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The Agony and the Ecstasy of the Nevada ESA Ruling

Matthew Ladner

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I've read a few school choice related Supreme Court decisions over the years, but I've never seen anything quite like the ruling that the Nevada Supreme Court made yesterday. To this untrained reader, it appears to be a determined exercise in cutting the baby.

The decision reads very cleanly until the matter of standing arises. Standing involves being able to demonstrate some personal harm, and the Court implicitly acknowledges a lack of harm on the part of the plaintiffs by creating an exception to standing out of whole clothe in the ruling:

> We now recognize an exception to this injury requirement in certain cases involving issues of significant public importance. Under this public-importance exception, we may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury. We stress, as have other jurisdictions recognizing a similar exception to the general standing requirements, that this public-importance exception is narrow and available only if the following criteria are met. First, the case must involve an issue of significant public importance. *See, e.g., Trs. for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987). Second, the case must involve a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution. *See Dep't of Admin. v. Horne*, 269 So. 2d 659, 662-63 (Fla. 1972). And third, the plaintiff must be an "appropriate" party, meaning that there is no one else in a better position who will likely bring an action and that the plaintiff is capable of fully advocating his or her position in court. *See*

So…..I am inferring from this that under the standing requirements that existed for *every previous case in the history of the state of Nevada*, that the Nevada Supreme Court would have felt compelled to acknowledge the obvious truth that the plaintiffs had claimed harm when in fact none actually existed. I'm no lawyer, and I don't play one on television, but I'm also astonished that the Court felt free to willy-nilly change standing requirements unilaterally and in

the late stages of an important case. If you can explain to me how this makes the least bit of sense, and it not entirely arbitrary and capricious, please feel free to educate me in the comments.

Having performed this incredibly one sided act of mental gymnastics, the court moves on to consideration of constitutional issues. First up, our old friend the "uniformity clause." Quite rightly, the Court squashes this bug of a claim under their boot:

> The plaintiffs do not dispute that Nevada's public school system is uniform, free of charge, and open to all students. SB 302 does not alter the existence or structure of the public school system. Nor does SB 302 transform private schools or its other participating entities into public schools. Indeed, NRS 353B.930 states that nothing in the provisions governing education savings accounts "shall be deemed to limit the independence or autonomy of a participating entity or to make the actions of a participating entity the actions of the State Government." Thus, SB 302 is not contrary to Section 2's mandate to provide for a uniform system of common schools.

Jolly good, moving on to sectarian purpose Blaine claim. This is where the Court makes a potentially very far-reaching conclusion:

> Thus, in depositing public funds into an education savings account, the State is not using the funds for a "sectarian purpose." The plaintiffs do not disagree on this point. Instead, they point to the fact that the ESA program permits parents to use the funds at religious schools, and they argue that this would constitute a use of public funds for a sectarian purpose, in violation of Section 10. We disagree. Once the public funds are deposited into an education savings account, the funds are no longer "public funds" but are instead the private funds of the individual parent who established the account. The parent decides where to spend that money for the child's education and may choose from a variety of participating entities, including religious and non-religious schools. Any decision by the parent to use the funds in his or her account to pay tuition at a religious school does not involve the use of "public funds" and thus does not implicate Section 10.

Note that this was an argument that Nick Dranias and I made in our paper for the Goldwater Institute that made the case for the Arizona ESA as a replacement for the voucher program for children with disabilities: that once a set of mutual benefits between a parent and the state had been realized that funds deposited into an account were private rather than public funds. Jason does a great job of expounding on this point in his **Cato post on the decision** and how this

precedent is followed in other policy areas. No one can claim that a state worker for instance cannot use their salary to pay for Catholic school tuition for instance- as the check from the state is exchanged for the labor of the worker and thus becomes private funds. Likewise in an ESA, the state realizes the benefit of paying for a traditional education for the child, and the parent realizes the benefit of flexibility under the rules of the account.

The Arizona ESA decision implicitly recognized this argument, but the Nevada decision explicitly embraces it.

After that we get back into agony, with the court sifting through a complex mess of requirements and dates of bills passing. Basically in the end the court emphatically holds that ESAs are constitutional, but finds that the way the legislature funded the ESA program was itself not constitutional. Basically the program exists but currently has no funding.

So where does this leave things? It leaves the 7,000+ students who applied for NVESA out in the cold. As the Wall Street Journal noted today, a looming special session on building a football stadium for an out of state billionaire also represents an opportunity to fund the educations of thousands of Nevada children.

Let's see what happens next.