Case No. 82118

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.; et al.

Plaintiffs-Appellants,

v.

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,

Defendants-Respondents.

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
CASE NO. 20 OC 00042 1B

RESPONDENTS' ANSWERING BRIEF

AARON D. FORD
Nevada Attorney General
STEVE SHEVORSKI (Bar No. 8256)
Chief Litigation Counsel
SABRENA K. CLINTON (Bar No. 6499)
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for Respondents

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I. INTRODUCTION

Nevada's Constitutional education clauses charge the Legislature with developing and implementing education policy in Nevada. Absent from these provisions, however, is any language establishing a positive right to an education of a particular quality or quantity. Because Plaintiffs-Appellants seek a determination from the courts on educational policy questions that the Constitution specifically assigns to the Legislature, their claims are non-justiciable and were properly dismissed by the district court. This Court should affirm the dismissal.

II. STATEMENT OF THE ISSUE PRESENTED

Where the Nevada Constitution textually commits education policy to the Legislature, are the determinations that: (1) the Constitutional education clauses mandate a sufficient education—both qualitatively and quantitatively, and (2) the Legislature has not provided such an education, non-justiciable political questions that implicate policy choices and value determinations properly left to the Legislature.

III. STATEMENT OF THE CASE

Plaintiffs-Appellants (hereinafter "Plaintiffs") appeal from a final order of the district court granting Defendants-Respondents' (the "State") motion to dismiss on the grounds that Plaintiffs' challenge to Nevada's education clauses present a non-justiciable political question.

IV. STATEMENT OF THE FACTS

A. The Nevada Constitution Tasks the Legislature with Determining Nevada's Education Policy.

The blueprint for Nevada's education policy is found in Article XI of the Constitution. Its ten (10) sections outline education policy as determined by the Legislature. Of significance to the instant matter are Sections 1, 2, and 6, which read in relevant part as follows:

> **Section 1.** "The legislature *shall encourage by all suitable means* the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, …" NEV. CONST. art. XI, § 1 (emphasis added).
>
> **Section 2.** "The 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 (emphasis added).
>
> **Section 6.** "[T]he Legislature shall enact one or more appropriations to provide the money *the Legislature deems to be sufficient*, when combined with the local money reasonable available for this purpose, to fund the operation of the public schools …" NEV. CONST. art. XI, § 6 (emphasis added).

These constitutional provisions were effectuated through the enactment of laws now codified in the Nevada Revised Statutes ("NRS"), Title 34, Chapters 385-400.

B. The Legislature Enacts Legislation to Fund the Operation of the Public Schools.

Nevada law declares that "the proper objective of state financial aid to public education is to ensure each Nevada child a *reasonably equal educational opportunity*[,]" and the Nevada Plan was initially adopted to accomplish that objective. NRS 387.121 (emphasis added). The Nevada Plan is a formula-based plan under which the Legislature establishes an estimated basic support guarantee per pupil consisting of state funding, local revenues, and other local funds that are not guaranteed by the state. NRS 387.121(1). The State guarantees a certain level of financial support to each school district. The amounts vary by school district and are set forth in Senate Bill 555 for the current biennium. S.B. 555, 2019 Leg., 80th Sess. (Nev. 2019). The basic support guarantee for each school district is calculated by multiplying the amount of the guarantee by the number of pupils enrolled. The state financial aid to each school district equals the difference between the school district basic support guarantee and local funds from taxes minus local funds attributable to pupils in the county who attend non-public schools. *Id.* State financial aid to public schools is also provided through other programs that target certain categories of pupils like English language learners or gifted and talented pupils. *See* NRS 387.121(2).

In the 80th (2019) session of the Legislature, Senate Bill 543 replaced the Nevada Plan with the Pupil-Centered Funding Plan effective 2021. *See* NRS

387.121 (July 1, 2021). Like the Nevada Plan, the Pupil-Centered Funding Plan combines state money with local funds to provide a certain base level of support to each pupil. The figure is adjusted to account for variation in local costs to provide a reasonably equal educational opportunity and for the costs of providing a reasonably equal educational opportunity to pupils with certain additional educational needs. *See* NRS 387.121(1) (July 1, 2021). Charter schools also receive state and local funds, but there are some differences in the calculation and distribution of those funds. *See* NRS 387.1214(2)(d) (July 1, 2021).

C. The Legislature Has Enacted Legislation Providing for Instruction and Curricula for a Uniform System of Common Schools.

The Legislature determined that public education is a matter for local control, imparting the boards of trustees of local school districts with the rights and powers necessary to maintain control of the education of the children within their districts. NRS 385.005 (1). Provided, however, that the State Board of Education shall advise the Legislature at each regular session of any recommended legislative action to ensure high standards of *equality of educational opportunity*. NRS 385.005 (3) (emphasis added). Nevada pupils are educated pursuant to laws that provide for: core academic subjects (NRS 389.026) and required instruction (NRS 389.054); establishment of academic content and performance (NRS 389.520); programs for gifted and talented students (NRS 388.52353), students with disabilities (NRS 388.419), and English language learners (NRS 388.407); and the annual submission

of strategic plans to improve student achievement and the allocation of resources (NRS 385.111-113).

D. Plaintiffs Alleged Violations of the Constitution for Failure to Provide a "Sufficient" Education.

Plaintiffs are parents of minor children who attend public schools in the Clark, Washoe, and White Pine County School Districts. In their complaint, they first claimed that the State violated Article XI, § 1 by failing to provide students a "sufficient education, both quantitatively and qualitatively." Joint Appendix ("JA") 34, ¶ 177. Second, they allege the State violated Article XI, § 2 by failing to provide a "sufficiently uniform system of common schools, both qualitatively and quantitatively." JA 35, ¶ 183. Third, Plaintiffs claimed students have a "basic right to a sufficient education" and they have been denied due process in acquiring that right in violation of Article 1, § 8. JA 36, ¶ 190. In each instance, Plaintiffs alleged that the primary cause of the purported violation is inadequate funding, so they sought an injunction to prohibit the State from giving force and effect to any school finance system that did not remedy these alleged deficiencies. Additionally, Plaintiffs requested a declaration that a sufficient education is a basic right under the Nevada Constitution and that Nevada's current funding system is insufficient to guarantee that basic right.

E. The District Court Dismissed the Complaint for Non-Justiciability.

The district court issued an order granting the State's motion to dismiss pursuant to NRCP 12(b)(5), concluding that: (1) the complaint presented non-justiciable questions not appropriate for adjudication; (2) that the plain language of Article XI textually commits the administration of education policy to the Legislature who has the discretion to appropriate the amount of money that it deems sufficient to fund public schools, and to determine what programs and processes to adopt in providing for a uniform system of public schools; (3) the education clauses are aspirational and do not guarantee an education of a particular quality or quantity, nor does it mandate the attainment of specific educational outcomes; (4) the complexities associated with promulgating, implementing, and enforcing a statewide system of education policy makes them better suited for determination by the legislature, not the courts which lack judicially discoverable and manageable standards to effectively resolve those issues; (5) to declare that a sufficient education is a basic right and that the current funding system is insufficient to guarantee or secure it would require an initial policy determination; and (6) consistent with the separation of powers doctrine, the court will not substitute its judgment for that of the legislature with respect to education policy. JA 99-100.

V. STANDARD OF REVIEW

This Court reviews the district court's legal conclusions de novo. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

When interpreting a constitutional provision, the rules of statutory construction apply. *Schwartz v. Lopez,* 132 Nev. 732, 745, 382 P.3d 886, 895 (2016). Ascertaining the intent of the legislature in enacting a statute is the leading rule of statutory construction. *McKay v. Board of Supervisors of Carson City,* 102 Nev. 644, 650, 730 P.2d 438, 443 (1986) (internal citation omitted). "This intent will prevail over the literal sense of the words. [But] [t]he meaning of the words used may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it." *Id.* However, a court may not go beyond the language of the statute to determine intent where the statute is clear on its face. *Id.* at 648, 730 P.2d at 441 (internal citation omitted).

VI. ARGUMENT

A. Plaintiffs' Claims Challenge Political Questions Committed to the Legislature, Making Them Non-Justiciable.

Controversies that "revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches" are political questions that are non-justiciable. *N. Lake Tahoe v. Washoe Cnty. Comm'rs,* 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) (internal citations omitted).

In *N. Lake Tahoe*, this Court explicitly adopted the factors enunciated in *Baker v. Carr,* 369 U.S. 186, 82 S. Ct. 691 (1962)[1] to review the justiciability of controversies that potentially involve those questions. *N. Lake Tahoe,* 129 Nev. at 688, 310 P. 3d at 587.

If one of the *Baker* factors is met, the political question doctrine requires dismissal of the complaint. *Id*. The factors include whether there is: (1) a textually demonstrable constitutional commitment of the issues to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; and (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion. *Id.* An analysis of those factors demonstrates that Plaintiffs' challenge to the education clauses is non-justiciable.

1. Plaintiffs do not refute the fact that the Nevada Constitution textually commits education policy to the Legislature.

By recognizing that education policy is textually committed to the Legislature, Plaintiffs essentially concede that the political question doctrine bars their claims. *See N. Lake Tahoe,* 129 Nev. at 688, 310 P. 3d at 587; JA 11. Plaintiffs' dissatisfaction with legislative choices to fund and implement education policy in

[1] Plaintiffs argue that the *Baker* factors are of limited applicability because this is a positive rights case. However, as discussed in Section II, the Nevada Constitution does not grant a positive right to an education of a particular quality.

Nevada does not erase this clear textual commitment. *See* JA 34, ¶ 175 (complaining that "the political branches of Nevada's state government are unable to remedy the deep constitutional infirmities of the statewide public education system[.]") Plaintiffs attempt to circumvent this by asserting that the education clauses provide positive rights, including a qualitative and quantitative right to a sufficient education. There is no Nevada authority concluding that a positive right usurps the applicability of the political question doctrine when an analysis of the policy choices and value determinations adopted to effectuate those rights is at issue. Put simply, the political question doctrine and positive rights are not inconsistent. Even so, the Nevada Constitution does not provide for a positive right to an education of a particular quality or quantity. The plain language of the education clauses and their legislative history support that conclusion.

2. Canons of statutory construction and legislative history affirm the aspirational nature of Nevada's education clauses.

The standard rules of statutory construction apply when interpreting a constitutional provision. *Schwartz,* 132 Nev. at 745, 382 P.3d at 895. Terms that are easily defined by reference to their common dictionary meaning are not vague or ambiguous. *Clancy v. State,* 129 Nev. 840, 847-48, 313 P.3d 226, 231 (2013). Moreover, words must be given their plain meaning unless doing so would violate the spirit of the provision. *Nev. Mining Ass'n v. Erdoes,* 117 Nev. 531, 538, 26 P.3d 753, 757 (2001).

Section 1 of the education clauses provide that "[t]he legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements . . ."). NEV. CONST. art. XI, § 1. "Use of the phrase 'by all suitable means' reflects the framers' intent to confer broad discretion on the Legislature . . .," which would necessarily include funding, curricula, and program determinations. *See Schwartz,* 132 Nev. at 747, 382 P.3d at 897. This is supported by Article XI, § 6 which states that "The Legislature shall enact one or more appropriations to provide the money the *Legislature deems to be sufficient.*" NEV. CONST. art. XI, § 6(2) (emphasis added).

Plaintiffs extrapolate a far more expansive meaning from the education clauses than their plain language supports. But this Court does not look beyond the instrument when the language is plain. *McKay,* 102 Nev. at 648, 730 P.2d at 441; *see also Lake County. v. Rollins,* 130 U.S. 662, 670 (1889) (Where "the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." (internal citation omitted).

The plain meaning of the key words in Nevada's education clauses demonstrate the aspirational nature of the provisions. Rather than mandating action, the Nevada Constitution "encourages" general support for certain cultural and

educational endeavors. "Encourage" means to "inspire with courage, spirit, or hope," "to spur on," or "to give help or patronage to." *See* Merriam-Webster Online Dictionary (2015), https://www.merriam-webster.com/dictionary/encourage.[2]

The education clauses contain no language equating "suitable" to a mandate guaranteeing an education outcome instructed by specific qualitative or quantitative components. This fact is not by happenstance, but rather by the express design of the constitutional framers who, only after lengthy debate, construed the "use of the phrase 'by all suitable means' . . . [to] confer broad discretion . . ." without a qualitative or quantitative mandate. *Schwartz,* 132 Nev. at 747, 382 P.3d at 897.[3] "[S]uitable" itself has a straightforward meaning, though subject to different specific

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[2] This is consistent with the common usage of "encourage" in other contexts. *See Univ. of Nev. v. Tarkanian,* 110 Nev. 581, 589, 579 P.2d 1180, 1185 (1994), *holding modified by Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.,* 114 Nev. 823, 963 P.2d 465 (1998) (internal citations omitted) (civil rights statutes were enacted "to *encourage* private enforcement of these laws through compensation to attorneys") (emphasis added); *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.,* 139 S. Ct. 628, 632 (2019) (internal citations omitted) (Federal patent system that *encourages* "the creation and disclosure of new, useful, and nonobvious advances in technology and design") (emphasis added). And the fact that "encourage" is preceded by the word "shall" does not alter the aspirational nature of the term.

[3] *See also Guinn,* 119 Nev. at 474-475, 76 P.3d at 32, fn. 40; Debates & Proceedings of the Nevada State Constitutional Convention of 1864, at 571, 572, 576 (Mr. Warwick: "I think there are some subjects which are justly and properly objects of legislation, and among them, one of the most worthy is that of education."); (Mr. McClinton: "education is a proper subject of legislation [ ] leave the rest to the wisdom, intelligence, and patriotism of those legislators. "); (Mr. Collins: "this constitutional provision is merely an outline by which the Legislature is to be governed. It contemplates that the Legislature shall establish a school system.").

interpretations in different contexts. Something suitable is "adapted to a use or purpose," "satisfying propriety," or "able, qualified." *See* Merriam-Webster Online Dictionary (2015), https://www.merriam-webster.com/dictionary/suitable; *see also United States v. Chudy,* 474 F.2d 1069, 1070 (9th Cir. 1973) (internal citation omitted) (A registrant is not required to report his every move . . . [h]e is required to provide a *suitable* means for being reached by the board.") (emphasis added).

Standard statutory analysis likewise applies to Article XI, Section 2 of the Nevada Constitution. The plain language of this provision does not provide for a "sufficiently" uniform system of common schools, both qualitatively and quantitatively. Irrespective of that fact, this Court has already ruled that "uniform system of common schools" as provided for in Section 2 is "clearly directed at maintaining uniformity *within* the public school system" and nothing more. *See Schwartz*, 132 Nev. at 746, 750, 382 P.3d at 896, 898 ("as long as the Legislature maintains a uniform public school system, open and available to all students, the constitutional mandate of Section 2 is satisfied.") Plaintiffs' allegations, even if true, failed to show that the State acted contrary to this mandate.

Even if this Court were to find that the education clauses are ambiguous and thus subject to more than one reasonable interpretation, the interpretation proposed by Plaintiffs is not one of them. No matter the number of ways the words of the education clauses could be understood, it contains no qualitative guarantee as

proposed by Plaintiffs. *See Rollins,* 130 U.S. at 670 ("To get at the thought or meaning expressed in a [ ] constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them.").

Rejection of Plaintiffs' proposed interpretation harmonizes with the Legislature's constitutional authority to frame and enact the laws, which power is so broad as to be practically absolute, except where expressly limited by state or federal constitutions. *See* NEV. CONST. art. IV; *see also Galloway v. Truesdell,* 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). This is also consistent with the aspirational language adopted by the framers for Nevada's educational clauses.

3. The lack of judicially discoverable and manageable standards warrants a determination of non-justiciability.

The State's standards for education are not mandates. Rather, they are the Legislature's attempt to effectuate the aspirational goals of Nevada's education clauses. Plaintiffs' challenge thus remains non- justiciable because the proposed "standards" identified by Plaintiffs provide no measure of constitutional compliance. OB at 21. It would be error for this Court to adopt these standards as mandatory requirements. *See* OB at 22-23.

In addition, recognizing the dynamic nature of education, the current policy subjects those standards to "periodic review and, if necessary, revision . . ." *See* NRS 389.520(1)(b). A judicial mandate would impact this process by dictating (or

restraining) legislative action effectively hampering the Legislature's ability to legislate in violation of separation of powers. A court cannot direct the Legislature to adhere to current educational standards when those standards are aspirational, fluid, or not otherwise expressly mandated by Nevada's education clauses.

Accordingly, the slew of cases cited by Plaintiffs which espouse that legislatures can simply develop remedies according to their own standards do not resolve the non-justiciability issue. For example, the Nevada Legislature has already developed remedies through periodic review and revision of its funding plans and educational programs. The fallacy in Plaintiffs' premise lies in the fact that there is still potential for disagreement with the outcomes even after the application of those remedies. Put another way, there is no guarantee that a different legislative approach (either financial or program-based) ordered by a court will rectify Plaintiffs' concerns. And no matter what approach is adopted, it will still require policy considerations which contravene the political question doctrine.

Further, Plaintiffs' presumption that increased funding and program modifications will garner different results is far from guaranteed. This Court has previously acknowledged limits to its authority with respect to education funding, explaining that courts have no ability to enforce an order requiring the legislature to fund education or otherwise "direct the Legislature to approve any particular funding amount or tax structure." *Guinn v. State of Nev.* 119 Nev. 460, 76 P.3d 22, 30 (2003).

Finally, to imply the ease in which any court could identify and apply judicially discoverable and manageable standards ignores the myriad of factors that a legislature considers through committee hearings and from various stakeholders like teachers, school districts, and school boards from across the state. This input in turn informs what approaches are adopted, how they are applied or modified, when and why. Plaintiffs' approach fails to account for the absence of such input to the judiciary. Thus, what Plaintiffs tout as a simplistic approach and resolution is in fact illusory.

4. A conclusion that the current education scheme fails to provide a sufficient education requires this Court to make a policy determination.

Before a court can apply judicially discoverable and manageable standards, it first must make a policy determination that students were entitled to a sufficient education, both qualitatively and quantitatively, followed by a determination addressing whether the students had been afforded the opportunity to receive one. This assessment invariably involves an analysis of the Legislature's policy choices and value determinations regarding core academic subjects (NRS 389.026), required instruction (NRS 389.054), academic content and performance (NRS 389.520), and strategic plans to improve student achievement and the allocation of resources (NRS 385.111-113). But it does so without the full benefit of the information and resources that influenced those decisions. To conclude that the Plaintiffs are entitled to "it"

and that the Legislature did not provide "it", the court has to first determine what "it" is. This type of analysis runs afoul of the political question doctrine making Plaintiffs' claims non-justiciable.

B. Plaintiffs' Positive-Rights Analysis Does Not Alter the Non-Justiciability of Their Claims.

The language of Nevada's Constitution, unlike those of many other states, does not grant a positive right to a sufficient education. Plaintiffs' claims thus remain non-justiciable.

While Nevada's education clauses provide for uniformity within the public school system, no language in the Constitution requires the Nevada Legislature to provide a particularized education that meets certain pedagogical standards like those espoused by Plaintiffs. Plaintiffs fail to identify any such mandate in Nevada's Constitution or in this Court's case law.

Plaintiffs' reliance on decisions from states whose education clauses do not mirror Nevada's clauses expose the fallacy of their argument. None of these state constitutions contain the aspirational language of Nevada's Constitution regarding education policy.[4] Rather, they each contain mandatory and specific language,

[4] Connecticut education clause: "The state shall maintain a system of higher education, including The University of Connecticut, which shall be dedicated to excellence in higher education." CONN. CONST. art. VIII, § 2.

Delaware education clause: "The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools . . ." DEL. CONST. art. X § 2.

indicating what precisely the legislature of the state is mandated to do. *See, e.g.* COLO. CONST. art. IX, § 2 ("The general assembly **shall**, as soon as practicable, provide for the establishment and maintenance of a **thorough** and uniform system of free public schools . . ."). *Id.* (emphasis added). Analysis of decisions from states with constitutions that actually do mirror Nevada's constitution mandates a different conclusion than that advocated by Plaintiffs.

Plaintiffs' position is also contradicted by the legislative history which indicates that the framers did not intend for Nevada's education clauses to impose an education guarantee.

Finally, Plaintiffs' challenge to Nevada's education clauses involve an analysis of factors that invariably revolve around policy choices and value determinations that are constitutionally committed to the Legislature. This Court must reject Plaintiffs' invitation to make such determinations, as doing so would contravene the very principles of the political question doctrine.

Kansas education clause: "The 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 a may be provided by law." KAN. CONST. art. XI, § 1.

Minnesota education clause: "… it is the duty of the legislature to establish a general and uniform system, of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state." MINN. CONST. art. XIII, § 1.

1. The language of the Nevada Constitution does not create a positive right to a sufficient education, either qualitatively or quantitatively.

Construing Nevada's education clauses as positive-rights provisions, Plaintiffs wrongly interpret the language to support a demand for a particular level of service or a specific educational outcome. Absent an express guarantee, however, there is no entitlement to either. The plain language of Nevada's education clauses does not provide such a guarantee. This fact is supported by the framers' intent and their omission of qualitative or quantitative mandates, as previously discussed. The "delegates [simply] . . . acknowledged the need to vest the Legislature with discretion over education into the future," without further articulating specific duties to effectuate that discretion. *Schwartz,* 132 at 747, 382 P.3d at 897 (citing *Debates & Proceedings of the Nevada State Constitutional Convention of 1864,* at 565-77 (Andrew J. Marsh off. Rep., 1866)).

Even assuming an education clause imposes some kind of duty, it would only obligate the government to pursue the specific ends identified. Here, Nevada's education clauses obligate the Legislature to provide for a uniform system of common schools which this Court recognized it satisfies by maintaining a public school system open and available to all students. *See Schwartz,* 132 Nev. at 750, 382 P.3d at 898. There is no comparable obligation with respect to education quality. The education clauses provide that the Legislature shall encourage [not guarantee]

educational pursuits and enact appropriations that it deems to be sufficient. *See* NEV. CONST. art. XI, §§ 1 and 6. The methods adopted to implement those pursuits, however, should not be invalidated simply because they are imperfect or susceptible to improvement. Rather, the analysis should hinge on whether the Legislature failed to consider relevant and material information to instruct its decisions, which is clearly not the case here for the reasons already discussed.

The fact that Nevada's education clauses do not impart the type of duty suggested by Plaintiffs is further substantiated by the absence of a finding from this Court or the U.S. Supreme Court that the right to education (let alone a sufficient education) is fundamental. Put simply, the positive rights that Plaintiffs seek do not exist in Nevada's education clauses. Plaintiffs' remedy, if any, is through the election process or a ballot initiative. *See* NEV. CONST. art. 19, § 2.

2. States with similar constitutional provisions to Nevada's have found education clause challenges to be non-justiciable political questions.

In *Campaign for Quality Educ. v. State of Cal.,* 209 Cal. Rptr. 3d 888 (Cal. Ct. App. 2016), plaintiffs challenged California's education policy based on two constitutional provisions that mirror Nevada's. Since Nevada relied on the California Constitution in developing its own, the decisions of their courts are instructive. *State ex rel. Harvey v. Second Jud. Dist. Ct.,* 117 Nev. 754, 763, 32 P.3d 1263, 1269 (2001). California's education clauses provided:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, *the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement*. (CAL. CONST. art. IX, §1) (emphasis added).
>
> The Legislature *shall provide for a system of common schools by which a free school shall be kept up and supported* in each district at least six months in every year, after the first year in which a school has been established. (CAL. CONST. art. IX, § 5) (emphasis added).

Plaintiffs alleged that these provisions provide for a "judicially-enforced right to an education of 'some quality' [ ], and, alternatively, that the Legislature is currently violating its constitutional obligations to 'provide for' and 'keep up and support' the 'system of common schools' by its current educational financing system." *Campaign* at 892. Rejecting those arguments, the court of appeal held that the case was non-justiciable because the California constitutional provisions "evince no constitutional mandate to an education of a particular standard of achievement or impose on the Legislature as affirmative duty to provide for a particular level of education expenditures." *Id.* at 902. The Court summed up its view as follows:

> [S]ections 1 and 5 of article IX, standing alone, do not allow the courts to dictate to the Legislature, a coequal branch of government, how to best exercise its constitutional powers to encourage education and provide for and support a system of common schools throughout the state. Because section 1 and 5 of article IX do not impose on the Legislature any duties that can be judicially enforced, there is no reason for a judicial evaluation as to whether there has been a breach of those alleged duties.

> Even if the matter were remanded for a trial, appellants would be entitled to the declaratory and injunctive relief requested in their pleadings. "The quandary described in the complaint[s] is lamentable, but the remedy lies squarely with the Legislature, not the judiciary."

Id. at 903 (quoting *Grossmont Union High Sch. Dist. v. State Dept. of Educ.,* 86 Cal. Rptr. 3d 890, 892 (Cal. Ct. App. 2008).

Campaign relied heavily on the analysis in *Bonner v. Daniels,* 907 N.E. 2d 516 (Ind. 2009) where Indiana's public school finance system was challenged as violating students' constitutional right to a quality education. Article VIII, Section 1 of the Indiana constitution provides:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly *to encourage, by all suitable means, moral intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools*, wherein tuition shall be without charge, and equally open to all.

IND. CONST. art. VIII, § 1 (emphasis added). Like in C*ampaign,* the *Bonner* court affirmed the trial court's dismissal of plaintiffs' complaint for failure to state a claim concluding "the framers and ratifiers certainly sought to establish a state system of free common schools but not to create a constitutional right to be educated to a certain quality or other output standard." *Bonner,* 907 N.E. 2d at 522.

The similarities between the constitutional provisions for Indiana, California, and Nevada are evident. In *Campaign*, "Section 1 [encourage by all suitable means]

was 'general and aspirational,' [ ] mak[ing] no provision for how the Legislature is to achieve its goal except to use all suitable means." *Campaign,* 209 Cal. Rptr. At 897 (quoting *Bonner,* 907 N.E. 2d at 521); also citing *Comm. for Educ. Equality v. State,* 294 S.W. 3d 477, 489 (Mo. 2009) ("[t]he aspiration for a 'general diffusion of knowledge and intelligence' concerns policy decisions, and these political choices are left to the discretion of the other branches of government"). Nevada's education clauses aspire to achieve delineated objectives through the adoption of various guidelines, policies, and goals, but the failure to attain any one of those objectives does not violate the constitution. *See Bonner,* 907 N.E. 2d at 522 ("The historical facts do not evidence any intention to require the establishment of a public education system with any particular standards of education output."). Put simply, Nevada's Article XI, Section 1 is general and aspirational merely providing goals for education with the ultimate policy determinations to be made by the Legislature.

Similar to Article XI, § 2 of Nevada's constitution, Section 5 of California's constitution provided for the creation of "'a system of common schools,' 'free,' and 'kept up and supported in each district.' (§ 5.) But, [ ] it does not 'delineate or identify any specific outcome standards to be achieved by the [Legislature's] performance of its duty to provide a system of common schools.'" *Campaign,* 209 Cal. Rptr. at 897 (quoting *Bonner,* 907 N.E. 2d at 897*)*; also citing *Kennedy v. Miller,* 97 Cal. 429, 432, 32 P. 558, ___ (Cal. 1893) ("[t]he term 'system,' [ ] imports a 'unity of purpose

as well as an entirety of operation, and the direction to the [L]egislature to provide a system of common schools means one system which shall be applicable to all the common schools within the state'"). This is consistent with this Court's assessment of § 2 providing for "a uniform system of common schools." "Looking to the plain language of § 2, it is clearly directed at maintaining uniformity within the public school." *Schwartz,* 382 P.3d at 896. The analyses of these cases support the non-justiciability of Plaintiffs' challenge here.

And although this Court has not yet squarely dealt with whether an appropriation that the Legislature deemed sufficient to fund public schools is a non-justiciable political question, it did not foreclose that conclusion. *See Shwartz,* 132 Nev. at 775, 382 P.3d at 902, fn. 11 (citing *N. Lake Tahoe FPD*, 129 Nev. at 687, 310 P.3d at 587). Instead of rejecting the State Treasurer's premise that such a "determination is a policy choice committed to the legislative branch," this Court concluded "we do not pass judgment on whether the amount appropriated is in fact sufficient to fund the public schools. Rather, the issue before us is whether the amount the Legislature *itself* deemed sufficient [ ] must be safeguarded for and used by public schools and cannot be diverted for other uses." *See Schwartz,* 132 Nev. at 775, 382 P.3d at 902, fn. 11 (citing *N. Lake Tahoe FPD*, 129 Nev. at 687, 310 P.3d at 587). This ruling preserves the political question doctrine as the standard for the Court to assess the type of constitutional challenges lodged by Plaintiffs.

3. The only cases from other jurisdictions that found education clause challenges justiciable examined constitutions with substantively different language and historical backgrounds than Nevada's.

The cases relied on by Plaintiffs are not instructive to this Court's analysis as to the justiciability of Plaintiffs' claims. This Court should not adopt the conclusions of jurisdictions interpreting education clause language that is different from the aspirational language of Nevada's clauses. Specifically, the combination of dissimilar provisions and legislative histories as well as state precedents that were relied upon by those courts do not support this Court's rejection of the political question doctrine as applied to constitutional challenges involving the education clauses. The cases cited by Plaintiffs are addressed in turn below.

a. *Lobato v. State,* 218 P.3d 358 (Colo. 2009)

In finding the educational challenges justiciable, *Lobato* analyzed *Lujan v. Colorado State Bd. of Education,* 649 P.2d 1005, 1010-11 (Colo. 1982). *Lujan* did not explicitly address the issue of the justiciability of the plaintiff's claims and further acknowledged that while it is in the province of the judiciary to determine what the law is, fashioning a constitutional system for financing public education is the proper function of the Legislature. 649 P.2d at 1025. And while the majority in *Lobato* declined to apply the *Baker* factors, the dissent did apply them concluding that the case presented a non-justiciable political question. *Lobato,* 218 P.3d at 378-

83. (Rice, J., dissenting). This Court explicitly adopted *Baker* as the Nevada standard for deciding when a case presents a non-justiciable political question. *N. Lake Tahoe*, 129 Nev. at 688, 310 P.3d at 587.

The only way *Lujan, Lobato* or any other court could conclude that a school finance system was unconstitutional is to engage in the type of policy analysis that the political question doctrine prohibits. Similar defects plague the other authority relied upon by Plaintiffs.

b. *Conn. Col. for Justice in Educ. Funding, Inc. v. Rell,* 990 A.2d 206 (Conn. 2010)

Plaintiffs' reliance on *Rell*, a plurality decision with numerous concurring and dissenting opinions that sharply divide on the precise contours of Connecticut's education clauses, is also misplaced. *Rell*'s view on looking to other states supports the State here. Noting "[t]he linguistic diversity of the various states' education clauses," the Connecticut Supreme Court emphasized the need for "careful review of the sister state decisions to determine which cases are of greatest precedential significance." *Rell*, 990 A.2d at 244.

Said differently, the plain meaning of the text matters. That is the premise of the State's argument here. Importantly, Article XI, §1, is aspirational, requiring only "encouragement" of various educational pursuits. NEV. CONST. art. XI, §1. This Court has already interpreted Article XI, §2 as only requiring "uniformity," not a

constitutionally mandated minimum qualitative threshold. *Schwartz*, 132 Nev. at 746, 382 P.3d at 896. And Article XI, §6(2) explicitly makes it the Legislature's prerogative to decide how much money is sufficient to provide for public education. NEV. CONST. art. XI, §6(2).

As further justification for its decision, the plurality in *Rell* reasoned, in part, that the remedy could be left to the legislature. *Rell,* 990 A.2d at 221-222. That rationale is flawed and exemplifies the political nature of issues before the court because the very act of finding a deficiency involves a policy determination that the current funding and program allocations are insufficient to secure the desired result. Put another way, a conclusion that the outcomes are deficient involves a policy analysis of what outcomes would be sufficient. Moreover, the practical problem of enforcement and management still exist implicating the *Baker* factors and creating the likelihood for re-litigation and continued judicial oversight.

c. *Delawareans for Educ. Opportunity v. Carney,* 199 A.3d 109 (Del. Ch. 2018)

Plaintiffs' reliance on *Carney* to support their contentions fairs no better. Delaware's framers also discussed and ultimately omitted the word "encourage" with one framer "explain[ing] he did not know of any 'encouragement' that the General Assembly should be providing 'except the establishment of schools.'" Id. at 147 (internal citation omitted). Unlike in Nevada, Delaware's framers specifically expressed concern about the quality of the schools and the fact that they fully

expected the education clause to be enforced in court. *Carney*, 199 A.3d at 148. This, the Delaware court recognized, establishes a duty to create "not just a system of public schools, but 'a good system of public schools.'" *Id*. at 150 (citation omitted).

While the Nevada Constitution's aspirational language recognizes that the promotion of quality education is good policy, neither the plain language of Nevada's education clauses nor the legislative history supports the existence of a duty tied to minimum quality. And this Court already interpreted Nevada's education clauses consistently with this point, noting that they merely require uniformity within the public schools. *Schwartz*, 132 Nev. at 746, 382 P.3d at 896.

d. *Gannon v. State,* 319 P.3d 1196 (Kan. 2014)

Since *Gannon* found educational challenges justiciable, Plaintiffs posit that Kansas's use of the phrases "*shall provide* for intellectual, education, vocational and scientific improvement by establishing and maintaining public schools. . ." and "*shall make suitable provision* for finance of the educational interests of the state" in its education clauses must mean that Nevada's inclusion of the term "shall" mandates the same conclusion. KAN. CONST. art. VI, §§ 1 and 6.

But, unlike Kansas, the education clauses in Nevada state that the "legislature *shall encourage* by all suitable means the promotion of intellectual, literary, scientific, . . . improvements" and "the Legislature *shall enact* one or more

appropriations to provide the money *the Legislature deems to be sufficient . . .*" NEV. CONST. art. XI, §§1 and 6 (emphasis added). As previously discussed, the plain meaning of "encourage" does not embody a directive or mandate. Rather, it is aspirational in nature, so *Gannon* has no bearing on this Court's reading of Article XI, §1. Meanwhile, when providing for uniformity—not a constitutionally mandated qualitative threshold—in the school system, how much money to appropriate to public education is explicitly made a matter of legislative discretion. NEV. CONST. art. XI, §6; *see also Schwartz*, 132 Nev. at 746, 382 P.3d at 896 (interpreting NEV. CONST. art. XI, §2).

e. *Cruz-Guzman v. State,* 916 N.W. 2d 1 (Minn. 2018)

Plaintiffs' reliance on *Cruz-Guzman v. State,* 916 N.W. 2d 1 (Minn. 2018) fails for the same reasons discussed above. Unlike Minnesota, Nevada's education clauses do not impose a duty on the Legislature to provide a qualitative education. And while the court in *Cruz-Guzman* may not have had to "devise particular educational policies" in order to reach its conclusion (OB at 16), it no doubt had to assess educational policy determinations which runs afoul of the political question doctrine.

VIII. CONCLUSION

This Court should affirm the district court's dismissal of Plaintiffs' complaint as non-justiciable.

Dated this 4th day of June, 2021.

AARON D. FORD
Attorney General

By: /s/ *Sabrena K. Clinton*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
Sabrena K. Clinton (Bar No. 6499)
Deputy Attorney General
Attorneys for Respondents

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Dated this 4th day of June, 2021.

AARON D. FORD
Attorney General

By: /s/ *Sabrena K. Clinton*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
Sabrena K. Clinton (Bar No. 6499)
Deputy Attorney General
Attorneys for Respondents

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I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 4th day of June, 2021, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Eddie Rueda*
Eddie Rueda, an employee of the
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