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10 **FIRST JUDICIAL DISTRICT COURT**  
11 **IN AND FOR CARSON CITY NEVADA**

12 HELLEN QUAN LOPEZ, individually and on  
13 behalf of her minor child, C.Q.; MICHELLE  
14 GORELOW, individually and on behalf of her  
15 minor children, A.G. and H.G.; ELECTRA  
16 SKRYZDLEWSKI, individually and on behalf  
17 of her minor child, L.M.; JENNIFER CARR,  
18 individually and on behalf of her minor  
19 children, W.C., A.C., and E.C.; LINDA  
20 JOHNSON, individually and on behalf of her  
21 minor child, K.J.; SARAH and BRIAN  
22 SOLOMON, individually and on behalf of  
23 their minor children, D.S. and K.S.,

24 Plaintiffs,

25 vs.

26 DAN SCHWARTZ, IN HIS OFFICIAL  
27 CAPACITY AS TREASURER OF THE  
28 STATE OF NEVADA,

Defendant.

Case No. 150C002071B

Dept. No II

MOTION TO APPEAR AS  
*AMICI CURIAE*; POINTS AND  
AUTHORITIES; AND BRIEF  
OF *AMICI*

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1 The National School Boards Association (“NSBA”) and the Nevada Association of School  
2 Boards (“NASB”), through their undersigned counsel, hereby respectfully move this court to  
3 exercise its discretion and grant them leave to participate as *Amici Curiae*.

#### 4 POINTS AND AUTHORITIES

5 While no specific provision of the Nevada Rules of Civil Procedure or the First Judicial  
6 District Court Rules addresses the submission of *amici curiae* briefs at the trial level, the  
7 information and arguments presented below may be helpful and of interest to the Court in securing  
8 a “just, speedy, and inexpensive determination” of this action. NRCP 1. *Amicus* participation is  
9 appropriate where the *amicus* brief is “desirable.” Cf. NRAP 29(c)(2). An *amicus* who makes a  
10 responsible presentation to a court in support of a party “can truly serve as the court’s friend.”  
11 *Neonatology Associates v. CIR*, 293 F.3d 128, 131 (3d. Cir. 2002) (authored by now United States  
12 Supreme Court Justice Alito).

13 Several Nevada Supreme Court opinions indicate that such participation has been allowed  
14 in the past. E.g., *Herbst Gaming v. Heller*, 122 Nev. 877, 882, 141 P.3d 1224, 1227 (2006) (noting  
15 that briefs were filed by *amici curiae* in district court); *Cole v. State*, 101 Nev. 585, 586-87, 707  
16 P.2d 545, 546 (1985) (noting that *amicus* counsel participated in district court proceedings); *Zeig v.*  
17 *Zeig*, 65 Nev. 464, 198 P.2d 724 (1948) (noting *amicus* participation in district court several times  
18 in opinion); *Haley v. Eureka County Bank*, 21 Nev. 127, 26 P. 64 (1891) (noting *amicus*  
19 participation in district court).

#### 20 INTERESTS OF THE *AMICI*

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



1 NASB is a non-partisan, non-profit organization that provides professional development,  
2 leadership training, educational advocacy, and other services to the seventeen school boards in the  
3 State of Nevada. All 107 elected or appointed school board members are represented. Collectively,  
4 boards govern school districts serving approximately 465,000 students across the State attending  
5 public schools in urban, rural, and remote communities. NASB's mission is promoting success for  
6 ALL students through local school board leadership. The Association partners with UNR  
7 Extended Studies, the Nevada Association of Counties, and the Nevada League of Cities and  
8 Municipalities to provide the Certified Public Official program for elected officials, an in-depth  
9 series that provides diverse resources for educational and professional development responsive to  
10 the changing needs of elected and appointed officials in public office throughout Nevada.

11 *Amici* believe that the Education Savings Accounts Program (ESAP) established by SB 302  
12 (2015) is unconstitutional and deprives Nevada students and their families of state and federal  
13 rights to a free, public education. SB 302 undermines public education and is part of a nationwide  
14 campaign by special interest groups to divert tax dollars away from public education and into  
15 private hands. *Amici* urge this Court to find the law unconstitutional and to avoid a ruling that  
16 would strengthen efforts that seek the destruction of one of the most important cornerstones of our  
17 democracy.

## 18 **BRIEF OF AMICI CURIAE**

### 19 **I. The Nevada Education Savings Account Program Harms Public Education.**

#### 20 **A. The Nevada ESAP conflicts with the judiciary's commitment to public 21 education as an inherent American value.**

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

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

1 citizenship. Today it is the principal instrument in awakening the child to cultural  
2 values, in preparing him for later professional training, and in helping him to adjust  
normally to his environment.

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

6 These same themes are echoed throughout the jurisprudence of school law. For instance,  
7 the High Court has concluded that "public school teachers may be regarded as performing a task  
8 'that [goes] to the heart of representative government'" and that public schools "are an  
9 'assimilative force' by which diverse and conflicting elements in our society are brought together  
10 on a broad but common ground." *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (quoting  
11 *Sugarman v. Dougall*, 413 U.S. 634, 647 n.6 (1973)); see also, e.g., *Bethel Sch. Dist. No. 403 v.*  
12 *Fraser*, 478 U.S. 675, 681 (1986) (internal citations omitted) ("[Public] education must prepare  
13 pupils for citizenship in the Republic.... It must inculcate the habits and manners of civility as  
14 values in themselves conducive to happiness and as indispensable to the practice of self-  
15 government in the community and the nation."); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("In sum,  
16 education has a fundamental role in maintaining the fabric of our society."); *San Antonio Indep.*  
17 *Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) ("Nothing this Court holds today in any way detracts  
18 from our historic dedication to public education.").

19 Just as the federal courts have consistently recognized that education is a public function  
20 necessary to preserve a democratic society, so, too, have the states. Today, every state constitution  
21 contains an education clause that recognizes the provision of a public education as a state function.<sup>1</sup>  
22 Appellate courts in a majority of states have now confirmed the states' constitutional obligations to  
23 provide an adequate public education on an equal basis to all children. Time and again the courts  
24 have insisted that the states provide for the needs of students in *all* of the public schools and  
25 eliminate disparities in educational opportunity. See, e.g., *Horton v. Meskill*, 376 A.2d 359, 375

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

1 (Conn. 1977) (holding that the state must “provide a substantially equal educational opportunity to  
2 its youth in its free public elementary and secondary schools”); *Claremont Sch. Dist. v. Governor*,  
3 635 A.2d 1375, 1376 (N.H. 1993) (finding that the constitution “imposes a duty on the State to  
4 provide a constitutionally adequate education to every educable child and to guarantee adequate  
5 funding”); *Leandro v. State*, 488 S.E.2d 249, 257 (N.C. 1997) (declaring that the constitution  
6 “requires that all children have the opportunity for a sound basic education”); *Seattle Sch. Dist. No.*  
7 *I v. State*, 585 P.2d 71, 91 (Wash. 1978) (concluding that “the constitution has created a ‘duty’ that  
8 is supreme, preeminent or dominant” to provide an adequate education with “sufficient funds”).<sup>2</sup>

9 This Court has an opportunity to reiterate the value that the American judiciary has placed  
10 in public education, by recognizing that the Nevada ESAP moves away from this inherent  
11 American value. In particular, the program fails to meet the state’s constitutional obligation to  
12 provide a system of free public education wherein all children may be educated, including those  
13 with disabilities. Moreover, the Nevada ESAP is unconstitutional even under the more liberal  
14 federal framework, because of its exclusion of public schools.<sup>3</sup> This exclusion limits the ability of  
15 families, particularly poor families, from both making the best educational choice for their  
16 children, and benefitting from the purported advantages associated with school choice. Thus, the  
17 ESAP weighs more heavily and disparately on those ill-prepared to bear its costs: the  
18 disadvantaged and poor families of Nevada.

19 **B. The Nevada ESAP’s diversion of public dollars away from schools harms**  
20 **Nevada public schools.**

21 By diverting funding from the State’s public schools, the Nevada ESAP categorically  
22 undermines this country’s longstanding commitment to public education. Public schools rely on a  
23 critical mass of per-pupil funding to provide quality education to all their students. By diverting  
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25 <sup>2</sup> This is only a small sampling of state decisions affirming the duty of the states to provide for  
26 public education. The Advocacy Center for Children’s Educational Success With Standards  
27 maintains a current and historical database of all state education litigation at  
<http://www.accessednetwork.org/litigationmain.html>.

28 <sup>3</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

1 substantial tax revenues to private schools that could be used in public schools, the ESAP  
2 constitutes a severe threat to the quality of public education programs. The impact of this diversion  
3 in funding is amplified in Nevada where public schools have been underfunded for years; Nevada  
4 has consistently ranked near the bottom in per-pupil spending among the states. In 2012 (the latest  
5 year for which data are available), Nevada ranked 45<sup>th</sup> among the states and the District of  
6 Columbia.<sup>4</sup> This underfunding is particularly troubling in light of a 2015 study that concluded that  
7 to provide an adequate education to the school children of Nevada, the per-pupil base funding rate  
8 should be increased to \$8,251. This would come at a cost of \$1.6 billion dollars more than the  
9 actual state, local and federal expenditures in fiscal year 2013.<sup>5</sup>

10 This lack of adequate funding has caused school districts to take drastic measures in recent  
11 years. For example, in 2010 Churchill County Public Schools closed schools, moved to a 4-day  
12 school week, reduced arts, dramas, and music education, cut school electives, and instituted  
13 furlough days for some of their employees.<sup>6</sup> Lincoln County Public Schools made similar cuts and  
14 also eliminated after-school programs and reduced technology purchases.<sup>7</sup> In 2008, the Center on  
15 Budget and Policy Priorities reported: "In Nevada, the governor has ordered various cuts to K-12  
16 education, including delaying an all-day kindergarten expansion, cutting per pupil expenditures by  
17 \$400 in a pilot program, eliminating funds for gifted and talented programs, eliminating funds for a  
18 magnet program for students who are deaf or hard of hearing, and making across-the-board cuts.  
19 Additionally, young children with developmental delays will lose more than 15,000 hours of

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21 <sup>4</sup> See U.S. CENSUS BUREAU, G10-ASPEF, PUBLIC EDUCATION FINANCES: 2012, Table 11 (June  
22 2014), [http://www.census.gov/content/dam/Census/library/publications/2014/econ/g-12-cg-  
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23 <sup>5</sup> GUINN CENTER FOR POLICY PRIORITIES, NEVADA K-12 EDUCATION FINANCE FACT SHEET 15 (Feb.  
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25 <sup>6</sup> Jim Hull, CENTER FOR PUBLIC EDUCATION, EXAMPLES OF STATE AND DISTRICT FUNDING CUTS  
26 (Oct. 7, 2010), [http://www.centerforpubliceducation.org/Main-Menu/Public-education/Cutting-to-  
the-bone-At-a-glance/Examples-of-state-and-district-funding-cuts.html](http://www.centerforpubliceducation.org/Main-Menu/Public-education/Cutting-to-the-bone-At-a-glance/Examples-of-state-and-district-funding-cuts.html).

27 <sup>7</sup> *Id.*  
28

1 needed services.”<sup>8</sup> Nevada still has not completely recovered from the cuts made to school funding  
2 since the 2008 recession. Adjusted for inflation, state per-pupil funding in Nevada for 2015-2016  
3 remains 3.5% less than in 2008.<sup>9</sup>

4 Given Nevada’s already significantly underfunded public education budget, the ESAP  
5 leaves most of Nevada’s families with even fewer educational resources available to them. This  
6 means that the students who remain in Nevada’s public schools will likely receive a lower-quality  
7 public education than if public funds were not expended on private schools. Under such  
8 circumstances, Nevada cannot afford to redirect even more money away from public schools.

9 **C. The Nevada ESAP’s lack of accountability harms Nevada students and taxpayers.**

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

15 **1. Participating educational providers under SB 302 do not have to meet**  
16 **state laws applicable to public schools.**

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

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

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

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

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

13           Other than personal visits to a school, subjective evaluations from other parents, or self-  
14 interested promotional information from the schools themselves, families typically would have  
15 little data to determine whether the private school they are choosing will, in fact, provide a better  
16 education to their children than the public schools. In other words, the Nevada ESAP allows public  
17 funds to be used to enroll a child in a private school, the quality of which is unknown to the  
18 parents, taxpayers, and the State.

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

27           In contrast, states regulate every aspect of traditional public schools, from curriculum to  
28 procurement to assessment, to assure the responsible use of public money and the adequate

1 education of its students. The Nevada ESAP rejects all of these safeguards and, in so doing,  
2 abandon any sincere effort to assure that the publicly funded education provided by private schools  
3 actually meets public needs.

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

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

12 This is especially true for students with disabilities who choose to attend a private school by  
13 using an education savings account. Many parents of children with disabilities, hoping for the best  
14 education for their child, may be lured into sending their child to a private school, not realizing that  
15 the private school they select may have no capacity and has no obligation to provide the same  
16 special education and related services the child received under the Individualized Education Plan  
17 (IEP) developed while the child attended public school. The law does not require private  
18 institutions to admit or meet the needs of children with disabilities; nor are such institutions subject  
19 to the comprehensive statutory and regulatory requirements to which public schools must conform  
20 in serving children with disabilities.

21 If the private setting turns out to serve their child's educational needs poorly, parents have  
22 few good options if the private school fails to make changes voluntarily. Parents can enroll their  
23 child in a new private school with the hope that it will better serve their child's needs; leave the  
24 child in an inappropriate private setting that fails to provide the individualized educational services

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