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Testimony for: Minnesota Senate E-12 Finance and Policy Committee

From: Michael P. Donnelly, JD, LLM, HSLDA Senior Counsel

Date: Friday, March 6, 2020

RE: Testimony in Opposition to HB 3658/SF 3977

My name is Michael Donnelly I am Senior Counsel for The Home School Legal Defense Association (“HSLDA”) which advocates for the rights of parents to direct the education and upbringing of their children. With nearly 85,000 member families we are headquartered in the Washington DC area and are the world’s largest homeschooling association. In Minnesota we work with our partner MACHE and represent the interests of thousands of families. I am an constitutional law instructor at Patrick Henry College and Regent Law School.

I respect the intentions of the proponents of this amendment to see quality education provided to MN children. They have obviously looked at this issue and done important work. Their desire to see change in education is admirable. Government funded education consumes massive resources and of course lawmakers and school administrators should require a level of accountability while seeking the very best outcomes possible. However, it seems to me that there is



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currently no constitutional or statutory obstacle to achieving the goals proponents are seeking.

Our association is concerned about SF 3977 because of the potential to harm our community, violate federal constitutional presumptions, and important societal norms.

We are concerned that by asserting that “all children have a fundamental right to a quality PUBLIC education” the state of Minnesota would create an unconstitutional preference for public education which could lead to the abolition of nonpublic education.

History shows this is not a crazy conspiracy theory. In 1925, the United States Supreme court invalidated a 1922 Oregon voter referendum that required all children to receive public education effectively banning nonpublic education. The case was *Pierce v. Society of Sisters* and the court found that

“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

If a child has a “right” to a “public education” – would parents who home educate or enroll their child in a nonpublic school be denying this right? The proponents say

that isn't their intent. Yet there are many who advocate for that very thing. Could parents now be subject to educational neglect investigations for denying the rights of their children?

We are concerned that the proposed amendment would not empower families but would empower the state as the ultimate authority in a determining a child's education.

By recasting the government's constitutional duty to provide educational opportunities using a child's rights formulation, the amendment rejects the constitutional presumption affirmed by the United States Supreme Court in *JR v Parham* that parents are presumed to act in the best interests of their children.

The idea of the state as the agent with final authority to decide what is in the best interests of children is also a principle embedded in the United Nations Convention on the Rights of the Child – a treaty which the US has declined to ratify for many good reasons and which our association has long opposed.

By setting up the state as the final arbiter of whether parents are appropriately providing for the education of their children, this amendment challenges some deeply rooted history, norms, and traditions of our constitutional republic.

With the greatest regard for the truth of the comments made regarding the issues of slavery and woman's suffrage but I would be troubled by the implication that

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opposition to this effort is racially or gender motivated simply because the current constitutional language was drafted in 1857.

Finally, the Amendment seems to undermine the important constitutional notion of separation of powers. The principle of the separation of powers is one of the great American ideas our founders wrote into our constitution to protect us from the power of unitary governing authorities. Our democratic system works best to protect citizen's rights when power is separated rather than combined.

Under this new approach, how would the various responsibilities of the "state" be assessed? Each branch of government would now have its own grant of power to argue that it is responsible to provide a quality public education and would be duty bound to assert it.

Ultimately, because these would be new constitutional questions, this issue would be decided by judicial elites rather than elected representatives. Our system allocates Policy debates on how to allocate resources and organize government institutions are best had in the legislature where elected representatives are the closest to the people and have more time and appropriate mechanisms to seek public input and to debate competing demands and values.

With so many new terms, principles, rights and duties in the proposed amendment it would take decades to unravel through constitutional litigation which would certainly involve both state and Federal Courts. And under the proposed

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amendment, one individual judge's swing vote could determine with finality Minnesota educational policy.

But the answer to issues of quality and equity is not more government - it is more empowered parents and families – empowered with more choices and not only public education.

When government grows, freedom shrinks. If we want better educational outcomes for our kids, we need more options for children not more government.

In closing, In Democracy in America, Alexis De Tocqueville wrote about one of the key attributes of American greatness that this amendment could undermine.

Everywhere that, at the head of a new undertaking, you see the government in France and a great lord in England, count on it that you will perceive an association in the United States.

In America I encountered all sorts of associations of which, I confess, I had no idea, and I often admired the infinite art with which the inhabitants of the United States managed to fix a common goal to the efforts of many men and to get them to advance to it freely.