In the Supreme Court of the State of Nevada

CARYNE SHEA, individually and as next friend of her minor children A.S. and M.S.; VENECIA SANCHEZ, individually and as next friend of her minor child Y.S.; BETH MARTIN, individually and as next friend of her minor children R.M. and H.M.; CALEN EVANS, individually and as next friend of his minor child C.E.; PAULA ARZOIAN, individually and as next friend of her minor child A.A.; KAREN PULEO, individually and as next friend of her minor children J.D.Jr., Jas.D., and Jac.D.; CHRISTINA BACKUS, individually and as next friend of her minor child D.B.; CAMERON BACKUS, individually and as next friend of his minor child D.B.; ALEXANDRA ELLIS, individually and as next friend of her minor children L.E., M.E., and B.E.,

Appellants,

vs.

THE STATE OF NEVADA; THE NEVADA DEPARTMENT OF EDUCATION; JHONE EBERT, Nevada Superintendent of Public Education, in her official capacity; NEVADA STATE BOARD OF EDUCATION; DOE INDIVIDUALS, I-XXV; ROE ENTITIES, I-XXV,

Respondents.

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APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

DATED this 8th day of April, 2021.

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ROUTING STATEMENT

Pursuant to N.R.A.P. 17(a)(11) and (12), Appellants suggest this matter be retained by the Nevada Supreme Court, as the question of whether the public educational system in Nevada is constitutionally adequate—and whether that question itself is justiciable—is both a constitutional matter of first impression and an issue of statewide public importance. Additionally, none of the categories indicating presumptive assignment to the Court of Appeals applies to this action.

I. INTRODUCTION

Parents, schoolchildren, and educators in Nevada find its current system of public education in a seriously deteriorative state, made even more dire by the long and dark pandemic year since the original Complaint here was filed. This state's poor educational outcomes, year after year—as seen in both objective and relative measures in state, regional, and national rankings—reflect a system-wide failure to provide an adequate education as expressly required by the Nevada Constitution. Now more than ever, the coordinate branches of Nevada government must be held to account regarding whether the policies, plans, funding, and resources provided to the public education system in Nevada are sufficient under law to meet the constitutional obligations the state has to its hundreds of thousands of schoolchildren.

When Nevada parents, on behalf of their children, allege as they have here that the state has failed to provide for adequate education, the judiciary has the institutional duty to interpret the pertinent constitutional clauses to determine whether the state has complied with its obligations. Contrary to the order of the district court below, the Complaint in the action below raises justiciable issues, can be governed

by judicially-manageable standards, and states claims for which relief can, and should, be resolved by the Nevada judiciary.

II. JURISDICTION OF THE COURT

This matter comes to the Court on a grant of a motion to dismiss and final judgment by the district court. JA 97-101; JA 102-111. Jurisdiction is proper, therefore, pursuant to N.R.A.P 3A(b)(1).

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The single issue for the Court's review in this appeal is whether Plaintiffs' claims below stemming from the Nevada Constitution's Education Clause, Article XI, present justiciable questions appropriate for adjudication by the courts of this State.

IV. STANDARD OF REVIEW

Where a district court dismisses an action upon motion pursuant to N.R.C.P. 12(b)(5), this Court's review is *de novo*. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Furthermore, all factual allegations brought in the Complaint below are, at this juncture, taken as true for purposes of evaluating Plaintiffs' claims.

V. STATEMENT OF THE CASE

On March 4, 2020, Plaintiffs/Appellants filed their Complaint in Carson City district court. JA 1-37. Defendants/Respondents filed their omnibus motion to dismiss, on grounds of non-justiciability, on April 23, 2020. JA 40-62. Appellants responded, and Respondents replied. JA 63-88; JA 89-96. On October 7, 2020, the district court granted Respondents' motion, and the order was entered on October 26, 2020. JA 97-101; JA 102-111. Appellants' notice of appeal was filed on November 17, 2020 and, therefore, this appeal is timely. JA 112-125.

VI. STATEMENT OF RELEVANT FACTS

For purposes of brevity, Plaintiffs, who are parents of Nevada schoolchildren alleging violations of their constitutional rights to adequate resourcing of public education, here incorporate the facts and allegations contained in their Complaint. JA 5-34. The recitations therein include meticulously-cited references to Nevada's educational standing in a variety of subjects; the methodologies for ranking and expressing the levels of student achievement; and the many, many standards and goals set out by the Legislature and the Executive for

complying with the constitutional mandate to provide an adequate public education in this state.

VII. ARGUMENT

A. The Nevada Constitution's Education Clause Does Not Mandate Dismissal For Non-Justiciability

1. The rights embodied in the Education Clause are basic, positive rights of Nevadans, capable of construction and enforcement by the judiciary

The foundation of the separation of powers doctrine in Nevada, Article 3, section 1 of the Nevada Constitution, states:

> The powers of the Government of the State of Nevada shall be divided into three separate departments, — the Legislative, — the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted by this constitution.

Nev. Const. art. III, § 1. This doctrine exists "to prevent one branch of government from encroaching on the powers of another branch." *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009).

Generally speaking, the Legislature is tasked with enacting laws, *see* Nev. Const. art. IV; the Executive is tasked with carrying out and

enforcing those laws, *see id.*, art. V; and the Judiciary is tasked with interpreting the laws and deciding justiciable controversies, *see id.*, art. VI; *N. Lake Tahoe Fire Prot. Dist. v. Washoe Cty. Bd. of Cty Commissioners*, 129 Nev. 682, 687, 310 P.3d 583 (2013). Each branch of government has distinct functions, but this does not mean that the separate branches' functions, like parallel lines, will never intersect; they intersect every day and in important lawsuits all the time. "Once the Legislature has made policy and value choices by enacting statutory law, that law's construction and application is the job of the judiciary." *Id.*, 129 Nev. at 688. It is, emphatically, the task of the judiciary to say what the law is, and whether it has been followed in any particular circumstances.

Unlike the federal constitution, which is a charter of negative rights that prohibits the government from infringing on individual rights, the Nevada Constitution, like most state constitutions, includes grants of positive rights—such as Nevadans' right to an adequate education—that entitle individuals to a benefit or action from their state government. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 894-95, 179 P.3d 366 (Kan. 2008) ("The difference in the inherent

remedial power of state courts arises because all state constitutions also grant positive rights, *i.e.,* rights that entitle individuals to benefits or actions by the state") (citing Helen Hershkoff, *Positive Rights and States Constitutions: The Limits of Federal Rationality Review,* 112 Harv. L. Rev. 1131, 1135 (1999) ("Unlike the Federal Constitution, every state constitution in the United States addresses social and economic concerns, and provides the basis for a variety of positive claims against the government.")).

As a concrete example of positive rights mandated by state constitutions, the *Sebelius* court noted that Article 6, section 6 of the Kansas Constitution requires the Kansas Legislature to "make suitable provision for finance" of the public schools. *Id.*, 285 Kan. 894 (*citing Montoy v. State*, 278 Kan. 769, 771, 120 P.3d 306 (Kan. 2005)). When a constitution mandates a positive right, the legislative and executive branches are compelled to carry out that constitutional goal. It is the state judiciary's role to ensure that the coordinate branches of government comply with their constitutional duties to provide positive rights. Put another way, "to enforce a positive right, courts must mandate a positive remedy by requiring the state government to act

and thereby fulfill the constitutional right." *Sebelius*, 285 Kan. at 894 (internal citation references excluded). For this reason, the factors found, for example, in *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962), relied upon by Respondents below, are of limited applicability in state law positive rights cases.[1] Inherent in the positive rights found in state constitutions, such as the right to enjoy adequately-resourced public education, is the ability to identify, analyze, vindicate, and remedy violation of those rights. Justiciability of claims like Plaintiffs' here is, therefore, essential to the entire state constitutional scheme.

This Court has not shied away from its mandate to interpret the law and ensure the Legislature effectuates positive rights such as the right to education. Indeed, the Court has in the past decided questions of great political importance involving the two other branches of government. *See, e.g., Guinn v. Legislature*, 119 Nev. 277, 71 P.3d 1260

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[1] Even in federal cases, non-justiciability on the basis of the political question doctrine is a narrow exception to jurisdiction. *See Baker v. Carr*, 369 U.S. at 217 (unless political question issues were "inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.").

(2003) (hereinafter "*Guinn I*") (granting Governor's petition for writ of mandamus to compel Legislature to fulfill its constitutional duty to approve balanced budget and to fund K-12 education), *overruled on other grounds by*, *Nevadans for Nevada v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006). The lessons of *Guinn I* were myriad and conflicting, to be sure, and the manner in which it proceeded and reached its conclusion was controversial, but the impulse to protect the rights of Nevadans to education funding was surely correct. What is recoverable from *Guinn I* is this Court's recognition that, first and foremost, it is the province of the Nevada judiciary to interpret the state constitution to resolve the collision of rights and prerogatives that arise in a dynamic, democratic society.

Furthermore, the *Guinn I* Court rightly recognized "the vital role that education plays in our state" and the mandatory nature of the Education Clauses. *Id.*, 119 Nev. at 286. Critically, the Court found that "constitutional provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights." *Id.* (quoting *Campbell Cnty. School Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995)). This is the enduringly

important aspect of the *Guinn I* case, that the Nevada Constitution affords Nevadans a judicially enforceable right to an adequate and sufficient public education.

In short, the Nevada Constitution establishes the positive right to the citizens of Nevada that the Legislature provide sufficient and adequate resources for the state's system of public education a right that is enforceable and justiciable.

2. Claims brought under similar clauses in other states have been found to be justiciable, for instructive reasons

Many states have confronted this precise question, the justiciability of their respective constitutional charges to provide adequate public education to its schoolchildren. Nevada has yet to answer this question in its highest court, but sister jurisdictions have done so many times over the years. In state after state, in fact, supreme courts have found education adequacy cases justiciable, with reasoning that is instructive for the present action. To wit:

Colorado

In *Lobato v. State,* 218 P.3d 358, 372-73 (Colo. 2009), the Supreme Court of Colorado considered whether the political question doctrine

prohibited its consideration of a challenge to the general assembly's fulfillment of the Colorado Constitution's mandate that the "general assembly shall … provide for the establishment and maintenance of a thorough and uniform system of free public schools." Colo. Const. art. IX, § 2.

The court "acknowledge[d] that the General Assembly enjoys broad legislative responsibility … to raise and spend funds for government purposes," but concluded that "[t]his general authority must be exercised in conformity with express or implied restraints imposed thereon by specific constitutional provisions." *Lobato*, 218 P.3d at 372-73 (internal quotation marks omitted). Conclusively, a "ruling that the plaintiffs' claims are non-justiciable would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility to fashion and to fund a 'thorough and uniform' system of public education." *Id.*, at 372.

Separation of powers, in other words, cannot be permitted to resolve into unchecked power by one branch to the exclusion of the others, especially in the realm of rights and prerogatives as important as public education.

Connecticut

The Connecticut Constitution states that "[t]here shall always be free public elementary and secondary schools in the state [and the] general assembly shall implement this principle by appropriate legislation." Conn. Const. art. VIII, § 1. In *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 295 Conn. 240, 990 A.2d 206 (Conn. 2010), the state argued that this provision delegated authority regarding education solely to the Legislature, rendering any challenge non-justiciable. The court held, however, that "the phrase 'appropriate legislation' in article eighth, § 1, does not deprive the courts of the authority to determine what is 'appropriate.'" *Id.*, 295 Conn. at 258 (quoting *Sheff v. O'Neill,* 238 Conn. 1, 678 A.2d 1267 (Conn. 1996)). The court contrasted the education article with other constitutional provisions which

> unambiguously confer full authority over the respective subject matter to the legislature, and do not contain qualifying terms such as appropriate legislation" that imply a judicial role in disputes arising thereunder, particularly when coupled with the word shall," which itself implies a constitutional duty" that is mandatory and judicially enforceable."

Id., 295 Conn. at 220 (citation omitted).

The Connecticut Constitution, therefore, like Nevada's, contains language that essentially presumes the ability of citizens to vindicate their rights to adequate and sufficient public education through resort to the courts.

Delaware

In *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109 (Del. Ch. 2018), the state moved to dismiss the plaintiffs' challenge to the adequacy of the education of "Disadvantaged Students," arguing, among other things, that obligations enumerated in the Delaware Constitution's Education Clause were not rights the courts could enforce—that "[t]he shortcomings of the public schools … present a non-justiciable political question[.]" *Id.*, 199 A.3d at 119. The State further argued that "it is impossible for a court to determine in the abstract what constitutes a meaningful education." *Id.*, at 120.

The court found, however, that the plaintiffs were not asking that question in the abstract; rather, they made "a more basic and straightforward claim: When educating Disadvantaged Students, Delaware's public schools must meet the standards and criteria that the Delaware Department of Education has chosen for itself." *Id.* The court

found that, using this standard, it could "readily apply these establish standards to the facts of the case." *Id.* Thus, the court found the case justiciable and denied the State's motion to dismiss. *Id.*

Plaintiffs here are not theorizing abstract concepts of educational adequacy. Instead, they are employing the state's own standards to measure the rank inadequacy of public education in Nevada—the Complaint below is a model of detail and precise reference to concrete data and measurement of educational goals and achievement in this state. Such questions are policy disagreements, but zero in upon the state's failure to meet its constitutional obligations and its own statutory and regulatory mandates for fulfilling those obligations.

Kansas

In *Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (Kan. 2014), the Kansas Supreme Court considered the justiciability of a challenge to the legislature's failure to meet the Kansas Constitution's mandate that "[t]he legislature shall provide for intellectual, educational, vocational, and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law," and

that "[t]he legislature shall make suitable provision for finance of the educational interests of the state." Kan. Const. art. VI, §§ 1, 6(b). The court concluded that, rather than giving absolute discretion to the Legislature with respect to education, the word "shall" in these provisions "reflects a constitutional duty" that is mandatory and judicially enforceable. *Gannon*, 319 P.3d at 1220.

Nevada's inclusion of the self-same directive—"shall"—argues for the oversight by the judiciary of the state's compliance with its educational mandates. Further, use of the word "suitable" in the Kansas Constitution's defining of the provision of education finance indicates that the Legislature did not have absolute discretion in finance of schools. *Id.* The State of Nevada is similarly constrained, in Article XI, section 1 of the Nevada Constitution, to provide by "all suitable means" the adequate and sufficient education Plaintiffs here have brought suit to demand.

Minnesota

In *Cruz-Guzman v. State*, 916 N.W.2d 1 (Minn. 2018), the plaintiffs brought claims alleging that the State had failed to provide students with an adequate education under the Minnesota

Constitution's Education, Equal Protection, and Due Process Clauses. The state moved to dismiss the complaint on multiple grounds, including for lack of subject matter jurisdiction, on the basis that the claims presented a non-justiciable political question. While the court noted that "specific determinations of educational policy are matters for the Legislature," it found that "it does not follow that the judiciary cannot adjudicate whether the Legislature has satisfied its constitutional duty under the Education Clause." *Id.*, 916 N.W.2d at 9. To so determine would be to "leave Education Clause claims without a remedy … [which] is incompatible with the principle that where there is a right, there is a remedy." *Id.* Further, "[p]roviding a remedy for Education Clause violations does not necessarily require the judiciary to exercise the powers of the Legislature." *Id.* The court found that the claims "ask[ed] the judiciary to answer a yes or no question – whether the Legislature has violated its constitutional duty[.]" *Id.* And, to resolve that question, the judiciary did not need to "devise particular educational policies[.]" *Id.* The Court found the Education Clause claims justiciable. *Id.*, 916 N.W.2d at 10.

In all, more than half the states of the Union have seen plaintiffs

prevail in court cases regarding educational adequacy, almost all of them brought pursuant to positive-right state constitutional provisions.[2] Each of those, obviously, entailed a determination that the issue was justiciable by the courts. Each had peculiarities of constitutional language or context that argued for courts to agree to hear and determine the controversies, but Nevada's constitutional provisions at stake here have all the hallmarks of justiciability.

Not every state, of course, has those same hallmarks and, admittedly, some courts have found the questions posed in this suit non-justiciable in certain instances. Below, Respondents relied heavily upon the California case of *Campaign for Quality Educ. v. State of Cal.*, 246 Cal. App. 4th 896, 209 Cal. Rptr. 3d 888 (Cal. App. 2016), which held the issue of educational funding adequacy in that state non-justiciable.

But there, "the question before [the court was] whether the right to an education of 'some quality' is enshrined, as a *constitutional* right."

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[2] *See* the useful survey available at http://www.schoolfunding.info/litigation-map/, collecting and discussing the entire range of school-resource cases across the country (last accessed April 4, 2021).

Id., 246 Cal. App. 4th at 907. Here, this Court has answered that query already, at least in the context of Nevada's own constitution. Many of the issues in the present case are of a first-impression nature, but the question of whether educational rights in Nevada are *constitutional* rights, however, is not among them. *See above,* Section VII.A.1.

Further, *Campaign for Quality Education* was a suit brought, specifically, to address educational funding levels. Here, Plaintiffs are not asking this Court to settle mere questions of funding, but rather to declare—by virtue of the language of the Nevada Constitution and the repeated setting of benchmarks, standards, and goals by the state—that the basic right to education is not being sufficiently provided to the schoolchildren of Nevada, and that the state must move from the aspirations to achievement if it is to fulfill its mandate.

Much like the constitutional provisions cited in the cases where justiciability was established, Nevada's Education Clause constitutes a mandatory directive to effectuate the positive, judicially enforceable right to a sufficient and adequate public education for all Nevadans. To find this issue non-justiciable would be to leave the Legislature with unchecked power, permitting it to abdicate its constitutional

responsibility, and to leave Nevadans without a remedy for their educational right. Such a result is untenable, and makes the constitutional right to an adequate public education an eternally empty promise.

B. There Are Manageable Judicial Standards To Resolve This Action

Arguments over whether manageable judicial standards can govern a state court's handling of a school-resources adequacy case are by now outdated. Plaintiffs in the first wave of these types of cases—fifty years ago or more—found great difficulty in convincing state courts that manageable standards could be formulated. The foundational cases (in the sense they initiated the modern era of litigation over the resources and financing of public education systems) like *McInnis v. Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968) and *Burrus v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), were dismissed at the time on grounds of failure to imagine manageable judicial standards, with the *Burrus* court specifically writing that "courts have neither the knowledge, nor the means, nor the power to tailor the public monies to fit the varying needs of these students throughout the state." *Burrus*, 310 F. Supp. at 574.

That view no longer obtains. Educational policy regarding

standards and accountability has transformed over half a century. Standards now clutter the field: federal educational standards; state standards; local district goals; reports of committees, subcommittees, and consultants; expertly-constructed benchmarks allowing policymakers to track progress through advanced metrics and analytics. Measurable and manageable standards are now the way in which we as a society conceive of and implement educational policy. Standards are everywhere, and state legislatures and agencies are the sources soliciting and producing them. If they can produce them, they can be made to abide by them.

The Pennsylvania Supreme Court has put this evolution into stark relief. A generation ago, in *Marrero v. Commonwealth of Pennsylvania*, 559 Pa. 14, 739 A.2d 110 (Pa. 1999), the court had found that funding adequacy was not justiciable, owing to a lack of appropriate standards. Just two decades later, however, in *William Penn School District v. Pennsylvania Department of Education*, 642 Pa. 236, 170 A.3d 414 (Pa. 2017), the very same court overruled its prior rulings, agreeing with plaintiffs that:

> the recent proliferation of federal and state curricular mandates, in tandem with elaborate student assessment

> and school accountability measures, reflect a sea change in the legislative imposition of standards. Specifically, the advent of the modern era of Common Core curricula and elaborate tools for assessing educational success, such as the PSSA and Keystone Exams, contradict any argument that there are no judicially enforceable standards that might apply to test the General Assembly's satisfaction of its mandate. And because a court can rely upon standards already established by the legislature to make a circumstance-specific determination of educational adequacy without fashioning a fixed baseline standard out of whole cloth, judicial oversight does not require an intrusion upon the General Assembly's policy-making function.

Id., 642 Pa. at 289-290.

In other words, the analytical revolution in education policy occasioned by federal programs like No Child Left Behind Act (2002), state and federal mandates, accountability markers, legislative reports and district-level studies, etc., now provides courts with judicially manageable standards to measure whether states were living up to the mandates for adequate and sufficient public education found in state constitutions, including Nevada's.

This shift towards courts' employment of a state's own announced standards as measures of constitutional compliance actually began earlier. The Kansas Supreme Court, in *Unified School District No. 229 v. State*, 256 Kan. 232, 885 P.2d 1170 (Kan. 1994), *cert. denied*, 115 S.

Ct. 2582 (1995), looked to the state legislature's own statement of educational goals, embodied in the Kansas School District Finance and Quality Performance Act, which listed ten goals that the Kansas Board of Education was to meet in defining school accreditation. The court acknowledged that the legislature's own standards were the product of a comprehensive study by education experts, and thus reasoned that it was not imposing its own judgment on the definition of adequacy, but rather employing that if the state itself. The court resolved the question of educational inadequacy without itself in the creating and implementing policy, avoiding intrusion into the legislature's sphere of powers.

In the years since, state after state has been held to account under constitutional education clauses, with reference to the standards the states themselves had created or embraced. Not only does this vindicate the positive rights of state residents, it also gives meaning and accountability to the promises of improved educational outcomes made by successive generations of elected officials.

The proper approach to a judicial definition of educational adequacy is to adopt as mandatory the standards that the legislature

and the education bureaucracy have adopted for themselves in the form of accreditation standards or statutory pronouncements of educational goals. Such an approach corrects noncompliance with constitutional duties, if necessary, but still permits courts to stay within their appropriate roles.

This is what the Complaint below represents. It lists example after example of the standards created by the Nevada Legislature and the educational bureaucracy within the state executive branch: "By devising an intricate statutory and regulatory scheme of content and curriculum requirements to be implemented by common schools in this state, the Legislature and the State of Nevada have already defined the contours of a the meaning of a basic, sufficient public education, and a uniform system of common schools." JA 11.

Indeed, paragraphs 63 through 134 of the Complaint detail, at exhaustive length, the standards the State has set for public education, through statutes, regulations, legislative declarations, the State Improvement Plan, Common Core standards, College and Career Readiness Anchor standards, English Language Arts standards, Measures of Academic progress standards, special-needs education

standards, and more. JA 11-27. These standards are remarkably detailed in their mandates. As for school finance, paragraphs 135 through 171 detail the Nevada Plan, and the new Pupil-Centered Funding Plan, with similar levels of detail. JA 27-34.

That Nevada's state-mandated educational standards are many, and complex, is not a basis for dismissal, but rather the very reason courts can manage the case and apply rational standards to resolve its claims. The Complaint demonstrates that Nevada's legislative and regulatory regime is a prodigious producer of educational standards. The proof will come in measuring educational outcomes against the stated goals set for our students, which is exactly what Plaintiffs' lawsuit is designed to achieve. There is no basis for dismissing the suit on grounds of the inability of the Court to divine and apply appropriate standards; those standards exist and are ready to serve Nevada's courts in vindicating the rights of Nevada schoolchildren.

C. The Education Clauses Are Not Merely Hortatory, And Establish Clear Duties

The district court, in its order, concluded that the Education Clause in Article XI are "aspirational, and does not guarantee an education of a particular quality or quantity, nor does it mandate the

attainment of specific educational outcomes." JA 99. This is not correct.

1. Article XI, Section 1 imposes discrete and mandatory duties upon the State

Article XI, section 1 of the Nevada Constitution states, "[t]he legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof." Nev. Const. art. XI, § 1.

The plain language of this provision imposes a duty upon the State to provide for meaningful educational opportunities, and use of the word "shall" removes any discretion associated with that duty. *See, e.g.*, *Goudge v. State*, 128 Nev. 548, 553, 287 P. 3d 301, 304 (2012). The Oxford Dictionary defines "encourage" as to "[g]ive support, confidence, or hope to (someone), to "[g]ive support and advice to (someone) so that they will do or continue to do something," or to [h]elp or stimulate (an activity, state, or view) to develop."[3] Further, Oxford defines "suitable"

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[3] *See Lexico Powered by Oxford*, available at https://www.lexico.com/en/definition/encourage (last visited April 4, 2021).

as "right or appropriate for a particular person, purpose, or situation.[4] The final portion of Article XI, section 1 states the Legislature must promote "intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements," what the article's title calls, generally, "education," or, per Oxford, the" body of knowledge acquired wile being educated."[5] Nev. Const. art. XI, § 1.

The Tennessee Supreme Court, in interpreting their constitutional education article, defined "education" as "[t]he act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment, and generally of preparing oneself or others intellectually for mature life." *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 150 (Tenn. 1993). The term "education" denotes, inarguably, a level of inherent quality. *Id.* A poor education, or a education wrongly imparted, is a miseducation. The particular level of quality is debatable, but there can be no dispute that Article XI, section

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[4] *Id.*, at https://www.lexico.com/en/definition/suitable (last visited April 4, 2021).

[5] *Id.*, at https://www.lexico.com/en/definition/education (last visited April 4, 2021).

1 here implies an education in the disciplines it expressly identifies.

Read as creating positive rights of Nevadans, Article XI, section 1 creates a duty to create, maintain, and support an education system that prepares students to participate in the economy, our democracy, and civil society—or, to employ the State's own standards, education must ensure students are "college, career, and community ready." JA 24.

Below, Respondents looked to *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016), to support the notion of unchecked legislative discretion in this area. The Court in *Schwartz*, however, determined only that the term "by all suitable means" provided discretion to enact programs in addition to the public education system in performance of the duty to encourage education in the state, rather than the qualitative aspects of the public system itself. *Id.*, 132 Nev. at 748-49. The Court specifically rejected the contention that the case required any analysis on whether the school system is or has been sufficiently funded by the Legislature. *Id.*, at 755 n. 11.

Other state courts with similar constitutional language to Nevada's have rejected interpretations providing legislatures with

untrammeled discretion regarding constitutional education clauses because such provisions were merely aspirational. *See, e.g., Campbell Cnty. School Dist. v. State,* 907 P.2d at 1257-59, 1271-72 (Language reading "shall suitably encourage" means "calculated to advance the sciences and liberal arts," and did not provide discretion to offer inadequate or inequitable resource levels). *See also Serrano v. Priest*, 18 Cal. 3d 728, 775, 557 P.2d 929 (Cal. 1976) (rejecting contention that the constitutional provision similar to Nevada's authorizes the legislature to condition educational opportunity on district wealth).

2. Article XI, Section 2 creates a duty to devise and provide adequately for a uniform system of common schools

Article XI, section 2 also imposes a duty on Legislature to provide for an appropriate education system, and reads, in relevant part, "[t]he 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 …" Nev. Const. art. XI, § 2. The plain language of the provision requires the Legislature not only to establish a uniform system of common schools, but to "provide for" that system as well. Nev. Const. art. XI, § 2. Nevada has established a

system of common schools via state academic standards, mandates, and requirements imposed upon districts and students, but whether it has met its obligation to "provide for" that system in a manner consistent with its duty is the subject of this action.

Any contention that the Legislature can mandate standards and requirements as part of its duty to develop a uniform system of common schools, but then subsequently fail to provide for that system to meet those mandates nullifies the duty imposed by the constitution provision. The guarantee of Article XI, section 2 imposes a duty that is necessarily qualitative, by any reasonable reading.

Other states with similar constitutional language to Nevada's interpret their provisions as imposing a clear duty to provide for a minimum standard of quality in their education systems. In *Leondro v. State,* 346 N.C. 336, 345-46, 488 S.E.2d 249, 254 (N.C. 1997), the North Carolina Supreme Court in found similar language guaranteed a quality of education defined as "sound basic education," and finding that "[a]n education that does not serve the purpose of preparing students to participate and complete in the society in which they live is devoid of substance and is constitutionally inadequate."

In *Connecticut Coalition for Justice in Education*, discussed above, the court found a guarantee to public school students of "the right to a particular minimum quality of education, namely, suitable educational opportunities, which includes preparing students for the workforce and higher education, civic engagement, and protection of liberty."[6] *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 295 Conn. at 243, 292-95.

In *Tennessee Small School Systems*, the court held that its provision required the legislature to "maintain and support a system of free public schools that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life".[7] *Tennessee Small School Systems v. McWherter*, 851 S.W.2d at 150-51.

In *Abbeville County School Dist. v. State*, 335 S.C. 58, 68, 515

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[6] *See* Conn. Const. art. XIII, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation").

[7] *See* Tenn. Const. art. XI, § 12 ("The state of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.").

S.E.2d 535, 540 (S.C. 1999), the South Carolina court agreed that its provision "requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education."[8]

In *Campaign for Fiscal Equity et al. v. State*, 86 N.Y.2d 307, 314, 316-17, 655 N.E.2d 661, 665-66 (N.Y. 1995), New York interpreted its provision to mean children are entitled to a "sound basic education," meaning basic literacy, calculating, and verbal skills provided via appropriate essential resources and facilities.[9]

Article XI, section 2 of the Nevada Constitution imposes a duty upon the Legislature to establish and provide for a uniform system of public schooling. *See* Nev. Const. art. XI, § 2. It is the province of this Court to determine whether the State has complied with that charge.

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[8] *See* S.C. Const. art. XI, § 3 ("The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning as may be desirable.").

[9] *See* N.Y. Const. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.").

VIII. CONCLUSION

Based upon the foregoing, Appellants ask this Court to reverse the decision of the district court.

DATED this 8th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Answer exempted by N.R.A.P. 32(a)(7)(C), it contains 6,012 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Answer regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2021, a true and correct copy of the **APPELLANTS' OPENING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

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