In the Supreme Court of the State of Nevada

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CARYNE SHEA, individually and as next friend of her minor children A.S. and M.S.; *et al.*,

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.

Case No.: 82118

District Court Case No.: 20OC 000421B

APPELLANTS' REPLY BRIEF

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N.R.A.P. 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 20th day of July, 2021.

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I. INTRODUCTION

The Court now has clear and concise statements of the positions of all parties to this appeal; Appellants will be succinct in reply.

Nevadans have positive rights, embodied in Article XI of the Nevada Constitution, to public education. The State must, in fulfillment of those rights, provide adequate resources and develop measurable mechanisms ensuring that public education in Nevada is suitable, adequate, and sufficient to meet the demands and requirements of modern state, regional, national and world society and economy. In turn, parents, schoolchildren, and citizens must have the tools to identify, analyze, vindicate, and remedy violations of those rights.

This suit stands at the intersection of those issues, and the State has taken the position in its Answering Brief that the Nevada Constitution's Education Clauses establish no positive rights, bestow no mandate or duty, and provide no guarantee that public education in this state should meet any particular standards or be of any certain quality or effectiveness, despite the flood of announced goals, benchmarks, measuring devices, tests, achievement requirements, studies, consultancies, and documentable results over these many

years. This is a desultory position to assume, in a state with such dismal historical outcomes in public education, their indicators discussed at great length in the Complaint below. Joint Appendix ("JA"), at 1-37. It also represents an unnecessarily cramped view of the text and language of the Education Clauses themselves, and overstates any impingement into the possible prerogatives of the Legislature by a wide margin. Appellants below made the necessary showings and elaborated the key arguments that should overcome those of the State on the question of justiciability, sufficient that this case should be permitted to proceed.

II. ARGUMENT

A. The Constitution's Education Clauses Are Not Merely Aspirational Or Hortatory

In the attempt to establish that no positive right to a basic, quality, or adequate education exists under their terms, the State argues that the "plain meaning of the key words in Nevada's education clauses demonstrate the aspirational nature of the provisions." Ans. Brf., at 10. That is not correct, however; whether the terms of those clauses are merely hortatory rather than charged with duty and action is a contextual interpretation, not something discernible from the face

of the words employed. And simply saying that because "*encourage* is preceded by the word *shall* does not alter the aspirational nature of the term," as the State does here, just adds another layer of interpretation to the State's approach, but does not permit or direct a conclusion regarding the nature of the textual provisions. *Id.*, at 11.[1]

Instead, Nevada's Education Clauses constitute mandatory directives to effectuate the positive, judicially enforceable right to a

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[1] In fact, inclusion of the word "shall" in original Article XI, Section 6 (regarding the provision of a special tax to provide for the support and maintenance of the University and common schools) was the subject of considerable debate at the time of its adoption in 1866. *See* Nev. Const. art. XI, § 6. The word "shall" was included in the original draft of the section, then removed and replaced with the words "may in its discretion." *See Debates & Proceedings of the Nevada Constitutional Convention of 1864*, at 587-88 (Marsh, 1866). On reconsideration, one of the Constitution's drafters proposed that the word "shall" be reintroduced and noted "the difficulty with which the Legislature of California has been prevailed upon to make sufficient appropriations for educational purposes." *Id.*, at 591. The concern was for too much legislative discretion in supporting the education system, that the Legislature may "take only half-way measures from year to year, *neglecting to do its whole duty*," and thus "will be doing injustice to the rising generation, and a discredit to ourselves." *Id.* (emphasis supplied).

Given this background, California case law holds less persuasive value, as Nevada's framers made clear that the Legislature has a discrete duty, which here Appellants argue is one the judiciary can and should read as enforceable.

sufficient and adequate public education for all Nevadans. The plain language of these provisions impose a duty upon the State to provide for a meaningful educational opportunity, and employment of the word "shall" makes that duty mandatory. *Goudge v. State*, 128 Nev. 548, 553, 287 P. 3d 301, 304 (2012).

The terms used in Article XI, Section 1, for example, under the lens of history and the framing constitutional debates, offer guidance on the enforceable meaning of a constitutionally adequate education. *See* Nev. Const. art. XI, § 1. Nevada's framers intentionally included science, mining, mechanics, and agriculture as qualitative definitions of an appropriate education, which were the contemporaneous fields and industries of the "modern economy" of the mid 1860s. Russell R. Elliott, *History of Nevada*, 90-122 (1987). They specifically equated "literacy," quite rightly, with the ability to participate in culture and democracy. *Debates and Proceedings*, at 569. An "education" was a necessary undertaking for preparing young persons to make their way in the world, and it carries with it an inarguable notion of inherent quality.[2]

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[2] *See Tennessee Small School Systems v. McWherter*, 851 S.W.2d

(footnote continued)

Read this way, properly, Article XI, Section 1 establishes a duty to create, maintain, and support an education system that prepares students to participate in our economy, our democracy, and our civil society—or, to employ the State's own standards, education must ensure students are "College, Career, and Community Ready"—in other words, what the Legislature itself has maintained are the prime purposes of public education. JA, at 24.

The text of Article XI, Section 2 requires the Legislature not just to establish a uniform system of common schools, but to "provide for" that system. *See* Nev. Const. art. XI, § 2. The State obviously has established a system of common schools—its uniformity remains an open question, still—via state academic standards, mandates, and requirements imposed upon districts and students, but legitimate legal questions persist as to whether it has met its obligation to "provide for" that system in a manner consistent with its duty.

139,150 (Tenn. 1993); *Campbell County School Dist. v. State,* 907 P.2d 1238, 1257-1259, 1271-72 (Wyo. 1995) (Language reading "shall suitably encourage" means "calculated to advance the sciences and liberal arts," without discretion to offer inadequate or inequitable resource levels.).

The contention that the Nevada Legislature can mandate a standards and requirements as part of their duty to develop a uniform system of common schools, but then subsequently fail to provide for that system nullifies the duty imposed by the original constitutional provision. As one constitutional drafter noted, "[w]hat we want is a basis upon which to build the educational superstructure, by means of which we can afford every child a sufficient amount of instruction to enable it to go creditable through life." *Debates and Proceedings*, at 577. The guarantee of Article XI, Section 2 imposes a duty that is necessarily qualitative.

Indeed, it is difficult to understand what exactly would make up a constitutionally adequate education, if the State's position is any guide, or to glean that a constitutionally adequate education is a concept the State is prepared to accept at all. Is a schoolchild entitled to a physical building in good working order? Could the State provide history textbooks that predate the moon landing or the Civil Rights Movement? Could it fail to provide materials abreast of current developments in math or science? Could courts act if this was, in fact, the reality of the public education regime in Nevada? These questions, when stated this

way, sound frankly ridiculous, because we understand instinctively that the right to education must be meaningful if it is to have real effect. That meaning is found in the dynamic process of providing the appropriate resources which will permit all Nevada schoolchildren the opportunity "to go creditable through life." There is no other way to conceive of education, and thus no other way to understand the duty to provide for an educational system.

To further underscore the point that the Educations Clauses are not simply aspirations but mandates of quality, one might profitably look not to the present-day dictionary definitions cited thus far, but to nineteenth-century definitions of the key terms here. *Webster's New International Dictionary of the English Language* of 1890, for example, shows that "encourage" meant not simply to inspire, but "to give help or patronage to, as an industry; to foster; as, to *encourage* local manufactures." Noah Webster, *Webster's New International Dictionary of the English Language, Based on the International Dictionary of 1890 and 1900*, 721 (1910). To "foster," in turn, meant to "nourish," "support," "to sustain and promote, as, to *foster* growth." *Id.*, at 857. The charge to "provide" for the school system meant, in the era of Nevada's founding,

"to take measures in view of an expected or a possible need; to make ready, to prepare." *Id.*, at 1725. "*To take measures*:" these were—and remain, when viewed appropriately—words of action, not of mere exhortation, and nineteenth-century Nevadans would have understood them as such, in a world in which technology and industrializing economy were progressing together in a manner unmatched, probably, until the present era.

The Nevada Constitution articulates a legislative duty to foster educational success, "encourage by all suitable means …," and "provide for a uniform system of common schools," creating a correlative fundamental right to an education and thus duties that may be judged by their results by courts of competent jurisdiction. *See* Nev. Const. art. XI, §§ 1, 2.

As previously discussed, the Nevada Supreme Court has already found children have a substantive right to a basic education. As the Court stated,

> "Our Constitution's framers strongly believed that each child should have the opportunity to receive a basic education. Their views resulted in a Constitution that places great importance on education. Its provisions demonstrate that education is a basic constitutional right in Nevada."

Guinn v. Legislature, 119 Nev. 277, 289, 71 P.3d 1260 (2003). The Court made clear that "[p]ublic education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access." *Id.*, 119 Nev. at 287. That right is distinctly less robust if there is no manner in which it may be enforced save for "the election process or a ballot initiative," as the State argues. Ans. Brf., at 19.

B. The State Relies Uncritically Upon Its Underdeveloped "Textual Commitment" Argument

The utility of *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691 (1962) here (or its potentially reduced resonance, in the context of a positive constitutional rights case) is worth the attention the parties to this appeal have given it in their briefs. One aspect of its application, however, the notion of "textual commitment" of a particular function to a specific branch of government, deserves more care than the State has provided. It states that "by recognizing that education policy is textually committed to the Legislature, [Appellants] essentially concede that the political question doctrine bars their claims." Ans. Brf., at 8. Appellants concede nothing of the sort, however. In fact, Appellants would argue that the State has done far too little to establish the necessary "textual

commitment" here to a degree that would activate the political question doctrine.

As leading constitutional scholars have put it,

> "Textual commitment"… has always been a problematic concept; it requires, one might say, its own interpretation. In a government of limited powers, after all, we usually think no government actor is empowered to act without some kind of "textual commitment" of authority to that actor. A textual grant of authority to act thus cannot be sufficient to show that disputes concerning the use of that authority are nonjusticiable. Does Article II's textual commitment of authority to the President to "take Care that the Laws be faithfully executed" mean that executive action is not subject to judicial review? Surely not.

Sanford Levinson & Ernest A. Young, *Who's Afraid Of The Twelfth Amendment?*, 29 Florida State University Law Review 925, 959-960 (2001). "We're looking, then, for something more before we can say that a particular constitutional grant of authority to a nonjudicial actor renders that authority immune to second-guessing by the courts. What that 'something more' consists of is, of course, the problem." *Id.*, at 960. Continuing on, "In *Nixon* (*v. United States*, 506 U.S. 224, 113 S. Ct. 732 (1993)), the Court found it in words of exclusion in the relevant constitutional text [in which] Article I provides that '[t]he Senate shall have the sole Power to try all Impeachments,' and the *Nixon* majority

found 'considerable significance' in the word 'sole.'" *Id.* (citing *Nixon v. United States*, 506 U.S. 224, 113 S. Ct. 732 (1993)).

Textual commitment, therefore, and the immunity from judicial scrutiny, does not flow simply from a constitutional text charging a body or a branch with a particular power; that is too simple a frame to employ. The political question doctrine, after all, is not a safety-valve to relieve judicial discomfort, it is a very narrow exception to the mandate that courts will hear the matters properly brought before them.

What is the source of textual commitment in the Education Clauses that forecloses judicial scrutiny of legislative or executive actions? There is no mention of "sole" authority by the Legislature, no exclusivity of discretion in all things educational; none of that is apparent from the text of any of the provisions of Article XI under examination here. *See* Nev. Const. art. XI.

Article XI's provisions are not written, and have not been interpreted, in ways similar to, for example, Article IV, Section 6, the grant of authority to each house of the Legislature to "judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its

proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member." Nev. Const. art. IV, § 6. As this Court recognized in *Commission on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009), that provision implicates core legislative functions "constitutionally committed to each house of the Legislature and cannot be delegated to another branch of the government." The provisions here evince no such ultimate commitment. The word "shall" appears hundreds of times in the Nevada Constitution, but very few of them would give rise to nonjusticiable questions if government conduct under their purview was challenged, as was the case in *Hardy*.

The Education Clauses, instead, appear much like other provisions of the Nevada Constitution in which the Legislature or the executive is given particular commands ("shall"), and courts will, as is their function generally, hear and resolve challenges to official acts by persons with legally-protectible interests in seeing those commands fulfilled. Nothing in these provisions appears to pull them within the sole interpretive province of the Legislature, or to press this Court to reject a case simply because it is brought pursuant to their terms.

Respondents point out that the *Baker v. Carr* factors appear to require the meeting of only one in order to raise the specter of political question abstention. Ans. Brf., at 8. Certainly, the State understands, as well, that the clarity and force of the presence of a political question should be absolutely unmistakable, not merely convenient, and that unless political question issues are "inextricable from the case at bar, there should be no dismissal for non-justiciability…." *Baker v. Carr*, 369 U.S. at 217.

One cannot take "textual commitment" as a given; to prevail in an argument that governmental conduct can have no review by the judiciary, it must be conclusively established, and here it has not been, nor does the text of the Constitution seem to support it. In this republic, we are not conditioned to accept readily the idea of unchecked discretion of any public body, especially not that of a legislature, and absent express language demanding it, such exceptions to judicial review should be rarely conceived or permitted.

C. Judicial Standards For The Suit Below Are Both Abundant And Manageable

Appellants discussed at length, in their Opening Brief, the kinds of judicially discoverable and manageable standards that can and will

guide courts in this sort of case. Furthermore, the Pennsylvania Supreme Court in *William Penn School District v. Pennsylvania Department of Education,* 559 Pa. 14, 739 A.2d 110 (Pa. 1999), as well as 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), made clear that judicial thinking on this issue is not encased in amber, and courts can and should strive to understand the opportunities that analytics and accountability mechanisms can provide them to assess educational progress. Op. Brf., at 19-24.

In response, the State's argument rests primarily upon its view of the Education Clauses as aspirational. "A court cannot direct the Legislature to adhere to current standards when those standards are aspirational, fluid, or not otherwise expressly mandated" by the Nevada Constitution, is a representative excerpt. Ans. Brf., at 14. But Appellants are not claiming any guarantees that any particular standards will, in themselves, produce positive educational outcomes. The argument that standards exist—and they clearly do, as exhaustively catalogued in the Complaint—and can be managed in a judicial setting is not remarkable; it is a reflection of the way the

Legislature and the executive have developed education policy in Nevada. This is not a plea for the courts to reinvent education policy in Nevada, but rather to determine whether what the Legislature and the executive agencies have invented in this regard comports with constitutional imperatives to educate Nevada schoolchildren appropriately.

Neither does this suit require the judiciary to usurp policy determinations that are the province of the Legislature or the executive. In fact, "policy" operates in the State's brief as a sort of shibboleth, much as does "textual commitment." The idea that Nevada students have a right to a sufficient education is not a policy determination; it is a clear command of the state constitution. The judiciary will not be making the policy choices for the Legislature; it will be testing those choices already made, as courts do in all manner of cases where government conduct is at issue.

D. Case Law And Judicial Experience Have Demonstrated That Courts Play Important Roles In Ensuring Constitutionally Adequate Educational Opportunities

Finally, both Appellants and the State provide this Court with numerous examples of state courts that have, and have not, found the

questions this appeal presents justiciable. It is clear that the mix of constitutional word choices, local histories and conditions, and varying opportunities for useful judicial review have led courts in different directions on the question. It is also beyond argument that, across dozens of states and hundreds of cases, courts have found usable standards, have managed them appropriately, and have added their expertise to the effort to achieve constitutionally adequate educational opportunities to schoolchildren.

For its part, the State relies 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. Ans. Brf., at 19-22.

But there, "the question before [the court was] whether the right to an education of 'some quality' is enshrined, as a *constitutional* right." *Campaign for Quality Education,* 246 Cal. App. 4th at 907. Here, the Court has answered that query, at least in the context of Nevada's own constitutional language, history, and force. Many of the issues here may, in fact, be first-impression matters; the question of whether educational rights in Nevada are *constitutional* rights, however, is not.

See Guinn, 119 Nev. at 286.

Further, *Campaign for Quality Education* was a suit brought, specifically, to address educational funding levels. Here, Appellants are not asking this Court to settle mere questions of funding amounts, 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 Nevada—that the rights to education bestowed by the state constitution are not being enjoyed by the schoolchildren of Nevada, and that the state must move from the hortatory to the actual in student achievement. It is not a question simply of funding, though the State tries to make it so in its brief; it is a wider matter of resources generally, and their availability and suitability across a uniform system of public education.

The State's reliance on California's intermediate court decision in *Campaign for Quality Education* ignores the unique structure and debates around the Nevada Constitution, as well as local conditions and realities here. Nevada's framers were, in fact, particularly concerned to draft this portion of the state constitution in contradistinction to California's lack of fiscal effort to support meaningful public education.

See Debates and Proceedings, at 592.

As the Minnesota Supreme Court stated in *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018), there is nothing inappropriate about a state's court system resolving pointed—even if difficult—questions about whether and how the Legislature or agencies of the State have violated their constitutional duties. Doing so does not impinge upon or erode the rights and duties of co-ordinate branches. In fact, that role is a commonplace of judicial purpose. It takes merely the willingness to shoulder the burden.

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III. CONCLUSION

This matter presents the justiciable question of whether Nevada's public education regime comports with constitutional requirements. Given the foregoing, the decision and order of the district court should be reversed.

DATED this 20th day of July, 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 3,623 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 20th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2021, a true and correct copy of the **APPELLANTS' REPLY BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: */s/ Dannielle Fresquez*
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