

No. 84735

**IN THE SUPREME COURT OF
THE STATE OF NEVADA**

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Elizabeth A. Brown
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EDUCATION FREEDOM PAC,

Appellant,

v.

BEVERLY ROGERS, AN INDIVIDUAL; RORY REID, AN INDIVIDUAL;
AND BARBARA K. CEVASKE, IN HER OFFICIAL CAPACITY AS
NEVADA SECRETARY OF STATE,

Respondents.

On Appeal from Order of the First Judicial
District Court for Carson City, Nevada
Case No.22OC000271B, Hon. Charles M.
McGee

**BRIEF OF AMICI CURIAE
PUBLIC FUNDS PUBLIC SCHOOLS, AMERICAN CIVIL LIBERTIES UNION
OF NEVADA, AND WASHOE EDUCATION ASSOCIATION
IN SUPPORT OF RESPONDENTS AND AFFIRMANCE**

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Public Funds Public Schools (“PFPS”) is a national campaign to ensure that public funds for education are used to maintain, support, and strengthen public schools; PFPS is a collaboration between Education Law Center (“ELC”) and the Southern Poverty Law Center (“SPLC”). ELC and SPLC have no parent corporations, and there are no publicly held companies that own 10% or more of any of the organizations’ stock. The American Civil Liberties Union of Nevada (“ACLU of Nevada”) and Washoe Education Association (“WEA”) have no parent corporations, and there are no publicly held companies that own 10% or more of the any of the organizations’ stock.

2. The law firms who have appeared for *Amici Curiae*, PFPS, ACLU of Nevada, and WEA in this case or are expected to appear in this Court are Kemp Jones, LLP and Ropes & Gray, LLP.

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INTEREST OF THE AMICI

Public Funds Public Schools (“PFPS”) is a national campaign to ensure that public funds for education are used to maintain, support, and strengthen public schools. PFPS opposes all forms of private school vouchers—including conventionally structured vouchers, Education Savings Account vouchers, and tax credit scholarship vouchers—and other diversions of public funds from public education. PFPS uses a range of strategies to protect and promote public schools and the rights of all students to a free, high-quality public education, including participation in litigation challenging vouchers and other diversions of public funds to private schools.

PFPS is a partnership between Education Law Center (“ELC”) and the Southern Poverty Law Center (“SPLC”). ELC, based in Newark, New Jersey, is a nonprofit organization founded in 1973 that advocates on behalf of public school children for equal and adequate educational opportunity under state and federal laws in New Jersey and across the nation. SPLC, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 to combat discrimination through litigation, education, and advocacy. The SPLC is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance human rights.

The American Civil Liberties Union (“ACLU”) of Nevada is a state affiliate of the national ACLU, a nonprofit, nonpartisan organization that has been our nation’s guardian of liberty for over 100 years. The ACLU of Nevada works to defend and preserve the individual rights and liberties that the Constitution, the laws of the United States, and Nevada law guarantee. Throughout its history the ACLU has served as direct counsel and amicus curiae in matters before the Supreme Court, United States Circuit Courts, United States District Courts, and state and local courts to combat discrimination in its many forms, including discrimination on the basis of race, gender, socio-economic status and disability, and inclusive of issues involving public education and funding, which are implicated in the instant matter. The ACLU of Nevada maintains educational equity as one of its strategic priorities and this matter raises many educational equity issues that will impact current and future students.

Moreover, the ACLU of Nevada maintains an interest in ensuring proper procedure with ballot initiatives brought before Nevada voters. Because the rights of Nevadans to maintain an education system devoid of discrimination in its many forms are at stake in this matter and there remain serious educational equity and constitutional elements underlying this matter, its proper resolution is of particular interest to the ACLU of Nevada and its members.

The Washoe Education Association (“WEA”) works to protect rights and due process for education professionals serving the Washoe County School District, which is the second largest school district in Nevada. WEA, which has over 2,900 members, believes that the best possible working conditions are the best possible learning conditions for the children of Washoe County. Through its Government Relations Committee, WEA organizes activities to advocate on behalf of students and educators at the local, state and national levels. One of WEA’s advocacy priorities is full funding for Nevada’s under-resourced public schools. WEA opposes private school vouchers, which divert public funds to private education and harm public schools.

Amici draw on their longstanding experience and expertise in civil rights and education law and policy to provide the Court with this crucial context.

SUMMARY

The ballot initiative and accompanying Description of Effect (“DOE”) proffered by Appellant represent that the only costs of the private school voucher program established by the proposed statute would be those budgetary amounts the Nevada Legislature may appropriate for the voucher accounts. In reality, the voucher proposal would necessitate a significant appropriation or expenditure of public dollars, and thus is an impermissible unfunded expenditure. Additionally, the DOE misleads Nevada’s voters and taxpayers, as the proposed voucher program would

have dramatic impacts on funding for Nevada’s public education system, including reductions to school district budgets that would impede districts’ ability to adequately serve their students. Moreover, the DOE fails to inform the public of the other significant non-economic costs to Nevadans of the voucher proposal.

A lofty promise inherent to private school voucher proposals is that they are cost-neutral to all parties involved. In truth, there is widespread evidence that voucher programs impose significant net-negative costs in the states that enact them, undermining their public school systems. The economic claims underlying voucher proposals—including the one at issue here—have thus consistently been shown to be inaccurate or misleading. These programs invariably lead to an increase in costs, both economic and non-economic, that negatively affect all stakeholders, particularly a state’s most vulnerable and high-need students.

In Nevada, these costs would only be exacerbated by the dire state of current public education funding. Nevada public schools suffer from chronic and severe state underfunding, frequently ranking in the bottom handful of states on school funding metrics. Were the Appellant’s proposed initiative to be enacted, a system that has been starved of the funding and resources needed to provide students with constitutionally guaranteed public education opportunities would be left with even less.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THE INITIATIVE PETITION TO BE AN UNFUNDED EXPENDITURE

Article 19, Section 6 of the Nevada Constitution prohibits the proposal of any statute which makes an appropriation or requires an expenditure, unless such statute imposes a sufficient tax or otherwise provides for raising the necessary revenue. Appellant incorrectly asserts that because the Initiative Petition does not explicitly require funding, but rather leaves whether to fund the program to the discretion of the Legislature, it wholly avoids the Constitution's prohibition on unfunded mandates. But clever drafting does not absolve the Petition of its obligation to prescribe a sufficient means for funding the proposed voucher program. For the Initiative Petition to be more than just symbolic, it would plainly necessitate a significant appropriation or expenditure of tax dollars to fund the vouchers and run the program.

Article 19, Section 6 is intended to ensure that initiative petitions account for the cost of the proposal to Nevada's taxpayers.¹ The Initiative Petition in question fails to meet this requirement. In addition to its failure to provide funding for the vouchers themselves, the Petition would also inevitably create funding shortfalls in the public education system, heightening the necessity that it include a sufficient revenue source.

¹ See generally, *Hearing on S.J.R. 1 Before the S. Judiciary Comm.*, 55th Leg. (Nev., Feb. 18, 1971) (statement of Senator James I. Gibson).

Research shows that voucher programs themselves are quite expensive. Moreover, because state funding for public schools is tied to student enrollment, districts will inevitably lose funding when students leave to take vouchers and enroll in private schools. At the same time, public school districts must continue to support many fixed costs, regardless of how many students leave the district to participate in a voucher program. They will also have to contend with the increased cost of educating a higher concentration of students with elevated needs—such as students with disabilities—who are largely not admitted to private schools. Taxpayers are required to foot the bill for all of this; however, the statute that would be enacted by the Petition does not prescribe any means for funding the significant costs it entails.

A. Voucher Programs Impose Significant Costs on the State While Undermining Public Schools

Voucher programs impose significant costs on public school systems, students, families, and taxpayers. While proponents of voucher programs, including those offering the Petition at issue here, often compare the cost of an individual voucher versus the per pupil funding for public schools to claim that these programs save taxpayers money,² this comparison does not tell the whole story. Research has shown

² See generally LAS VEGAS REVIEW-JOURNAL, *School Choice Programs Save States, Taxpayers Billions* (2021)

<https://www.reviewjournal.com/opinion/editorials/editorial-school-choice-programs-save-states-taxpayers-billions-2484399/> (proclaiming that voucher programs consistently create savings due to the difference in per pupil spending versus voucher cost per student).

repeatedly that private school voucher programs impose significant increases in education costs to the State, while drawing crucial funding away from public schools, exacerbating existing resource deficiencies.

1. Voucher Programs are an Inherently Expensive Proposition

Voucher programs are expensive to operate, and in fact are more expensive than public schooling. A 2018 study of Arizona’s private school voucher program found that educating a voucher student cost 75% more than educating a public school student.³ A 2021 report found that the additional expense of implementing a universal private school voucher system—including accommodation of additional students, administration, adjudication, and transportation—would increase the total cost to the public of funding education by up to 33%.⁴ In failing to account for such costs, the Petition elides the burden on taxpayers that the proposal imposes, and the consequent legal requirement of a sufficient revenue source.

Misuse of voucher funds also increases the cost of these programs. In addition to the costs inherent in operating a private school voucher program, investigations

³ Dave Wells, *\$10,700 Per Student: The Estimated Cost of Arizona’s Private School Subsidy Programs*, GRAND CANYON INST. 4 (2018), https://grandcanyoninstitute.org/wp-content/uploads/2018/09/GCI_Policy_Private_School_Program_Costs_2018_Sept_5_2018.pdf.

⁴ Robert Shand & Henry M. Levin, *Estimating a Price Tag for School Vouchers* NAT’L EDUC. POL’Y CTR. 4 (2021), <https://nepc.colorado.edu/publication/voucher-costs>.

have shown these programs too often result in mismanagement of public funds and fraud.⁵ Any audits or oversight to prevent and address such abuse consume additional public resources.

2. Voucher Programs Also Exacerbate Resource Deficiencies in Public Schools

Nevada's public school funding system, similar to that in most states, bases state funding allocations in large part on student enrollment.⁶ Thus, when districts' enrollment decreases because students take vouchers to attend private schools, the districts experience a direct loss of state funding. However, as explained below, districts' costs do not decrease commensurate with the loss in state funding.

The operation of public schools entails substantial fixed costs, which the Petition at issue blatantly disregards. For example, public school districts fund administration costs, maintain and repair their facilities, support teacher and staff pensions, and account for other long-term contracts such as bussing and student

⁵ Leslie Postal, Beth Kassab & Annie Martin, *Florida Private Schools Get Nearly \$1 Billion in State Scholarships with Little Oversight, Sentinel Finds*, ORLAND SENTINEL (Oct. 17, 2017), <https://www.orlandosentinel.com/news/education/os-florida-school-voucher-investigation-1018-htmllstory.html>; STATE OF ARIZ., OFFICE OF THE AUDITOR GEN., *Arizona Department of Education: Department Oversees Empowerment Scholarship Accounts Program Spending, but Should Strengthen its Oversight and Continue to Improve Other Aspects of Program Administration* (2016), https://www.azauditor.gov/sites/default/files/16-107_Report.pdf.

⁶ NEV. DEP'T OF EDUC., *Pupil Centered Funding Plan Components* at 3, https://doe.nv.gov/uploadedFiles/ndedoenvgov/content/Boards_Commissions_Councils/Commission_on_School_Funding/2020/September/PupilCenteredFundingPlanComponents.pdf.

nutrition. In 2021, the three largest school districts in Nevada—Clark County, Washoe County, and Elko County—spent \$280,323,232, \$51,855,716, and \$14,248,729, respectively, on facilities operation and maintenance alone; collectively they realized pension expenses of \$80,482,982 and administration expenses of \$36,125,230.⁷ Because voucher students exit public school districts at all different grade levels and from different school buildings, districts are unable to proportionally reduce their fixed costs to cover the attendant per pupil funding loss.⁸ For the same reasons, they are unable to proportionally reduce even more variable costs such as teacher salaries.⁹

Because private schools can refuse to admit or provide adequate services for students with disabilities, English Learners, and others who may require increased resources for an equitable education,¹⁰ these students are more frequently educated

⁷ ELKO COUNTY SCHOOL DISTRICT, *State of Nevada Financial Statements* (2021) https://drive.google.com/file/d/14WmZigUsK9qPe0U9zDmgSwyKJz6_RhM3/view ; *Clark County School District Basic Financial Statements* (2021) <https://ccsd.net/resources/accounting-department/cafr/2021/basic-financial.pdf>; Washoe County School District Annual Comprehensive Report (2021) <https://www.washoeschools.net/cms/lib/NV01912265/Centricity/Domain/67/FY21%20ACFR%20Final%20For%20Website.pdf>.

⁸ See, e.g., Stuart S. Yeh, *The Cost-Effectiveness of Five Policies for Improving Student Achievement*, 28(4) AM. J. EVALUATION 416 (2007), <https://journals.sagepub.com/doi/10.1177/1098214007307928>.

⁹ *Id.*

¹⁰ See, e.g., Julie F. Mead and Suzanne E. Eckes, NAT'L EDUC. POLICY CTR., *How School Privatization Opens the Door for Discrimination* 7 (2018), https://nepc.colorado.edu/sites/default/files/publications/PB%20Mead-Eckes%20Privatization_4.pdf.

in public schools. Private schools participating in voucher programs may also “counsel out” or expel students they deem “high cost.”¹¹ In other cases, parents return their children to public schools when they realize they are not receiving the necessary services or supports or are not entitled to the same legal protections as in public schools. Public schools must then serve an elevated concentration of high-need and more costly-to-educate students, even as they are being starved of necessary funding due to voucher programs.

Finally, voucher programs shift education expenses to families. Whereas public schools provide transportation, special education services, and free or reduced-price lunches for qualifying students, these and other essential services must often be purchased separately by families using vouchers to attend private schools.¹² This is in addition to the frequent need to “top up” the value of a voucher to cover the full cost of private school tuition.¹³

¹¹ See generally Luis Benveniste, Martin Carnoy & Richard Rothstein, *All Else Equal: Are Public and Private Schools Different?* (2013); Selene Almazan & Denise Stile Marshall, *Council of Parent Attorneys and Advocates, School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice* (2016), https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/Policy_Docs/COPA_A_Voucher_paper_final_R6.pdf

¹² See, e.g., Meghan Casey Whittaker, *The Average Voucher Doesn't Cover Full Cost of Private School, NCLD Data Analysis Shows*, UNDERSTOOD (Nov. 21, 2017), <https://www.understood.org/en/communityevents/blogs/the-inside-track/2017/11/21/the-average-voucher-doesnt-cover-full-cost-of-private-school>.

¹³ See, e.g., *id.*

B. Nevada Public Schools Already Suffer from Severe Underfunding

Nevada’s public education system has been facing a funding crisis for some time. In the 1980s, Nevada ranked 24th in K-12 per-pupil funding but fell to 49th in the early 2000s and has remained near the bottom of the national rankings ever since.¹⁴ State leaders are scrambling to find solutions to bring the per-pupil spending up to the national average, which would require the state “to find an additional \$200 million more, each year.”¹⁵

Indeed, Education Law Center’s 2021 *Making the Grade* report gave Nevada an “F” on all its metrics: funding level, funding effort, and funding distribution.¹⁶ Nevada provides approximately \$5,100 less than the national average in state and local dollars per pupil after adjusting for regional cost differences.¹⁷ The state’s school funding “effort,” measured as the percentage of state GDP allocated to PK-12 funding, ranked 46th out of the 50 states plus Washington, D.C.¹⁸ Nevada also fails

¹⁴ Mike Kazmierski, *Nevada Still Falling Well Short of Adequate Education Funding*, RENO GAZETTE JOURNAL (Apr. 15, 2021), <https://www.rgj.com/story/opinion/columnists/2021/04/16/nevada-still-falling-well-short-adequate-education-funding-mike-kazmierski/7233815002/>.

¹⁵ Kim Burrows, *What’s Nevada Doing to Increase School Funding?* NEWS 4 (May 9, 2022), <https://mynews4.com/news/local/whats-nevada-doing-to-increase-school-funding-reno-sparks-washoe-county-schools-school-board-carson-city-northern-nevada-students-class-sizes-increase-staffing>.

¹⁶ *Making the Grade*, EDUC. L. CTR. 8 (2021), https://edlawcenter.org/assets/MTG%202021/2021_ELC_MakingTheGrade_Report_Dec2021.pdf.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 14.

to distribute funding equitably; not only does it fail to provide additional funding to high-poverty districts that require extra resources to ensure an adequate education for their students, it actually has a regressive funding structure that provides these districts with significantly less state funding than low-poverty districts. Nevada's high poverty districts receive, on average, a stunning 32% less funding than low poverty districts.¹⁹

Students in Nevada's public education system bear the brunt of these funding shortfalls. Nevada has historically had some of the largest class sizes in the country.²⁰ Moreover, Nevada's public schools have suffered cuts to programs and resources essential to serving the state's most vulnerable students, such as class size reduction programs, early grade reading interventions, and support for struggling schools.²¹ Nevada schools have also suffered cuts in college and career readiness and advanced placement programs.²² Given these severe resource deficiencies, it is no wonder that

¹⁹ *Id.* at 12.

²⁰ *Study: Average Class Sizes in Nevada are Largest in the US*, ASSOCIATED PRESS (Aug. 18, 2018) <https://apnews.com/article/191224822bff477c927c05efa11da0df>.

²¹ Jhone M. Ebert and Heidi Haartz, NEV. DEP'T OF EDUC., *2021-2023 Budget K-12 Funding* 6 (2021), https://www.leg.state.nv.us/App/NELIS/REL/81st2021/ExhibitDocument/OpenExhibitDocument?exhibitId=46420&fileDownloadName=K_12_Jhone%20Ebert_Overview.pdf.

²² *Id.*

the Education Week finance study from January 2021 ranked Nevada 49th in the nation for educational opportunities and advancement.²³

Nevada has long struggled to adequately fund its public education system. The state’s antiquated funding formula, the Nevada Plan, remained largely unchanged from its creation in 1967 until very recently.²⁴ Unlike funding formulas used in other states, the Nevada Plan bore no relationship to the actual cost of educating students, but instead relied on outdated district spending data to determine state funding for each district.²⁵ Under the Nevada Plan, “[e]ach district’s guaranteed funding amount . . . [was] generated based on district-specific characteristics,” rather than taking into account the cost of educating students with different needs, such as students living in poverty, English Learners and students with disabilities.²⁶

Instead, Nevada attempted to find new revenue sources to increase public school funding, but these have failed to make an impact. For example, voters were promised that the 2009 room tax initiative and the 2016 wholesale marijuana tax

²³*Quality Counts 2021: Chance for Success*, EDUCATION WEEK (2021), <https://epe.brightspotcdn.com/53/49/8bbe12b94d1dac483739761844f9/quality-counts-2021-chance-for-success-table.pdf>.

²⁴ *Fair and Adequate Funding*, EDUCATE NEVADA NOW <https://educatenevadanow.com/initiatives/school-finance-reform-resources/>.

²⁵ *Id.*

²⁶ Augenblick, Palaich and Associates, Education Commission of the States, and Picus Odden and Associates, *Nevada School Finance Study 3* (Oct. 22, 2018), https://doe.nv.gov/uploadedFiles/ndedoenvgov/content/Boards_Commissions_Councils/State_Board_of_Education/2018/November/APASchoolFinanceStudyFinalReport.pdf.

initiative would provide public schools with more funding.²⁷ But as this new tax revenue went into the public school funding account, “other sources of revenue to that account decreased,” leaving the overall funding level of Nevada’s public education system largely unchanged.²⁸

In 2019, Nevada enacted legislation to transition to a new student-centered funding formula called the “Pupil-Centered Funding Plan.”²⁹ However, the new formula is based on inadequate estimates of the cost of education.³⁰ In April 2021, a state legislative commission concluded Nevada would need to invest between \$2.2 and \$3.2 billion just to reach the national average per-pupil funding.³¹ The legislature, however, has only pledged to raise \$1.4 billion in new revenue.³² The State began implementation of the new formula in the 2021-2022 school year.³³ For the 2021-2022 school year, Clark County School District, the state’s largest district,

²⁷ *Fair and Adequate Funding*, *supra* note 23.

²⁸ *Id.*

²⁹ Mary McKillip and Danielle Farrie, *Nevada’s New Formula is an Opportunity Not to be Lost*, EDUC. L. CTR., at 1-2, https://edlawcenter.org/assets/files/pdfs/publications/Nevada_School_Funding_PDF.pdf.

³⁰ *Id.*

³¹ April Corbin Girnus, *Did Half a Billion Over Two Years Settle the Education Budget? Not Exactly*, NEVADA CURRENT (May 20, 2021), <https://www.nevadacurrent.com/2021/05/20/did-half-a-billion-over-two-years-settle-the-education-budget-not-exactly/>.

³² *Id.*

³³ McKillip and Farrie, *supra* note 28 at 1.

serving 64% of its public school students,³⁴ budgeted \$7,264 per pupil,³⁵ which is still substantially below the national average of \$13,185.³⁶

For decades, Nevada’s public education system has faced a severe underfunding crisis. As discussed above, the proposed voucher statute will only exacerbate this dire situation by enacting a costly program that further drains resources from the public education system. The Petition thus requires a significant expenditure of taxpayer funds—without remedying, and indeed worsening, the state’s education funding woes.

II. THE DISTRICT COURT CORRECTLY FOUND THE INITIATIVE PETITION TO BE MISLEADING

The district court found that the Petition’s Description of Effect (“DOE”) insufficiently explained the effect of the voucher program on the budgets of Nevada school districts and why the proposed statute would necessitate the expenditure of public funds. NRS 295.009(1)(b) requires that initiative petitions “set forth, in not more than 200 words, a description of the effect of the initiative or referendum if the initiative or referendum is approved by the voters.” The DOE “[can]not be deceptive or misleading” and must explain the “ramifications of the proposed judgment” so that

³⁴ *About Clark County School District*, <https://newsroom.ccsd.net/about/>.

³⁵ CLARK COUNTY SCHOOL DISTRICT, *Amended Final Budget 2 (2022)* <https://ccsd.net/resources/budget-finance-department/ccsd-fy-2022-amended-final-budget-state-forms.pdf>.

³⁶ Melanie Hanson, EDUCATION DATA INITIATIVE, *US Public Spending Statistics (2022)* <https://educationdata.org/public-education-spending-statistics>.

voters may make an informed decision.³⁷ The Petition’s DOE does not come close to adequately explaining the most significant effects of the initiative, including the financial costs—as explained above—and major non-financial consequences such as decreased academic outcomes, exacerbated school segregation, and loss of rights for vulnerable students.

A. The DOE Does Not Explain that Voucher Programs Are Costly and Reduce Public School Funding

As explained in detail above, *see* Section I *supra*, voucher programs are themselves expensive for the State to operate, and they exacerbate resource deficiencies in the public school system. The DOE makes no mention whatsoever of these effects of enacting the statute proposed in the Initiative Petition.

B. The DOE Does Not Explain Voucher Programs’ Effect on Educational Attainment

Private school voucher programs are touted as providing greater educational opportunity to struggling students, but the reality is that these programs do not in any way guarantee better educational outcomes. In fact, research has demonstrated that voucher programs have a significant *negative* impact on student achievement, particularly when it comes to English language arts and math.³⁸

³⁷ *Educ. Initiative PAC v. Comm. To Protect Nevada Jobs*, 293 P. 3d 874, 879 (Nev. 2013); *Nev. Judges Ass’n v. Lau*, 112 Nev. 51, 59 (1996).

³⁸ *See* R. Joseph Waddington and Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and (cont’d)*

Studies of Wisconsin voucher programs reported negative effects for students using vouchers to attend private schools.³⁹ A 2016 study of the Ohio voucher program, which was funded by voucher advocates, found that voucher students “fared worse academically compared to their closely matched peers attending public schools” and that “[s]uch impacts also appear to persist over time, suggesting that the results are not driven simply by the setbacks that typically accompany any change of school.”⁴⁰

Researchers at the University of Arkansas tracked Louisiana’s voucher program for four years, finding that students who used vouchers saw statistically

Middle School, JOURNAL OF POLICY ANALYSIS AND MANAGEMENT (Aug. 8, 2018), <https://onlinelibrary.wiley.com/doi/10.1002/pam.22086>; Patrick J. Wolf, Jonathan N. Mills, Yujie Sude, Heidi H. Erickson, & Matthew L. Lee, *How has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects after Four Years*, LOUISIANA SCHOLARSHIP PROGRAM EVALUATION POLICY BRIEF SCHOOL CHOICE DEMONSTRATION PROJECT (Apr. 24, 2019), <http://www.uaedreform.org/wp-content/uploads/LSP4-Policy-Brief-SCDP.pdf>; David Figlio and Krzysztof Karbownik, *Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effects*, THOMAS FORDHAM INSTITUTE 2 (July 2016), <https://edex.s3-us-west->

[2.amazonaws.com/publication/pdfs/FORDHAM%20Ed%20Choice%20Evaluation%20Report_online%20edition.pdf](https://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FORDHAM%20Ed%20Choice%20Evaluation%20Report_online%20edition.pdf); Mark Dynarski, Ning Rui, Ann Webber, Babette Gutmann, & Meredith Bachman, *Evaluation of the DC Opportunity Scholarship Program: Impacts Two Years After Students Applied*, INSTITUTE OF EDUCATION SCIENCES (May 2018), <https://ies.ed.gov/ncee/pubs/20184010/pdf/20184010.pdf>.

³⁹ Ellie Bruecker, *Assessing the Fiscal Impact of Wisconsin’s Statewide Voucher Program*, NAT’L EDUC. POL’Y CTR. (Oct. 2017) https://nepc.colorado.edu/sites/default/files/publications/PM%20Bruecker%20Funding_0.pdf.

⁴⁰ Figlio and Karbownik, *supra* note 36.

significant declines in English and math.⁴¹ Another study found significant negative effects in both reading and math for students who attended a voucher school for more than three years.⁴²

The Petition's DOE, in taking no notice of thoroughly researched negative effects of voucher programs on academic achievement, is misleading and omits key information on program effects.

C. The DOE Does Not Explain Vouchers' Effect on School Segregation

The DOE further fails to address the segregative impacts of a proposed voucher program. Following *Brown v. Board of Education*, 347 U.S. 483 (1954), southern states passed dozens of laws attempting to stifle racial integration,⁴³ with private school voucher plans featuring prominently in this anti-integration legislation.⁴⁴ Although today's voucher proponents no longer espouse a segregationist intent, voucher programs often have a segregative effect.

Indiana's private school voucher program has been seen as a case study for the segregating effects of vouchers: "Indiana's voucher program increasingly benefits higher-income white students, many of whom are already in private schools, and

⁴¹ Wolf, Mills, Sude, Erickson, & Lee, *supra* note 36 at 7.

⁴² Figlio and Karbownik, *supra* note 36.

⁴³ Chris Ford, Stephenie Johnson, and Lisette Partelow, *The Racist Origins of Private School Vouchers*, CENTER FOR AMERICAN PROGRESS (July 12, 2017), <https://www.americanprogress.org/article/racist-origins-private-school-vouchers/>.

⁴⁴ See Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 Tenn. L. 359, 386 (1997).

diverts funding from all other students who remain in the public school system.”⁴⁵ The Century Foundation’s analysis of the Louisiana voucher program confirmed “patterns noted in demographic studies of voucher users and private school attendance: that black students typically used vouchers to leave public schools where their race was overrepresented, but white students tended to leave public schools where their race was underrepresented.”⁴⁶ The study concluded that, “[o]n balance, voucher programs are more likely to increase school segregation than to promote integration or maintain the status quo.” The Petition proposed by Appellant is unashamedly misleading as it turns a blind eye to the risk of further segregating the public education system Nevada has failed to adequately integrate since *Brown*.⁴⁷

D. The DOE Does Not Explain that Voucher Programs Cost Students with Disabilities and English Learners Crucial Rights and Protections.

The Petition’s DOE further fails to address the issue that many private schools accepting vouchers do not provide the special education services that public schools are required to provide to meet the needs of students with disabilities. Additionally,

⁴⁵ Ford, *supra* note 43.

⁴⁶ Halley Potter, *Do Private School Vouchers Pose a Threat to Integration?*, THE CENTURY FOUNDATION (Mar. 21, 2017), <https://tcf.org/content/report/private-school-vouchers-pose-threat-integration>.

⁴⁷ *See generally*, Amelia Pak-Harvey, *CCSD’s Failed Desegregation History Remains Visible Today*, LAS VEGAS REV. J., (2018), <https://www.reviewjournal.com/local/education/ccsds-failed-desegregation-history-remains-visible-today/>.

it fails to provide any notice that participating in a voucher program generally means students with disabilities have to forego most of the substantial rights and protections against discrimination that are afforded to them in public schools under the Individuals with Disabilities Education Act (“IDEA”) and other federal laws.⁴⁸

When rights under IDEA are terminated, students and families suffer severe disadvantages. Vouchers cover only a fraction of the high tuition charged by the minority of private schools that provide adequate support for children with disabilities.⁴⁹ If a school is not able to meet the needs of a student with disabilities, that student may be discharged from the private school and parents have no recourse when private schools refuse to meet their child’s special needs.

English Learner (“EL”) students, who make up 13.4% of Nevada’s student population,⁵⁰ also would also have great difficulty using vouchers and would lose significant rights if they do so. Federal law requires public schools to remove barriers that “impede equal participation by [EL] students in [their] instructional programs.”

⁴⁸ Ian Farrell and Chelsea Marx, *The Fallacy of Choice: The Destructive Effects of School Vouchers on Children with Disabilities*, 67 Am. Univ. L. Rev. 1797 (2018).

⁴⁹ Selene Almazan & Denise Stile Marshall, *School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice*, Council of Parent Attorneys & Advocates 16 (2016), <https://tinyurl.com/4c2jzy5e>.

⁵⁰ NEVADA ACCOUNTABILITY PORTAL, http://nevadareportcard.nv.gov/di/report/reportcard_1?report=reportcard_1&scope=e7.y18&organization=c2269&fields=309%2C310%2C311%2C313%2C318%2C320&hiddenfieldsid=309%2C310%2C311%2C313%2C318%2C320&scores=573%2C574%2C575%2C805%2C576%2C577%2C806%2C583&num=1

20 U.S.C. § 1703(f) (the Equal Educational Opportunities Act (“EEOA”)).⁵¹ State educational agencies and public school districts are legally obligated to identify ELs who may need language assistance; sufficiently staff and support such programs; guarantee equal opportunities to participate in all curricular and extracurricular activities; avoid unnecessary segregation; monitor and evaluate students’ progress; and appropriately communicate with parents who do not speak English, among other requirements.⁵² But, the EEOA applies only to states and their public schools, and Title VI only to recipients of federal funding.⁵³

Furthermore, private schools are not obligated to enroll all voucher students who apply and voucher schools may elect not to provide language assistance services, as two thirds of private schools participating in D.C.’s voucher program in 2017 did

⁵¹ See also *Lau v. Nichols*, 414 U.S. 563, 566–68 (1974) (upholding regulations under Title VI of the Civil Rights Act that required public schools to take “affirmative steps” to address ELs’ educational needs).

⁵² U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV. & U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* 8-9 (Jan. 7, 2015), <https://tinyurl.com/bpf4rjjm>.

⁵³ Julie F. Mead & Suzanne E. Eckes, *How School Privatization Opens the Door for Discrimination*, Nat’l Educ. Pol’y Ctr., 10 (2018), <https://tinyurl.com/t5z8j7ws>. To be sure, state educational agencies are themselves subject to Title VI, and some commentators have argued that instituting a publicly funded voucher program without providing for meaningful access for ELs constitutes a denial of a state “benefit” through a “contractual or other arrangement” in violation of Title VI. *Id.* at 10-11. Nevertheless, a majority of voucher program statutes at most incorporate the language of Title VI, thereby tying Title VI protections to the receipt of federal funds. *Id.*

not.⁵⁴ Other barriers—including the difficulty in navigating the enrollment process for parents who are not native English speakers—may also result in the exclusion of ELs even from voucher schools that might admit them.⁵⁵

The Petition’s DOE makes no effort to notify the public that a central effect of the proposed voucher statute would be to exclude significant portions of the state’s students, including students with disabilities and ELs, or deprive them of their legal rights.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully ask that this Court affirm the judgment of the district court.

Dated this 11th day of August, 2022.

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⁵⁴ See Tony Hana, *How School Vouchers Affect English Learners*, NEW AMERICA (July 24, 2017), <https://tinyurl.com/27u75kks>. See also Mandy McLaren & Emma Brown, *Trump Wants to Spend Millions More on School Vouchers. But What’s Happened to the Millions Already Spent?*, Wash. Post (July 15, 2017), <https://tinyurl.com/m398rsew>.

⁵⁵ See *id.*

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CERTIFICATE OF COMPLIANCE

The undersigned does certify that:

1. I have read the brief;
2. to the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
3. the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and
4. the brief complies with the formatting requirements of Rule 32(a)(4)-(6); it uses a 14-point Times New Roman font;
5. the brief complies with the type-volume limitations stated in Rule 32(a)(7) and Rule 29(e); it contains 4733 words.

Dated this 11th day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that on the 11th day of August, 2022, I caused to be served via the Nevada Supreme Court’s e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing **BRIEF OF AMICI CURIAE PUBLIC FUNDS PUBLIC SCHOOLS, AMERICAN CIVIL LIBERTIES UNION OF NEVADA, AND WASHOE EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court’s E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system.

/s/ Pamela McAfee
An employee of Kemp Jones, LLP