. Even the libertarian Cato Institute, upon examining the existing literature

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[42] Barnett, *supra* note 28.

[43] Martin R. West and Paul E. Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 Econ. J. C46, C54 (2006) ("Impacts of the 'F' grade on African Americans and those eligible for the federal free lunch program were about 6% of a standard deviation."), *available at* http://goo.gl/5Xg7EL.

[44] Ron Zimmer, *et al.*, *Charter Schools in Eight States: Effects on Achievement, Attainment, Integration, and Competition* 90-91 (RAND Corporation 2009), *available at* http://goo.gl/QXY1lF.

[45] *Id.* at 91.

on the supposed competitive effect of voucher programs on public schools, concluded that "no one theory appears to be predominant among the research community."[46] And the CEP Meta-Study examined the supposed competitive effect of voucher programs and noted only modest gains in public school student achievement in a few cases, while at the same time warning that "it is difficult, if not impossible to decisively attribute the causes of achievement gains" to voucher programs—particularly since other policy changes tend to run concurrently with any given voucher program.[47] In other words, causation for any marginal improvements seen, where they occurred at all, could not be determined.

On the whole, research does not establish either that private school choice programs improve achievement among participants, or that they improve educational performance in public schools through competition.

B. The ESA Program's Design Virtually Guarantees That It Will Harm Nevada Public Schools

Amici Friedman Foundation and Foundation for Excellence both claim that, even where there is a lack of evidence that voucher programs improve achievement, such programs at least have no negative effects on public schools. Friedman Foundation Brief at 5,14; Foundation for Excellence Brief at 13-14.[48] On the contrary, existing research on voucher programs provides compelling evidence that the design of the ESA Program will result in significant harm to

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[46] Matthew Carr, *The Impact of Ohio's Ed Choice on Traditional Public School Performance*, 31 Cato Journal 257, 260 (2011), *available at* http://goo.gl/SX2Uo6; *see also* Clive R. Belfield and Henry M. Levin, *The Effects of Competition on Educational Outcomes: A Review of U.S. Evidence*, 72 Rev. Educ. Res. 279 (2002), *available at* http://goo.gl/BBfPXt; Gregory Elacqua, Teachers College, Columbia University, *School Choice in Chile: An Analysis of Parental Preferences and Search Behavior* (2004) (finding that data from Chile do not support the claim that competition improves public schools), *available at* http://goo.gl/beQzmU.

[47] CEP Meta-Study, *supra* note 13, at 11.

[48] *See also supra* notes 37-38 and accompanying text.

Nevada's public schools. For, even though existing voucher programs have done little to improve educational quality, their creators have in most cases at least paid heed to research showing that poorly-designed programs can do real harm to the health of an education system. By contrast, several features of the ESA Program make it highly likely to lead to an unequal system of schools in which voucher students attending private schools are no better off than they were in the public schools from which they departed, while harder-to-educate students become increasingly concentrated in under-resourced public schools.

1. As discussed in detail above, there is broad disagreement about the impact of voucher programs as a general matter. But if there is one area on which even scholars at opposite ends of the ideological spectrum agree, it is that design of a voucher program is "critical to predicting [its] empirical effects," and that "[s]pecific variations in the details of voucher/charter policies are likely to make a big difference in many of the empirical outcomes."[49] Accordingly, both predictive research models and empirical studies on existing voucher programs have emphasized that design is critical.[50] Yet, the ESA Program contains none of the design features recommended by researchers.

The 2007 RAND study identified a number of design features that would give voucher programs the best possible chance of increasing student achievement and avoiding harm to the overall system of education, several of which are highly significant for purposes of analyzing the ESA Program.

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[49] 2007 RAND Study, *supra* note 4, at 74; xviii. *See also* Rajashri Chakrabarti, Federal Reserve Bank of New York, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs* 32 (2004) ("[U]nderstanding the effect of different voucher designs is essential to the formulation of effective voucher policies."), *available at* http://goo.gl/a7W8s6.

[50] *Id. See also* 2015 NBER Paper, *supra* note 5, at 4.

Perhaps the most straightforward design strategy is to target voucher programs to at-risk students. While this technique cannot require the best private schools to participate in a voucher program—and indeed they typically choose not to do so[51]—it at least ensures that those schools that do participate will serve low-income and special needs students, and it can mitigate any harmful systemic effects on students who remain in the public schools.[52] All existing voucher programs in the United States—other than Nevada's ESA Program—are restricted in this way.[53]

Other than using a targeted program, the RAND study identifies various methods that can be used, individually or in concert, to reduce stratification that may result from voucher programs. For example, participating schools can be required to practice open admissions, thus reducing their ability to "choose their students" and admit only those with superior test scores or other indicators of academic ability. The RAND study also suggests providing supplemental funding for students with special needs to subsidize the "additional costs" associated with educating such students and to incentivize private schools to admit them. It suggests forbidding participating schools from charging tuition above the amount of the voucher – a practice that screens out lower-income students. Finally, it urges policymakers to take steps to ensure that

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[51] 2015 NBER Paper, *supra* note 5, at 14 n.22 (discussing Chilean program).

[52] 2007 RAND Study, *supra* note 4, at 240.

[53] 2015 NBER Paper, *supra* note 5 at 23 n. 36, and Tables 1 and 2; *see also* Hanover Research, *Assessing the Effectiveness of School Voucher Programs* 6 (2013) ("Of the 17 publicly-funded voucher programs in the U.S., seven are open only to students with special needs, six are means-tested, two are open to students who lack public schools at their grade level, one is based solely upon students' enrollment in failing schools, and only one is open to all school-age children."), http://goo.gl/oSShvr.The one program described as "open to all school-age children" was subsequently struck down as unconstitutional by the Colorado Supreme Court. *Taxpayers for Public Educ. v. Douglas County Sch. Dist.*, 351 P.3d 461 (Colo. 2015).

there is no information gap among parents that would skew participation towards students with more advantaged and engaged parents. [54]

The recent 2015 NBER Paper also points to research highlighting the importance of many of these same design features. Noting that answers to the most fundamental questions about voucher programs' impacts both on participating students and on the education system at large "depend on voucher design," the paper reports that virtually all scholars now understand that a "laissez-faire" voucher design like that advocated by Milton Friedman[55] will induce "cream-skimming"— the drawing away of the most-advantaged students to private schools—and lead to a highly stratified system of education.[56] Accordingly, the 2015 NBER Paper suggests the use of measures such as requiring over-subscribed private schools to admit students on a lottery basis, requiring that private schools accept the voucher as full tuition payment, and providing incentives (financial or otherwise) for schools to enroll "less able" students.[57]

In sum, there is widespread agreement among academic experts that voucher programs that focus on encouraging private schools to serve at-risk students will be most effective at mitigating the cream-skimming effect.[58] Conversely, there is broad agreement and substantial

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[54] 2007 RAND Study, *supra* note 4, at 239-44.

[55] *See generally* Milton Friedman, "The Role of Government in Education," Chapter 6 in *Capitalism and Freedom* (1962).

[56] 2015 NBER Paper, *supra* note 5, at 18-19.

[57] *Id.* at 22.

[58] *Id*; *see also* Helen F. Ladd, *School Vouchers: A Critical View*, 16 J. Econ. Perspectives 3, 19-21 (2002); Caroline M. Hoxby, *School Choice and School Competition: Evidence from the United States*, 10 Swedish Econ. Pol'y Rev. 9, 56-61 (2003) (discussing how program design in some voucher programs has mitigated cream-skimming), *available at* http://goo.gl/AMgE3B.

evidence that programs that allow participating schools to choose their students are most likely to see widespread stratification.[59]

2. The ESA Program contains none of the critical features researchers deem necessary to design a voucher program that at least does not harm public schools. Indeed, the ESA Program breaks every rule in this respect: it is not geared towards at-risk students; private schools are not required to practice open admissions; they do not need to admit students on a lottery basis if demand for seats outpaces supply; they may charge tuition in excess of the voucher amount; and, no other mechanisms exist in the Program to ensure that private schools serve the neediest students. Consequently, the highest-income, highest-achieving students will find it easiest to take advantage of the Program. [60]

At the same time, the screening procedures employed by participating schools will result in few voucher options for at-risk students. While presumably participating private schools will have to refrain from discriminating against prospective students based on certain characteristics— such as race—protected by applicable federal or state law, the Program imposes no requirement that participating schools be open to all students. For example it does not prohibit discrimination against students due to past behavior problems, academic ability as measured by standardized test performance, religious affiliation or belief, or sexual orientation.

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[59] Ladd, *supra* note 58, at 13 (predicting that vouchers would "contribute to stratification to the extent that they placed low income families in a less favorable position to exercise choice than higher income families," for example "if the government did not pay for transportation to the chosen schools, if voucher schools were allowed to charge fees and tuition in addition to the amount of the voucher, if schools were allowed to select their students or if low-income families have less access to information than did high-income families.").

[60] The Program nominally requires public school attendance prior to receiving a voucher, but the requirement can be met by existing private school students if they enroll in just one public school class for 100 days. SB 302 § 7. Pending regulations would also allow students entering school for the first time to receive vouchers under the Program even if they have never attended public schools. Nevada State Treasurer, Letter, *Treasurer's Office Announces Major Updates to ESA's* [*sic*], (Oct. 20, 2015), *available at* http://goo.gl/9pDt7i.

Indeed, a review of the informational materials of Nevada private schools shows that most private schools discriminate in admissions on the basis of disability,[61] behavior problems,[62] religion,[63] sexual orientation,[64] or academic ability[65]—and more often than not they discriminate on the basis of several of these categories. Moreover, outside of Reno and the Las Vegas metropolitan area, virtually all of Nevada's private schools are religiously affiliated.[66] And to the extent that such data is available, it appears that all of the few private schools where an ESA award would cover the full cost of tuition are religious schools—where non-religious students[67] and students with special needs may be unwelcome or at least disadvantaged in the admissions process.[68] Under these policies, particularly given some participating schools' practice of

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[61] For example, Grace Christian Academy does not accept students with disabilities, *GCA Parent-Student Handbook* 37, http://goo.gl/wjYkHG; Sage Ridge School provides "no or minimal accommodations" to students with special needs, http://goo.gl/6QmkBk.

[62] Virtually all of Nevada's private schools reserve the right to expel students for behavioral problems.

[63] For example, Bethlehem Lutheran School requires families to agree to attend church. BLS Enrollment Packet 2, http://goo.gl/GFRkdx. Faith Christian Academy requires parents to be Christians and abide by its statement of faith. FCA Handbook at 5-6 http://goo.gl/EUitGD. In addition, most Catholic schools prioritize Catholic students for admission or offer a discount to parishioners, as with Bishop Gorman High School. http://goo.gl/72AABJ (explaining admission priority); http://goo.gl/o9VK1n (reflecting parishioner discount).

[64] For example, International Christian Academy discriminates against students who are gay or whose parents are gay. ICA Moral Principle Agreement, Enrollment Packet 13, http://goo.gl/GH3HWD.

[65] Most private schools require submission of test scores and existing grades as part of a student's admissions package, and most reserve the right to eject pupils for behavioral problems or failure to perform well academically.

[66] *See* Nevada Department of Education, *Private School Directory 2015-16*, http://goo.gl/IxUfh1.

[67] To the extent religious schools are the only viable option for potential ESA students, their typical requirement that all students participate in the school's program of religious training and religious exercise may well discourage participation in the Program by parents who are unwilling to accept mandatory religious instruction of their children as the price of an ESA voucher.

[68] *Id.*

discrimination against special needs students,[69] the most difficult-to-educate students will likely find it impossible as a practical matter to use ESA funds to attend a private school.

The cream-skimming effect in Nevada will be further aggravated by the fact that ESA vouchers will not cover the total cost of education at most participating schools. Few private schools in Nevada charge tuition at levels that would be fully covered by an ESA Program voucher beyond the elementary school level,[70] and of those virtually all are religiously affiliated. This problem will be magnified at the high school level, given that the number of private high schools in Nevada is small—the Nevada Department of Education lists just over 30 private schools in the entire state serving grades 9-12—and private-school tuition nearly always exceeds the voucher amount; indeed many schools charge tuition that is two to four times the maximum ESA award.[71] Furthermore, there is nothing in SB 302 or its proposed regulations prohibiting schools from raising tuition levels for voucher students, charging them additional fees, or declining to grant them financial aid on equal footing with non-voucher students. Finally, private schools typically do not provide transportation, adding an additional logistical barrier for low-income students—and a well-nigh insuperable barrier for students who are mobility-impaired.[72]

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[69] The application of participating schools' admissions policies to voucher applicants may raise numerous questions under the Nevada Constitution and Nevada anti-discrimination laws—questions that will likely have to be resolved through litigation.

[70] *See* Trevon Milliard, *Most Takers For Private School Money Come From Nevada's Wealthiest Areas*, Reno Gazette Journal (Oct. 29, 2015) ("The average annual tuition of a Nevada private elementary school is $7,432, increasing to $8,543 in middle school and $10,726 in high school."), *available at* http://goo.gl/dZosgF.

[71] For example, Sierra Lutheran High School in Carson City charges over $8,000 in tuition and fees http://goo.gl/TDgjCT; The Meadows School in Las Vegas charges over $24,000 for high school students, http://goo.gl/dIVwjT; and Bishop Manogue Catholic High School in Reno charges $10,500, http://goo.gl/doQZ7j.

[72] A recent study of North Carolina's charter school system by the state's Department of Education found that a lack of transportation "coincides with lower enrollment of low-income students." Shelby Dawkins-Law and Azaria Verdin, North Carolina State Board of Education

There is, indeed, evidence that the cream-skimming that would appear inevitable in light of the ESA's design is already occurring. An early analysis by the Reno Gazette-Journal of information released about students applying for vouchers revealed that 80 percent of applicants live in neighborhoods where household incomes are above the state median.[73] By contrast, only about 7 percent of applicants live in low-income areas, even though over half of Nevada's public school students are low-income.[74]

3. This cream-skimming effect will be seriously detrimental to Nevada's public schools. While the ESA Program is unique among U.S. voucher schemes, there is a long-standing voucher program that confirms the accuracy of researchers' predictions. In 1981, Chile implemented a large-scale voucher program "strongly based" on Milton Friedman's ideal of a market-based education system.[75] This program remained in place largely unchanged for over 20 years—making it extraordinarily stable among voucher programs and thus especially useful in determining long-term effects.[76] Chile's voucher program matches the design of the ESA Program in almost every respect. It allows any student wishing to attend a private school to take her per-pupil funding from the public schools and use it to attend a participating private school.[77] As in Nevada, participation in the Chilean program is not means-tested, admissions to

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Public Charter Schools with Transportation: Increasing Access to Learning Opportunities for All Students (Aug, 2013), http://goo.gl/rcVHVh.

[73] *See* Milliard, *supra* note 70 (comparing data on applicants to the ESA Program with Census Bureau data).

[74] *Id.*

[75] 2007 RAND Study, *supra* note 4, at 113.

[76] Chang-Tai Hsieh and Miguel Urquiola, *The Effects of Generalized School Choice on Achievement and Stratification: Evidence from Chile's Voucher Program*, 90 J. Pub. Econ. 1477, 1478, 1480-81 (2006), *available at* http://goo.gl/Ht5OQz.

[77] *Id.* at 1478.

participating schools are not open, and private schools are permitted to—and do—reject students whom they view as potentially low-performing.[78]

The outcome of Chile's program has, tragically, reflected what researchers would predict based on its design. It has improved nothing about Chilean education save for enrollment figures at private schools, with the proportion of school-age children attending private schools roughly doubling in the decade following the program's creation.[79] To meet this demand, the number of private schools increased—but most of the new entrants were for-profit schools of relatively low quality.[80] On the other hand, elite private institutions largely opted to continue operating without public funding and their enrollment numbers stayed relatively constant.[81]

The program did not boost average schooling outcomes in Chile. Instead, the country saw an overall decline in student achievement following the implementation of the program—a decline that was especially pronounced in public schools where vouchers lured the largest number of students away to private schools.[82] And the cream-skimming practiced by the private schools resulted in middle-class flight from public schools, such that Chile now has the second most socio-economically stratified education system among OECD countries.[83] This outcome is consistent with the 2007 RAND study's prediction that "removing high-achieving students will

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[78] *Id.* at 1498-99.

[79] *Id.* at 1481.

[80] *Id.* at 1482-83.

[81] *Id.* at 1480.

[82] Hsieh and Urquiola, *supra* note 76, at 1488, 1498-99.

[83] 2015 NBER Paper, *supra* note 5, at 37 (citing Cristián Bellei, Juan Pablo Valenzuela, and Danae De Los Ríos, *Segregación Escolar en Chile* in Sergio Martinic and Gregory Elacqua, eds., *Fin de Ciclo?* 219 (UNESCO 2010) , *available at* http://goo.gl/CJ5Y1k).The state of Chile's education system has led to persistent student protests. *Id.* at 38, 55-56; Gram Slattery, *Chile's Emboldened Students Back On Streets To Defy Government*, Reuters (June 25, 2015), http://goo.gl/OXixre.

reduce the achievement of those left behind."[84] It is difficult to imagine that Nevada will escape similar results if the ESA Program is implemented.

Voucher proponents frequently argue that, since "the funding follows the student" under programs like the ESA Program, public and private schools are on equal footing and need only compete to attract more students. This is not necessarily the case. Each student requires somewhat different funding and resources, but when a student enrolls in the ESA Program the public school will lose funding based on the average per-pupil cost to educate one student. At the same time, public schools must be open to all students—including children whose special needs require greater-than-average resources. Furthermore, public schools are required to provide a much wider range of services than private schools such as special education, transportation, food services, and vocational education—and costs for these programs may remain relatively constant even if there is a small to moderate decline in enrollment due to the ESA Program. And many of schools' fixed overhead costs remain the same regardless of enrollment levels. Thus, when the funding assigned to one student leaves a public school, an equal reduction cannot necessarily be made in the school's budget. And the design of the ESA Program is such that the students most likely to leave public schools via the Program are also those most likely to take more funding from the district than it costs to educate them. The scope of the Program makes it highly likely that this shift in the student bodies of public schools will occur on a significant scale, causing a general decline in educational services, including increased class sizes and fewer educational offerings.

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[84] 2007 RAND Study, *supra* note 4, at 236; *see also* Robert Bifulco, *et al.*, *The Effects of Public School Choice on Those Left Behind: Evidence from Durham, NC*, 84 Peabody J. of Educ. 130 (2008) (finding that a cream-skimming effect resulted from North Carolina's school choice programs).

Research examining the impact of voucher program design uniformly suggests that a program like Nevada's will lead to stratification and decline in public school quality. In the one existing case in which a program closely resembling the ESA Program has been implemented—in Chile—that has been precisely the result. This cannot be what the framers of the Nevada Constitution envisioned when they directed the Legislature to establish and maintain a "uniform system of common schools." Nev. Const. art. XI, § 2.

CONCLUSION

This Court's consideration of the constitutional issues presented by this lawsuit should not be colored by ill-founded claims about the educational merits of voucher programs advanced by Defendant and its *amici*, but rather should be guided by research regarding the actual likely impact of the ESA Program, particularly given the Program's design. The ESA Program will severely undermine Nevada's uniform system of common schools, and should be declared unconstitutional.

RESPECTFULLY SUBMITTED this 23rd day of November, 2015.

Francis C. Flaherty, Bar No. 5303
Casey A. Gillham, Bar No. 11971
E-Mail: fflaherty@dlpfd.com
cgillham@dlpfd.com

Counsel for Amici Curiae *Nevada State Education Association and National Education Association*