

ADAM PAUL LAXALT  
Attorney General  
LAWRENCE VANDYKE (Nev. Bar No. 13643C)  
*Solicitor General*  
JOSEPH TARTAKOVSKY (Nev. Bar No. 13796C)  
*Deputy Solicitor General*  
KETAN D. BHIRUD (Nev. Bar No. 10515)  
*Head of Complex Litigation*  
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PAUL D. CLEMENT (D.C. Bar No. 433215)\*  
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500 New Jersey Ave., NW  
Seventh Floor  
Washington, DC 20001  
(202) 234-0090  
pclement@bancroftpllc.com  
\*Motion for admission *pro hac vice* pending

*Attorneys for Defendant*

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
**IN AND FOR CARSON CITY**

HELLEN QUAN LOPEZ, et al.,

Plaintiffs,

v.

DAN SCHWARTZ, in his official capacity as  
Treasurer of the State of Nevada,

Defendant.

Case No. 15-OC-00207-1B

Dept. No. II

**DEFENDANT'S NOTICE OF APPEAL**

Notice is hereby given that DAN SCHWARTZ, defendant above named, hereby  
appeals to the Supreme Court of Nevada from the Order Granting Motion for Preliminary  
Injunction entered in this action on the 11<sup>th</sup> day of January, 2016.

///

///

REC'D & FILED

2016 JAN 15 PM 3:46

Electronically Filed  
Jan 20 2016 03:53 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court


Attorney General's Office  
100 North Carson Street  
Carson City, NV 89701

1 The Nevada Supreme Court has jurisdiction to hear this appeal, as an order granting  
2 an injunction is appealable under Nevada Rule of Appellate Procedure 3A(b)(3).

3 DATED this 15<sup>th</sup> day of January, 2016.

4 Respectfully submitted,

5 Adam Paul Laxalt  
6 Attorney General

7 By:   
8 Lawrence VanDyke  
9 Solicitor General  
10 Joseph Tartakovsky  
11 Deputy Solicitor General  
12 Ketan Bhirud  
13 Head of Complex Litigation  
14 OFFICE OF THE ATTORNEY GENERAL  
15 100 North Carson Street  
16 Carson City, NV 89701-4717  
17 (775) 684-1100  
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19 JTartakovsky@ag.nv.gov  
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21 Paul D. Clement\*  
22 BANCROFT PLLC  
23 500 New Jersey Avenue, NW  
24 Seventh Floor  
25 Washington, DC 20001  
26 (202) 234-0090  
27 pclement@bancroftpllc.com

28 \*Motion for admission *pro hac vice* forthcoming

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 15<sup>th</sup> day of January, I deposited for mailing at Carson City, Nevada, a true and correct copy of the foregoing NOTICE OF APPEAL, addressed to:

DON SPRINGMEYER, ESQ.  
JUSTIN C. JONES, ESQ.  
BRADLEY S. SCHRAGER, ESQ.  
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP  
3556 E. RUSSELL ROAD, SECOND FLOOR  
LAS VEGAS, NEVADA 89120

DAVID G. SCIARRA, ESQ.  
AMANDA MORGAN, ESQ.  
EDUCATION LAW CENTER  
60 PARK PLACE, SUITE 300  
NEWARK, NEW JERSEY 07102

TAMERLIN J. GODLEY, ESQ.  
THOMAS PAUL CLANCY, ESQ.  
LAURA E. MATHE, ESQ.  
SAMUEL T. BOYD, ESQ.  
MUNGER, TOLLES & OLSON, LLP  
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MATTHEW T. DUSHOFF, ESQ.  
LISA J. ZASTROW, ESQ.  
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LAS VEGAS, NEVADA 89145

TIMOTHY D. KELLER  
INSTITUTE FOR JUSTICE  
398 S. MILL AVENUE, SUITE 301  
TEMPE, ARIZONA 85281

  
An Employee of the State of Nevada

REC'D & FILED

2016 JAN 15 PM 3:46

SUSAN HEWITT  
CLERK  
BY *[Signature]*  
DEPUTY

1 ADAM PAUL LAXALT  
Attorney General  
2 LAWRENCE VANDYKE (Nev. Bar No. 13643C)  
*Solicitor General*  
3 JOSEPH TARTAKOVSKY (Nev. Bar No. 13796C)  
*Deputy Solicitor General*  
4 KETAN D. BHIRUD (Nev. Bar No. 10515)  
*Head of Complex Litigation*  
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9 PAUL D. CLEMENT (D.C. Bar No. 433215)\*  
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10 500 New Jersey Ave., NW  
Seventh Floor  
11 Washington, DC 20001  
(202) 234-0090  
pclement@bancroftpllc.com  
12 \*Motion for admission *pro hac vice* pending

13 *Attorneys for Defendant*

14  
15  
16 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
17 **IN AND FOR CARSON CITY**

18 HELLEN QUAN LOPEZ, et al.,

19 Plaintiffs,

20 v.

21 DAN SCHWARTZ, in his official capacity as  
Treasurer of the State of Nevada,

22 Defendant.

Case No. 15-OC-00207-1B

Dept. No. II

23 **DEFENDANT'S CASE APPEAL STATEMENT**

24 1. Name of appellant filing this case appeal statement:

25 **Dan Schwartz, in his official capacity as Treasurer of the State of Nevada.**

26 2. Identify the judge issuing the decision, judgment, or order appealed from:

27 **The Honorable James E. Wilson, Jr.**  
28



3. Identify each appellant and the name and address of counsel for each appellant:

**Appellant: Dan Schwartz, Office of the State Treasurer, 101 N. Carson Street, Suite 4, Carson City, NV 89701. Name and address of counsel: Adam Paul Laxalt (Nev. Bar No. 12426), Lawrence VanDyke (Nev. Bar No. 13643C), Joseph Tartakovsky (Nev. Bar No. 13796C), Ketan Bhirud (Nev. Bar No. 10515), OFFICE OF THE ATTORNEY GENERAL, 100 North Carson Street, Carson City, NV 89701-4717; Paul D. Clement (D.C. Bar No. 433215), BANCROFT PLLC, 500 New Jersey Avenue, NW, Seventh Floor, Washington, DC 20001.**

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

**Respondents: HELLEN QUAN LOPEZ, individually and on behalf of her minor child, C.Q.; MICHELLE 4 GORELOW, individually and on behalf of her minor children, A.G. and H.G.; ELECTRA SKRYZDLEWSKI, individually and on behalf of her minor child, L.M.; JENNIFER CARR, 6 individually and on behalf of her minor children, W.C., A.C., and E.C.; LINDA JOHNSON, individually and on behalf of her minor child, K.J.; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S.**

**Respondents' appellate counsel (anticipated; also trial counsel): DON SPRINGMEYER (Nevada Bar No. 1021) JUSTIN C. JONES (Nevada Bar No. 8519) BRADLEY S. SCHRAGER (Nevada Bar No. 10217) WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP, 3556 E. Russell Road, Second Floor Las Vegas, Nevada 89120; TAMERLIN J. GODLEY; THOMAS PAUL CLANCY; LAURA E. MATHE; SAMUEL T. BOYD, MUNGER, TOLLES & OLSON LLP; 355 South Grand Avenue, Thirty-Fifth Floor Los Angeles, California 90071-1560; DAVID G. SCIARRA, AMANDA MORGAN (Nevada Bar No. 13200) EDUCATION LAW CENTER, 60 Park Place, Suite 300, Newark, NJ 07102.**

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney

1 permission to appear under SCR 42 (attach a copy of any district court order granting such  
2 permission):

3 **PAUL D. CLEMENT, TAMERLIN J. GODLEY; THOMAS PAUL CLANCY; LAURA E.**  
4 **MATHE; SAMUEL T. BOYD, and DAVID G. SCIARRA sought *pro hac vice* admission in**  
5 **the district court.**

6 6. Indicate whether appellant was represented by appointed or retained counsel in  
7 the district court:

8 **Appellant was represented by the Office of the Attorney General and Bancroft**  
9 **PLLC, as indicated in question #3.**

10 7. Indicate whether appellant is represented by appointed or retained counsel on  
11 appeal:

12 **Appellant is represented by the Office of the Attorney General and Bancroft**  
13 **PLLC, as indicated in question #3.**

14 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and  
15 the date of entry of the district court order granting such leave:

16 **No in forma pauperis.**

17 9. Indicate the date the proceedings commenced in the district court (e.g., date  
18 complaint, indictment, information, or petition was filed):

19 **Complaint was filed September 9, 2015.**

20 10. Provide a brief description of the nature of the action and result in the district  
21 court, including the type of judgment or order being appealed and the relief granted by the  
22 district court:

23 **Plaintiffs moved for a preliminary injunction, on three grounds, against**  
24 **enforcement of S.B. 302, Nevada's new Education Savings Account statute. The court**  
25 **granted the motion on one of the three grounds and on that ground preliminarily**  
26 **enjoined enforcement of S.B. 302. That order is being appealed by Appellant.**

27 **///**

28 **///**

1 11. Indicate whether the case has previously been the subject of an appeal to or  
2 original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court  
3 docket number of the prior proceeding:

4 A petition for a writ of mandamus challenging a district court order denying  
5 Petitioners' motion to intervene as defendant in the district court was filed on January  
6 15, 2016 and docketed under No. 69580. The case caption is:

7 AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN;  
8 JEFFREY SMITH; AND TRINA SMITH, Petitioners,  
9 vs.

10 THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND  
11 FOR THE COUNTY OF CARSON CITY; AND THE HONORABLE JAMES E.  
12 WILSON, DISTRICT JUDGE, Respondents,

13 and HELLEN QUAN LOPEZ, INDIVIDUALLY AND ON BEHALF OF HER MINOR  
14 CHILD, C. Q.; MICHELLE GORELOW, INDIVIDUALLY AND ON BEHALF OF HER  
15 MINOR CHILDREN, A. G. AND H. G.; ELECTRA SKRYZDLEWSKI, INDIVIDUALLY  
16 AND ON BEHALF OF HER MINOR CHILD, L.M.; JENNIFER CARR, INDIVIDUALLY  
17 AND ON BEHALF OF HER MINOR CHILDREN, W. C., A. C., AND E. C.; LINDA  
18 JOHNSON, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, K. J.;  
19 SARAH SOLOMON AND BRIAN SOLOMON, INDIVIDUALLY AND ON BEHALF OF  
20 THEIR MINOR CHILDREN, D. S., AND K. S.; AND DAN SCHWARTZ, NEVADA  
21 STATE TREASURER, IN HIS OFFICIAL CAPACITY, Real Parties in Interest.

22 12. Indicate whether this appeal involves child custody or visitation:

23 No.

24 ///

25 ///

26 ///

27 ///

28 ///

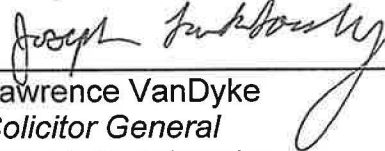
1 13. If this is a civil case, indicate whether this appeal involves the possibility of  
2 settlement:

3 **A settlement remains a possibility, but has not been seriously discussed.**

4 DATED this 15<sup>th</sup> day of January, 2016.

5 Respectfully submitted,

6 Adam Paul Laxalt  
7 Attorney General

8 By:   
9 Lawrence VanDyke  
10 Solicitor General

11 Joseph Tartakovsky  
12 Deputy Solicitor General

13 Ketan Bhirud  
14 Head of Complex Litigation  
15 OFFICE OF THE ATTORNEY GENERAL  
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26 Washington, DC 20001  
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28 [pclement@bancroftpllc.com](mailto:pclement@bancroftpllc.com)  
\*Motion for admission *pro hac vice* pending

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 15<sup>th</sup> day of January, 2016, I deposited for mailing at Carson City, Nevada, a true and correct copy of the foregoing DEFENDANT'S CASE APPEAL STATEMENT, addressed to:

DON SPRINGMEYER, ESQ.  
JUSTIN C. JONES, ESQ.  
BRADLEY S. SCHRAGER, ESQ.  
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP  
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LAS VEGAS, NEVADA 89145

TIMOTHY D. KELLER  
INSTITUTE FOR JUSTICE  
398 S. MILL AVENUE, SUITE 301  
TEMPE, ARIZONA 85281

  
An Employee of the State of Nevada

Judge: WILSON JR, JAMES E

Case No. 15 OC 00207 1B  
Ticket No.  
CTN:

LOPEZ, HELLEN QUAN et al

-vs-

By:

ALLEN, LARA DRSPND

By: DUSHOFF, MATTHEW T  
400 SOUTH RAMPART BLVD  
STE 400  
LAS VEGAS, NV 89145

Dob: Sex:  
Lic: Sid:  
ESPINOZA, AURORA DRSPND

By: DUSHOFF, MATTHEW T  
400 SOUTH RAMPART BLVD  
STE 400  
LAS VEGAS, NV 89145

Dob: Sex:  
Lic: Sid:  
FOUNDATION FOR EXCELLENCE DRSPND  
IN EDUCATION

By: HUTCHISON, MARK A  
  
10080 WEST ALTO DRIVE  
STE 200  
LAS VEGAS, NV 89145

Dob: Sex:  
Lic: Sid:  
HAIRR, AIMEE DRSPND

By: DUSHOFF, MATTHEW T  
400 SOUTH RAMPART BLVD  
STE 400  
LAS VEGAS, NV 89145

Dob: Sex:  
Lic: Sid:  
ROBBINS, ELIZABETH DRSPND

By: DUSHOFF, MATTHEW T  
400 SOUTH RAMPART BLVD  
STE 400  
LAS VEGAS, NV 89145

Dob: Sex:  
Lic: Sid:  
SCHWARTZ, DAN DRSPND

By:

Dob: Sex:  
Lic: Sid:  
SMITH, JEFFREY DRSPND

By: DUSHOFF, MATTHEW T  
400 SOUTH RAMPART BLVD  
STE 400  
LAS VEGAS, NV 89145

Dob: Sex:  
Lic: Sid:  
SMITH, TRINA DRSPND

By: DUSHOFF, MATTHEW T  
400 SOUTH RAMPART BLVD  
STE 400  
LAS VEGAS, NV 89145

Dob: Sex:  
Lic: Sid:

Plate#:  
Make:  
Year: Accident:  
Type:  
Venue:  
Location:

CARR, JENNIFER PLNTPET  
GORELOW, MICHELLE PLNTPET  
JOHNSON, LINDA PLNTPET  
LOPEZ, HELLEN QUAN PLNTPET  
SKRYZDLEWSKI, ELECTRA PLNTPET  
SOLOMAN, BRIAN PLNTPET  
SOLOMAN, SARAH PLNTPET

Bond: Set:  
Type: Posted:

Charges:

Ct. Offense Dt: Cvr:  
Arrest Dt:  
Comments:

Ct. Offense Dt: Cvr:  
Arrest Dt:  
Comments:

Ct. Offense Dt: Cvr:  
Arrest Dt:  
Comments:

Ct. Offense Dt: Cvr:  
Arrest Dt:  
Comments:

Ct.

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Offense Dt: Cvr:  
Arrest Dt:  
Comments:

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Ct.

Offense Dt: Cvr:  
Arrest Dt:  
Comments:

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Ct.

Offense Dt: Cvr:  
Arrest Dt:  
Comments:

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Ct.

Offense Dt: Cvr:  
Arrest Dt:  
Comments:

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**Sentencing:**

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No.	Filed	Action	Operator	Fine/Cost	Due
1	01/15/16	DEFENDANT'S CASE APPEAL STATEMENT	1BCGRIBBLE	0.00	0.00
2	01/15/16	DEFENDANT'S NOTICE OF APPEAL FILED	1BCGRIBBLE	24.00	0.00
3	01/15/16	NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION	1BCGRIBBLE	0.00	0.00
4	01/12/16	NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION	1BCGRIBBLE	0.00	0.00
5	01/11/16	ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION	1BJULIEH	0.00	0.00
6	01/08/16	HEARING HELD: The following event: STATUS CHECK scheduled for 01/08/2016 at 1:30 pm has been resulted as follows:  Result: HEARING HELD Judge: WILSON JR, JAMES E Location: DEPT II	1BJHIGGINS	0.00	0.00
7	01/07/16	HEARING HELD: The following event: MOTION HEARING - CIVIL scheduled for 01/06/2016 at 1:30 pm has been resulted as follows:  Result: HEARING HELD Judge: WILSON JR, JAMES E Location: DEPT II	1BJULIEH	0.00	0.00
8	01/06/16	MEDIA REQUEST & ORDER ALLOWING CAMERAS IN THE COURTROOM	1BJULIEH	0.00	0.00
9	01/05/16	MOTION TO ASSOCIATE COUNSEL	1BVANESSA	0.00	0.00
10	12/30/15	DECISION AND ORDER, COMPRISING FINDINGS OF FACT AND CONCLUSIONS OF LAW	1BJULIEH	0.00	0.00
11	12/30/15	ORDER STRIKING PROPOSED INTERVENORS' PLEADING AND PAPERS	1BJULIEH	0.00	0.00
12	12/30/15	ORDER GRANTING MOTION FOR LEAVE TO FILE AMICUS BRIEF	1BJULIEH	0.00	0.00
13	12/29/15	ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE	1BJULIEH	0.00	0.00
14	12/28/15	ORDER FOR MOTION GRANTING LEAVE TO PARTICIPATE AS AMICI CURIAE	1BJULIEH	0.00	0.00
15	12/28/15	ORDER ADMITTING LAURA E. MATHE TO PRACTICE	1BJULIEH	0.00	0.00
16	12/28/15	ORDER ADMITTING THOMAS PAUL CLANCY TO PRACTICE	1BJULIEH	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
17	12/28/15	ORDER ADMITTING DAVID GEORGE SCIARRA TO PRACTICE	1BJULIEH	0.00	0.00
18	12/28/15	ORDER ADMITTING SAMUEL T. BOYD TO PRACTICE	1BJULIEH	0.00	0.00
19	12/28/15	ORDER ADMITTING TAMERLIN JANE GODLEY TO PRACTICE	1BJULIEH	0.00	0.00
20	12/24/15	ORDER DENYING DEFENDANT'S MOTION TO DISMISS	1BVANESSA	0.00	0.00
21	12/24/15	REQUEST FOR SUBMISSION	1BVANESSA	0.00	0.00
22	12/24/15	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCGRIBBLE	0.00	0.00
23	12/24/15	ORDER FOR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	1BCGRIBBLE	0.00	0.00
24	12/22/15	REQUEST TO SUBMIT MOTION FOR LEAVE TO FILE AMICUS BRIEF	1BJULIEH	0.00	0.00
25	12/17/15	DEFENDANTS REPLY BRIEF IN SUPPORT OF COUNTERMOTION TO DISMISS	1BCCOOPER	0.00	0.00
26	12/16/15	REQUEST TO SUBMIT PROPOSED AMICI CURIAE'S MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE	1BVANESSA	0.00	0.00
27	12/15/15	PLAINTIFFS' REQUEST FOR SUBMISSION OF MOTIONS TO ASSOCIATE COUNSEL	1BVANESSA	0.00	0.00
28	12/10/15	REQUEST FOR SUBMISSION	1BVANESSA	0.00	0.00
29	12/09/15	REQUEST FOR SUBMISSION	1BVANESSA	0.00	0.00
30	12/09/15	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCCOOPER	0.00	0.00
31	12/09/15	ORDER GRANTING EXTENSION	1BCCOOPER	0.00	0.00
32	12/09/15	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCCOOPER	0.00	0.00
33	12/08/15	ORDER DENYING REQUEST TO SUBMIT	1BCCOOPER	0.00	0.00
34	12/07/15	NOTICE OF ASSOCIATION OF COUNSEL	1BCGRIBBLE	0.00	0.00
35	12/07/15	NOTICE OF SUBSTITUTION OF COUNSEL FOR INTERVENOR DEFENDANTS	1BCGRIBBLE	0.00	0.00
36	12/07/15	PLAINTIFFS' REQUEST FOR SUBMISSION OF MOTION TO STRIKE	1BCGRIBBLE	0.00	0.00
37	12/07/15	PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STRIKE PROSPECTIVE INTERVENORS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS	1BCGRIBBLE	0.00	0.00
38	12/01/15	ERRATA TO MOTION TO ASSOCIATE COUNSEL	1BVANESSA	0.00	0.00
39	11/25/15	PARENT-INTERVENORS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE	1BVANESSA	0.00	0.00
40	11/24/15	PLAINTIFFS' REPLY ON ITS MOTION FOR A PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS	1BVANESSA	0.00	0.00
41	11/24/15	MOTION TO APPEAR AS AMICI CURIAE; POINTS AND AUTHORITIES; AND BRIEF OF	1BVANESSA	0.00	0.00



## AMICI

No.	Filed	Action	Operator	Fine/Cost	Due
42	11/23/15	MOTION OF NEVADA STATE EDUCATION ASSOCIATION AND NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION	1BVANESSA	0.00	0.00
43	11/19/15	AFFIRMATION PURSUANT TO NRS 239.030 (2)	1BCGRIBBLE	0.00	0.00
44	11/19/15	MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE Receipt: 42089 Date: 11/19/2015	1BCGRIBBLE	218.00	0.00
45	11/19/15	PLAINTIFFS' MOTION TO STRIKE PROSPECTIVE INTERVENORS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS	1BCGRIBBLE	0.00	0.00
46	11/18/15	TRIAL DATE MEMO	1BCCOOPER	0.00	0.00
47	11/18/15	MOTION FOR LEAVE TO FILE PROPOSED BRIEF OF AMICUS CURIAE THE BECKET FUND FOR RELIGIOUS LIBERTY	1BCCOOPER	0.00	0.00
48	11/18/15	MOTION TO ASSOCIATE COUNSEL	1BCCOOPER	0.00	0.00
49	11/16/15	REQUEST TO SUBMIT MOTION FOR LEAVE TO FILE AMICUS BRIEF	1BVANESSA	0.00	0.00
50	11/16/15	MOTION FOR LEAVE TO FILE AMICUS BRIEF	1BVANESSA	0.00	0.00
51	11/13/15	NOTICE TO SET	1BCGRIBBLE	0.00	0.00
52	11/12/15	STIPULATION TO EXTEND BRIEFING SCHEDULE, SET HEARING, AND PROVIDE FOR ELECTRONIC SERVICE	1BCCOOPER	0.00	0.00
53	11/09/15	PARENT-INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS (STRICKEN PER ORDER FILED 12/30/15)	1BCGRIBBLE	0.00	0.00
54	11/05/15	AFFIRMATION PURSUANT TO NRS 239.030	1BVANESSA	0.00	0.00
55	11/05/15	OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND COUNTERMOTION TO DISMISS	1BVANESSA	0.00	0.00
56	10/20/15	PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND POINTS AND AUTHORITIES IN SUPPORT THEREOF	1BVANESSA	0.00	0.00
57	10/15/15	REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE	1BCCOOPER	0.00	0.00
58	10/05/15	PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE	1BJULIEH	0.00	0.00
59	10/02/15	AMENDED NOTICE TO SET (STRICKEN PER ORDER FILED 12/30/15)	1BCGRIBBLE	0.00	0.00
60	10/01/15	PLAINTIFFS' MOTION TO ASSOCIATE COUNSEL, TAMERLIN JAME GODLEY, ESQ.	1BCGRIBBLE	0.00	0.00
61	10/01/15	PLAINTIFFS' MOTION TO ASSOCIATE COUNSEL, DAVID GEORGE SCIARRA, ESQ.	1BCGRIBBLE	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
62	10/01/15	PLAINTIFFS' MOTION TO ASSOCIATE COUNSEL, THOMAS PAULL CLANCY, ESQ.	1BCGRIBBLE	0.00	0.00
63	10/01/15	PLAINTIFFS' MOTION TO ASSOCIATE COUNSEL, LAURA E. MATHE, ESQ.	1BCGRIBBLE	0.00	0.00
64	10/01/15	PLAINTIFFS' MOTION TO ASSOCIATE COUNSEL, SAMUEL T. BOYD	1BCGRIBBLE	0.00	0.00
65	09/25/15	NOTICE TO SET	1BVANESSA	0.00	0.00
66	09/25/15	ACCEPTANCE OF SERVICE OF SUMMONS AND COMPLAINT	1BVANESSA	0.00	0.00
67	09/17/15	INTEVENOR DEFENDANTS MOTION TO ASSOCIATE COUNSEL (STRICKEN PER ORDER FILED 12/30/15)	1BCCOOPER	0.00	0.00
68	09/17/15	MOTION TO INTERVENE AS DEFENDANTS	1BCCOOPER	0.00	0.00
69	09/17/15	PLAINTIFF'S/PETITIONER'S INITIAL APPEARANCE AFFIRMATION PURSUANT TO NRS 239.030	1BCCOOPER	0.00	0.00
70	09/17/15	ADDITIONAL DEFENDANT (TRINA SMITH) Receipt: 41241 Date: 09/17/2015	1BCCOOPER	30.00	0.00
71	09/17/15	ADDITIONAL DEFENDANT (JEFFREY SMITH) Receipt: 41241 Date: 09/17/2015	1BCCOOPER	30.00	0.00
72	09/17/15	ADDITIONAL DEFENDANT (LARA ALLEN) Receipt: 41241 Date: 09/17/2015	1BCCOOPER	30.00	0.00
73	09/17/15	ADDITIONAL DEFENDANT (ELIZABETH ROBBINS) Receipt: 41241 Date: 09/17/2015	1BCCOOPER	30.00	0.00
74	09/17/15	ADDITIONAL DEFENDANT (AURORA ESPINOZA) Receipt: 41241 Date: 09/17/2015	1BCCOOPER	30.00	0.00
75	09/17/15	INTERVENTOR -DEFENDANTS ANSWER TO PLAINTIFFS COMPLAINT Receipt: 41286 Date: 09/21/2015 (STRICKEN PER ORDER FILED 12/30/15)	1BCCOOPER	218.00	0.00
76	09/11/15	ISSUING SUMMONS	1BVANESSA	0.00	0.00
77	09/09/15	ADDITIONAL PLAINTIFF - BRIAN SOLOMAN Receipt: 41108 Date: 09/09/2015 Receipt 41108 reversed by 41111 on 09/09/2015. Receipt: 41113 Date: 09/09/2015	1BCGRIBBLE	30.00	0.00
78	09/09/15	ADDITIONAL PLAINTIFF - SARAH SOLOMAN Receipt: 41108 Date: 09/09/2015 Receipt 41108 reversed by 41111 on 09/09/2015. Receipt: 41113 Date: 09/09/2015	1BCGRIBBLE	30.00	0.00
79	09/09/15	ADDITIONAL PLAINTIFF - LINDA JOHNSON Receipt: 41108 Date: 09/09/2015 Receipt 41108 reversed by 41111 on 09/09/2015. Receipt: 41113 Date: 09/09/2015	1BCGRIBBLE	30.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
80	09/09/15	ADDITIONAL PLAINTIFF - JENNIFER CARR Receipt: 41108 Date: 09/09/2015 Receipt 41108 reversed by 41111 on 09/09/2015. Receipt: 41113 Date: 09/09/2015	1BCGRIBBLE	30.00	0.00
81	09/09/15	ADDITIONAL PLAINTIFF - ELECTRA SKRYZDLEWSKI Receipt: 41108 Date: 09/09/2015 Receipt 41108 reversed by 41111 on 09/09/2015. Receipt: 41113 Date: 09/09/2015	1BCGRIBBLE	30.00	0.00
82	09/09/15	ADDITIONAL PLAINTIFF - MICHELLE GORELOW Receipt: 41108 Date: 09/09/2015 Receipt 41108 reversed by 41111 on 09/09/2015. Receipt: 41113 Date: 09/09/2015	1BCGRIBBLE	30.00	0.00
83	09/09/15	COMPLAINT Receipt: 41113 Date: 09/09/2015	1BCGRIBBLE	265.00	0.00
Total:				1,055.00	0.00
Totals By: COST				1,055.00	0.00
INFORMATION				0.00	0.00
*** End of Report ***					

REC'D & FILED

2016 JAN 11 PM 2:33

SUSAN MERRIWETHER  
CLERK

BY SW DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY

HELLEN QUAN LOPEZ, individually  
and on behalf of her minor child, C.Q.;  
MICHELLE GORELOW, individually  
and on behalf of her minor children,  
A.G. and H.G.; ELECTRA  
SKRYZDLEWSKI, individually and on  
behalf of her minor child, L.M.;  
JENNIFER CARR, individually and on  
behalf of her minor children, W.C.,  
A.C., and E.C.; LINDA JOHNSON,  
individually and on behalf of her minor  
child, K.J.; SARAH and BRIAN  
SOLOMON, individually and on behalf  
of their minor children, D.S. and K.S.,

CASE NO: 15 OC 00207 1B

DEPT.: 2

Plaintiffs,

vs.

ORDER GRANTING MOTION FOR  
PRELIMINARY INJUNCTION

DAN SCHWARTZ, IN HIS OFFICIAL  
CAPACITY AS TREASURER OF THE  
STATE OF NEVADA,

Defendant.

PROCEDURAL BACKGROUND

Before the Court is Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs are parents whose children attend Nevada public schools. Plaintiff Parents seek an injunction to stop the State Treasurer from implementing Senate Bill 302 ("SB 302") which authorizes educational savings accounts. Plaintiff Parents alleged SB 302 violates certain sections of Article 11 of the Nevada Constitution. State Treasurer Dan Schwartz

1 opposed the motion. The court authorized the filing of several amicus briefs, and denied  
2 a motion to intervene. The court held a hearing on the motion.

### 4 **ISSUES AND CONCLUSIONS**

5 As a preliminary matter, the court emphasizes that the issues before it do not  
6 include the educational or public policy merits of the education savings account  
7 provisions of SB 302. The educational and public policy issues were debated and voted  
8 upon by the legislature and approved by the governor. Courts have no super-veto power,  
9 based upon public policy grounds, over legislative enactments. Therefore, this court  
10 cannot consider whether the SB 302 provisions for education savings accounts are wise,  
11 workable, or worthwhile.

12 Plaintiff Parents argued SB 302 violates the Nevada Constitution in three ways:

13 First, it violates Article 11, Section 3 and Sections 6.1 and 6.2 because those  
14 sections prohibit the transfer of funds appropriated for the operation of the  
15 public schools to any other use.

16 Second, it violates Article 11, Section 6.2 because it removes from the  
17 public school system a portion of the funds the Legislature has “deemed  
18 sufficient” to maintain and operate the public schools.

19 Third, it violates Article 11, Section 2 because it creates a non-uniform  
20 system of schools, and uses public funds to create the non-uniform system of  
21 schools.

22 Having examined the submissions the parties and the amicus briefs, and having  
23 heard oral argument by the parties, this court concludes Plaintiff Parents have failed to  
24 carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada  
25 Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302  
26 violates Article 11, Sections 6.1 and 6.2, and that irreparable harm will result if an  
27 injunction is not entered. Therefore an injunction will issue to enjoin Treasurer  
28 Schwartz from implementing SB 302.

## FINDINGS OF FACT

### Public School Funding

The Nevada Constitution requires the legislature to support and maintain public schools by direct legislative appropriation from the general fund, and to provide the money the legislature deems to be sufficient, when combined with the local money, to fund the public schools for the next biennium. To fulfill its constitutional obligation to fund education, the legislature created the Nevada Plan, statutes which establish the process by which the legislature determines the biennial funding for education. Under the Nevada Plan the legislature establishes basic support guarantees for all school districts.

The basic support guarantee is the amount of money each school district is guaranteed to fund its operations. The amount for each school district is determined by the number of pupils in that school district. After the legislature determines how much money each local school district can contribute, the legislature makes up the difference between the district's contribution and the amount of the basic support guarantee.

Under NRS 387.1233(3), the so-called "hold harmless" provision, a school district must be funded based on the prior year's enrollment figure if the school district experiences a reduction in enrollment of five percent or more.

Funds appropriated by the legislature from the general fund sufficient to satisfy each district's basic support guarantee are deposited into the State Distributive School Account ("DSA"), which is an account within the state general fund.

The DSA, in addition to receiving such appropriations from the general fund, also receives money from other sources, including the Permanent School Fund ("PSF"). The legislature created the PSF to implement Article 11, Section 3 of the Nevada Constitution, which provides that specified property, including lands granted by Congress to Nevada for educational purposes and the proceeds derived from these sources, are pledged for educational purposes and the money therefrom must not be

1 transferred to other funds for other uses. Section 3 money is kept in the PSF, and  
2 interest on Section 3 money is transferred to the DSA.

3 The interest on the PSF constitutes a small portion of the funds in the DSA. In  
4 2014, of the \$1.4 billion in the DSA that came from the State Government, \$1.1 billion,  
5 or 78 percent, came from the general fund, and \$1.6 million, or 0.14%, came from the  
6 PSF.<sup>1</sup>

7 In June 2015, the legislature enacted Senate Bill 515 ("SB 515") to ensure  
8 sufficient funding for K-12 public education for the 2015-2017 biennium. The legislature  
9 established an estimated weighted average basic support guarantee of \$5,710 per pupil  
10 for FY 2015-16 and \$5,774 per pupil for FY 2016-17.<sup>2</sup> The legislature appropriated \$1.1  
11 billion from the general fund for the DSA for FY 2015-16 and more than \$933 million for  
12 FY 2016-17, for a total of more than \$2 billion for the biennium.

### 13 14 **Senate Bill 302**

15 As part of the education reform measures enacted in 2015, the legislature passed  
16 and the governor signed SB 302 which authorized the State Treasurer to use public  
17 school funds to create private accounts called education saving accounts ("ESAs"). The  
18 money in these accounts may only be used to pay for non-public education expenses,  
19 including but not limited to private school tuition, tutoring, home-based education  
20 curricula, and transportation.

21 Under SB 302 the State Treasurer may enter into written agreements with a  
22 parent of a school aged child who has been enrolled in a Nevada public school for not  
23 less than 100 consecutive school days. If a written agreement is entered into, the parent  
24 must establish an ESA on behalf of the child, and the treasurer must deposit the grant  
25 money into the ESA. For a child with a disability, or a child who lives in a low income

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26  
27 <sup>1</sup>See [http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf)  
28 [DSA-SummaryForBiennium.pdf](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf).

<sup>2</sup>Id. Section 7.

1 household, the amount of the grant is 100% of the statewide average basic support per  
2 pupil; for all other children the amount of the grant is 90% of the statewide average  
3 basic support per pupil. For the 2015-16 school year the grant amounts will be \$5,710  
4 per disabled or low income pupil, and \$5,139 for all other pupils. Funds deposited into  
5 ESAs are subtracted from the legislative appropriation to fund the school district in  
6 which the child who is receiving the ESA grant resides.

7 Under SB 302 general fund money appropriated to fund the operation of the  
8 public schools will be used to fund education savings accounts.

9 SB 302 does not limit the number of ESAs that can be established, cap the  
10 amount of public school funding that can be transferred to ESAs, or impose any  
11 household income limitations on eligibility.

## 12 13 **PRINCIPLES OF LAW**

### 14 **Judicial Deference**

15 Judicial deference to duly enacted legislation is derived from three “first  
16 principles” of state constitutional jurisprudence.<sup>3</sup>

17 First, all political power originates with the people.<sup>4</sup>

18 Second, unlike the Constitution of the United States which granted specific  
19 powers to the federal government and retained all other powers in the people, the  
20 Nevada Constitution granted all of the people’s political power to the government of  
21 Nevada except as limited in the Nevada Constitution.<sup>5</sup> The Nevada government consists  
22 of three branches, the legislative, executive, and judicial. The public officials the people  
23 elect to the constitutional offices in each branch exercise all of the people’s political

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24  
25 <sup>3</sup>*Gibson v. Mason*, 5 Nev. 283, 291-99, 1869 Nev. LEXIS 46 (1869); *King v.*  
26 *Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948). See *Bush v. Holmes*, 919  
27 So.2d 392, 414 (FL 2006) Bell, J. Dissent.

28 <sup>4</sup>*Gibson* at 291.

<sup>5</sup>*Id.*



1 power except for those powers expressly denied by the Nevada Constitution.<sup>6</sup> Each  
2 branch is endowed with and confined to the execution of powers peculiar to itself, and  
3 each branch is supreme within its respective sphere.<sup>7</sup> Thus, the legislature is supreme in  
4 its field of making the law so long as it does not contravene some express or necessarily  
5 implied limitation appearing in the constitution itself.<sup>8</sup> The people's grant of powers  
6 upon the legislature was general in terms with specified restrictions.<sup>9</sup> The legislature has  
7 general legislative or policy-making power over such issues as the education of Nevada's  
8 children except as those powers are specifically limited by an express or necessarily  
9 implied provision in the Nevada Constitution or the U.S. Constitution.<sup>10</sup>

10 Third, because general legislative or policy-making power is vested in the  
11 legislature, the power of judicial review over legislative enactments is strictly limited.  
12 "Statutes are presumed to be valid, and the challenger bears the burden of showing that  
13 a statute is unconstitutional."<sup>11</sup> "When making a facial challenge to a statute, the  
14 challenger generally bears the burden of demonstrating that there is no set of  
15 circumstances under which the statute would be valid."<sup>12</sup> "In case of doubt, every  
16 possible presumption will be made in favor of the constitutionality of a statute, and  
17 courts will interfere only when the Constitution is clearly violated."<sup>13</sup> "Further, the

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18  
19 <sup>6</sup>*Id.* at 291-92.

20 <sup>7</sup>*Id.* at 292.

21 <sup>8</sup>*Gibson* at 292; *King* at 542.

22 <sup>9</sup>*Gibson* at 292.

23 <sup>10</sup>*King* at 542.

24 <sup>11</sup>*Busefink v. State*, 128 Nev. A.O. 49, 286 P.3d 599, 602, (2012), citing *Flamingo*  
25 *Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009)  
(quoting *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)).

26 <sup>12</sup>*Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep't of Taxation*, 130 Nev. A.O.  
27 73, 334 P.3d 392, 398 (2014).

28 <sup>13</sup>*List v. Whisler*, 99 Nev. 133, 137-138, 660 P.2d 104, 106 (1983), citing *City of*  
*Reno v. County of Washoe*, 94 Nev. 327, 333-334, 580 P.2d 460 (1978);

1 presumption of constitutional validity places upon those attacking a statute the burden  
2 of making a clear showing that the statute is unconstitutional.”<sup>14</sup> The Nevada Supreme  
3 Court has “concede[d] the elasticity of the [Nevada] constitution, as a living thing, to be  
4 interpreted in the light of new and changing conditions,” and that the Supreme Court  
5 “may not condemn legislation simply because the object or purpose is new (no matter  
6 how astonishing or revolutionary) so long as a constitutional limitation is not  
7 violated....”<sup>15</sup>

### 8 9 **Preliminary Injunction**

10 A preliminary injunction may issue “upon a showing that the party seeking it  
11 enjoys a reasonable probability of success on the merits and that the defendant’s  
12 conduct, if allowed to continue, will result in irreparable harm for which compensatory  
13 damage is an inadequate remedy.”

### 14 15 **ANALYSIS**

16 Plaintiff Parents have made a facial challenge to SB 302. Using the above  
17 principles of law the court must decide whether Plaintiff Parents have made a clear  
18 showing that SB 302 violates one or more specified sections of Article 11 of the Nevada  
19 Constitution, and that the plaintiffs will suffer irreparable harm.

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*Mengelkamp v. List*, 88 Nev. 542, 545, 501 P.2d 1032 (1972); *State of Nevada v.*  
25 *Irwin*, 5 Nev. 111 (1869).

26 <sup>14</sup>*List v. Whisler* at 138, citing *Ottenheimer v. Real Estate Division*, 97 Nev. 314,  
27 315-316, 629 P.2d 1203 (1981); *Damus v. County of Clark*, 93 Nev. 512, 516, 569  
28 P.2d 933 (1977); *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530  
P.2d 108 (1974).

<sup>15</sup>*King* at 543.

1 **Reasonable Probability of Success on the Merits**

2  
3 *Plaintiff Parents have not clearly shown that SB 302 violates Article 11, Section 3.*

4  
5 Plaintiff Parents pointed out that Article 11, Section 3 provides that funds from  
6 sources specified in Section 3 are “pledged for educational purposes and the money  
7 therefrom must not be transferred to other funds for other uses.” They cited *State ex rel.*  
8 *Keith v. Westerfield*<sup>16</sup> for the proposition that funds appropriated for the public schools  
9 under Article 11 can only be used for the support of the public schools and no portion of  
10 those funds can be used for non-public school expenditures “without disregarding the  
11 mandates of the constitution.”<sup>17</sup> Plaintiff Parents argued that because SB 302, Section  
12 16.1 directs the State Treasurer to transfer into ESAs the basic support guarantee per-  
13 pupil funding appropriated by the legislature for the operation of the school district in  
14 which the ESA-eligible child resides, SB 302, Section 16.1 violates Article 11, Section 3.

15 The Treasurer countered that SB 302 does not mandate the use of Section 3  
16 money for the ESA program, and the Distributive School Account has sufficient money  
17 to fund the ESA program without using Section 3 money. The Treasurer argued that  
18 based upon these facts the Plaintiff Parents have not met their burden of proof.

19 The court concludes the Treasurer’s argument is correct. Because SB 302 does  
20 not require the use of Section 3 money for the ESA program, the ESA program can be  
21 funded without Section 3 money, and therefore Plaintiff Parents have not met their  
22 burden of clearly proving that there is no set of circumstances under which the statute  
23 would be valid, and therefore Plaintiff Parents have failed to show a reasonable  
24 likelihood of success on the merits on the Article 11, Section 3 issue.

25 The Treasurer also argued that the ESA program was created for and serves  
26 educational purposes. The court concludes this argument lacks merit because the

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27 <sup>16</sup>23 Nev. 468 (1897).

28 <sup>17</sup>*Id.* at 121.

1 Nevada Supreme Court held in *State ex rel. Keith v. Westerfield* that the legislature is  
2 prohibited from using Article 11 Section 3 funds for any purpose except that immediately  
3 connected with the public school system.

4 The court concludes the other arguments made by the Treasure on the Article 11,  
5 Section 3 issue also lack merit.

6  
7 *Plaintiff Parents have clearly shown that SB 302 violates Article 11, Sections 6.1 and*  
8 *6.2.*

9 Plaintiff Parents argued SB 302, Section 16(1) violates Article 11, Sections 6.1 and  
10 6.2 because general funds appropriated to fund the operation of the public schools must  
11 only be used to fund the operation of the public schools, but under SB 302 some amount  
12 of general funds appropriated to fund the operation of the public schools will be diverted  
13 to fund education saving accounts.

14 Under SB 302 general fund money appropriated to fund the operation of the  
15 public schools will be used to fund education savings accounts. The legislature  
16 recognized that general fund money appropriated to fund the operation of public schools  
17 would be used to fund education savings accounts. This is evidenced by the legislature's  
18 amendment of NRS 387.045 which provides:

19 1. No portion of the public school funds or of the money specially  
20 appropriated for the purpose of public schools shall be devoted to any  
other object or purpose.

21 2. No portion of the public school funds shall in any way be segregated,  
22 divided or set apart for the use or benefit of any sectarian or secular society  
or association.

23 The legislature amended that statute to make an exception so funds appropriated for  
24 public schools can be used to pay the education savings account grants established by SB  
25 302.

26 Sections 6.1 and 6.2 require the legislature to support public schools by direct  
27 legislative appropriation from the general fund before any other appropriation is  
28 enacted. Those sections do not expressly say that the general funds appropriated to fund

1 the operation of the public schools must only be used to fund the operation of the public  
2 schools. Sections 6.1 and 6.2 do however necessarily imply that the legislature must use  
3 the general funds appropriated to fund the operation of the public schools only to fund  
4 the operation of the public schools.

5 Sections 6.1 and 6.2 mandate that the legislature make appropriations to fund the  
6 operation of the public schools. An “appropriation” is “the act of appropriating to ... a  
7 particular use;” or “something that has been appropriated; *specif*: a sum of money set  
8 aside or allotted by official or formal action for a specific use (as from public revenue by  
9 a legislative body that stipulates the amount, manner, and purpose of items of  
10 expenditure)....”<sup>18</sup> To “appropriate” means “to set apart for or assign to a particular  
11 purpose or use in exclusion of all others.”<sup>19</sup> Therefore, Sections 6.1 and 6.2 require the  
12 legislature to set apart or assign money to be used to fund the operation of the public  
13 schools, to the exclusion of all other purposes. Because some amount of general funds  
14 appropriated to fund the operation of the public schools will be diverted to fund  
15 education saving accounts under SB 302, that statute violates Sections 6.1 and 6.2 of  
16 Article 11.

17 Plaintiff Parents have met their burden of clearly proving that there is no set of  
18 circumstances under which the statute would be valid, and therefore Plaintiff Parents  
19 have shown a reasonable likelihood of success on the merits on the Article 11, Sections  
20 6.1 and 6.2 issue.

21  
22 *Plaintiff Parents have clearly shown that SB 302 violates Article 11, Section 6.2.*

23 Plaintiff Parents argued SB 302 violates Article 11, Section 6.2 because: “The  
24 direct legislative appropriation can only be used ‘to fund the operation of the public  
25  
26

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27 <sup>18</sup>Webster’s Third New International Dictionary 106 (2002).

28 <sup>19</sup>Id.

1 schools..., ””<sup>20</sup> but SB 302 diverts funds from the DSA thereby reducing the amount  
2 deemed sufficient by the legislature to fund public education.<sup>21</sup>

3 The Treasurer argued the legislature complied with Section 6.2 when it passed SB  
4 515 which guarantees a minimum fixed amount of funding through the hold harmless  
5 guarantee and a minimum per-pupil amount of funding with no upper limit, i.e., the  
6 per-pupil basic support guarantee. The Treasurer pointed out that the legislature passed  
7 SB 515 just three days after it passed SB 302, and that “when the legislature enacts a  
8 statute, [the Nevada Supreme Court] presumes that it does so ‘with full knowledge of  
9 existing statutes relating to the same subject.’”<sup>22</sup>

10 The court concludes Plaintiff Parents’ argument is correct. Under Sections 6.1  
11 and 6.2 the legislature must appropriate from the general fund an amount for the  
12 operation of the public schools. The legislature appears to have appropriated money  
13 from the general fund into one account to fund the operation of the public schools and  
14 to fund ESAs. Because Section 6.2 requires the legislature to appropriate money to fund  
15 the operation of the public schools, it is necessarily implied that the money appropriated  
16 to fund the operation of the public schools will be used to fund the operation of the  
17 public schools and not for other purposes. SB 302’s diversion of funds from the Section  
18 6 direct legislative appropriation from the general fund to fund the operation of the  
19 public schools reduces the amount deemed sufficient by the legislature to fund public  
20 education and therefore violates Article 11, Section 6.2.

21 Plaintiff Parents have met their burden of clearly proving that there is no set of  
22 circumstances under which SB 302 would be valid, and therefore Plaintiff Parents have  
23

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24 <sup>20</sup>Pls.’ Mot. For Prelim. Inj. p. 11.

25 <sup>21</sup>Pls.’ Reply on Its Mot. For Prelim. Inj. p. 1.

26 <sup>22</sup>*Division of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d  
27 482, 486 (2000) citing *City of Boulder v. General Sales Drivers*, 101 Nev. 117,  
28 118-19, 694 P.2d 498, 500 (1985).

1 shown a reasonable likelihood of success on the merits on the Article 11, Sections 6.2  
2 issue.

3  
4 *SB 302 does not create a non-uniform system of schools, or use public funds to create a  
5 system of education other than the type mandated in Article 11 Section 2.*

6 Article 11 Section 2 requires the legislature establish and maintain a “uniform  
7 system of common schools.” Plaintiff Parents argued the Legislature has enacted an  
8 extensive framework of requirements to ensure the public schools are open to all  
9 children and meet performance and accountability standards. They argued SB 302  
10 allows public school funds to pay for private schools and other entities that are not  
11 subject to the requirements applied to public schools, are unregulated, and not uniform.  
12 For example, they argue, the private schools, online programs and parents receiving  
13 public school funds under SB 302 do not have to use the state adopted curriculum  
14 taught in public schools; meet public school teaching requirements; comply with other  
15 educational standards and accountability requirements established for public schools;  
16 and they do not have to accept all students so they may discriminate based on a  
17 student’s religion or lack thereof, academic achievement, English language learner  
18 status, disability, homelessness or transiency, gender, gender identity and sexual  
19 orientation.

20 Plaintiffs also alleged that in mandating the establishment of a public school  
21 system, the Nevada Constitution has, in the same breath, forbidden the Legislature from  
22 establishing a separate, publicly-funded alternative to Nevada’s uniform system of  
23 public schools. They cited *State v. Javier C.*<sup>23</sup> for the proposition that “Nevada follows  
24 the maxim ‘*expressio unius est exclusio alterius*,’ the expression of one thing is the  
25 exclusion of another”; and *King v. Bd. of Regents of Univ. of Nev.*<sup>24</sup> for the proposition  
26 that “[t]his rule applies as forcibly to the construction of written Constitutions as other

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27 <sup>23</sup>128 Nev. A.O. 50, 289 P.3d 1194, 1197 (2012).  
28

<sup>24</sup>65 Nev. 533, 556, 200 P.2d 221 (1948).



1 instruments.” Plaintiff Parents argued that under this principle, the legislature may not  
2 enact statutes that achieve constitutional goals by means different from those explicitly  
3 provided for in the Constitution. The Nevada Supreme Court held that “[e]very positive  
4 direction” in the Nevada Constitution “contains an implication against anything  
5 contrary to it which would frustrate or disappoint the purpose of that provision.”<sup>25</sup>

6 Plaintiff Parents have failed to show that the ESA program is contrary to or would  
7 frustrate or disappoint the Article 11, Section 2 mandate that the legislature provide a  
8 uniform system of common schools. SB 302 does not do away with public schools.  
9 Therefore the *expressio unius est exclusio alterius* maxim does not prohibit the  
10 legislature from providing students with options not available in the public schools.

11 Article 11, Section 1 requires the legislature to encourage by all suitable means the  
12 promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and  
13 moral improvements. Plaintiff Parents’ argument would limit the legislature and stunt  
14 the “encourage by all suitable means” provision of section 2.

15 The court concludes that Plaintiff Parents have failed to show that Article 11,  
16 Section 2 prohibits the legislature from enacting SB 302. Therefore, Plaintiff Parents  
17 have failed to show a likelihood of success on the merits on this issue.

### 18 19 **Irreparable Harm**

20 Plaintiff Parents argued the irreparable injury element for a preliminary  
21 injunction is met because SB 302 violates the Nevada Constitution, and cited several  
22 cases in support of their argument.<sup>26</sup>

23 The Treasurer argued the court must weigh the potential hardship to the relative  
24 parties and others, and the public interest, and cited cases in support of this proposition.

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25  
26 <sup>25</sup>*Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (citation  
omitted).

27  
28 <sup>26</sup>*City of Sparks v. Sparks Mun. Court*, 129 Nev. A.O. 38, 302 P.3d 1118, 1124  
v. (2013); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9<sup>th</sup> Cir. 1997); *Eaves*  
*Bd. Of Clark Cnty Comm’rs*, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980).



The court concludes that the diversion of any funds in violation of Article 11, Section 6 will cause irreparable harm to students in Nevada. The court concludes Plaintiff Parents have demonstrated irreparable harm and that on balance the potential hardship to Plaintiff Parents' children outweighs the interests of the Treasurer and others.

## CONCLUSION

Having examined the submissions of the parties and the amicus briefs, and having heard oral argument by the parties, this court concludes Plaintiff Parents have failed to carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302 violates Article 11, Sections 6.1 and 6.2 and that irreparable harm will result if an injunction is not entered.

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**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and I certify that on January 11, 2016, I deposited for mailing at Carson City, Nevada, and emailed, a true and correct copy of the foregoing Order and addressed to the following:

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ORIGINAL

FIRST JUDICIAL DISTRICT COURT  
IN AND FOR CARSON CITY, NEVADA

REC'D & FILED

2016 JAN 12 PM 3:45

SUSAN MERTHWETHER  
CLERK  
BY *[Signature]*  
DEPUTY

Case No. 15 0C 00207 1B

Dept. No.: II

HELLEN QUAN LOPEZ, individually and on  
behalf of her minor child, C.Q.; MICHELLE  
GORELOW, individually and on behalf of her  
minor children, A.G. and H.G.; ELECTRA  
SKRYZDLEWSKI, individually and on behalf  
of her minor child, L.M.; JENNIFER CARR,  
individually and on behalf of her minor  
children, W.C., A.C., and E.C.; LINDA  
JOHNSON, individually and on behalf of her  
minor child, K.J.; SARAH and BRIAN  
SOLOMON, individually and on behalf of  
their minor children, D.S. and K.S.,

Plaintiffs,

vs.

DAN SCHWARTZ, IN HIS OFFICIAL  
CAPACITY AS TREASURER OF THE  
STATE OF NEVADA,

Defendant.

NOTICE OF ENTRY OF ORDER  
GRANTING MOTION FOR  
PRELIMINARY INJUNCTION

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*Attorneys for Plaintiffs*

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that the **ORDER GRANTING MOTION FOR**  
3 **PRELIMINARY INJUNCTION** was filed with the First Judicial District Court on the 11<sup>th</sup> day  
4 of January 2016, a true and correct copy of which is attached hereto.

5 Dated this 12th day of January, 2016.

6 By:  (Nev. #10085)

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of January, 2016, a true and correct copy of **NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION** was placed in an envelope, postage prepaid, addressed as stated below, in the basket for outgoing mail before 4:00 p.m. at WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP. The firm has established procedures so that all mail placed in the basket before 4:00 p.m. is taken that same day by an employee and deposited in a U.S. Mail box.

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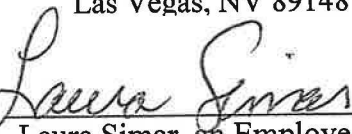
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2016 JAN 11 PM 2:33

SUSAN MERRIWETHER  
CLERK

BY SN DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY

HELLEN QUAN LOPEZ, individually  
and on behalf of her minor child, C.Q.;  
MICHELLE GORELOW, individually  
and on behalf of her minor children,  
A.G. and H.G.; ELECTRA  
SKRYZDLEWSKI, individually and on  
behalf of her minor child, L.M.;  
JENNIFER CARR, individually and on  
behalf of her minor children, W.C.,  
A.C., and E.C.; LINDA JOHNSON,  
individually and on behalf of her minor  
child, K.J.; SARAH and BRIAN  
SOLOMON, individually and on behalf  
of their minor children, D.S. and K.S.,

CASE NO: 15 OC 00207 1B

DEPT.: 2

Plaintiffs,

vs.

ORDER GRANTING MOTION FOR  
PRELIMINARY INJUNCTION

DAN SCHWARTZ, IN HIS OFFICIAL  
CAPACITY AS TREASURER OF THE  
STATE OF NEVADA,

Defendant.

PROCEDURAL BACKGROUND

Before the Court is Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs are parents whose children attend Nevada public schools. Plaintiff Parents seek an injunction to stop the State Treasurer from implementing Senate Bill 302 ("SB 302") which authorizes educational savings accounts. Plaintiff Parents alleged SB 302 violates certain sections of Article 11 of the Nevada Constitution. State Treasurer Dan Schwartz



1 opposed the motion. The court authorized the filing of several amicus briefs, and denied  
2 a motion to intervene. The court held a hearing on the motion.

### 4 ISSUES AND CONCLUSIONS

5 As a preliminary matter, the court emphasizes that the issues before it do not  
6 include the educational or public policy merits of the education savings account  
7 provisions of SB 302. The educational and public policy issues were debated and voted  
8 upon by the legislature and approved by the governor. Courts have no super-veto power,  
9 based upon public policy grounds, over legislative enactments. Therefore, this court  
10 cannot consider whether the SB 302 provisions for education savings accounts are wise,  
11 workable, or worthwhile.

12 Plaintiff Parents argued SB 302 violates the Nevada Constitution in three ways:

13 First, it violates Article 11, Section 3 and Sections 6.1 and 6.2 because those  
14 sections prohibit the transfer of funds appropriated for the operation of the  
15 public schools to any other use.

16 Second, it violates Article 11, Section 6.2 because it removes from the  
17 public school system a portion of the funds the Legislature has "deemed  
18 sufficient" to maintain and operate the public schools.

19 Third, it violates Article 11, Section 2 because it creates a non-uniform  
20 system of schools, and uses public funds to create the non-uniform system of  
21 schools.

22 Having examined the submissions the parties and the amicus briefs, and having  
23 heard oral argument by the parties, this court concludes Plaintiff Parents have failed to  
24 carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada  
25 Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302  
26 violates Article 11, Sections 6.1 and 6.2, and that irreparable harm will result if an  
27 injunction is not entered. Therefore an injunction will issue to enjoin Treasurer  
28 Schwartz from implementing SB 302.

## FINDINGS OF FACT

### Public School Funding

The Nevada Constitution requires the legislature to support and maintain public schools by direct legislative appropriation from the general fund, and to provide the money the legislature deems to be sufficient, when combined with the local money, to fund the public schools for the next biennium. To fulfill its constitutional obligation to fund education, the legislature created the Nevada Plan, statutes which establish the process by which the legislature determines the biennial funding for education. Under the Nevada Plan the legislature establishes basic support guarantees for all school districts.

The basic support guarantee is the amount of money each school district is guaranteed to fund its operations. The amount for each school district is determined by the number of pupils in that school district. After the legislature determines how much money each local school district can contribute, the legislature makes up the difference between the district's contribution and the amount of the basic support guarantee.

Under NRS 387.1233(3), the so-called "hold harmless" provision, a school district must be funded based on the prior year's enrollment figure if the school district experiences a reduction in enrollment of five percent or more.

Funds appropriated by the legislature from the general fund sufficient to satisfy each district's basic support guarantee are deposited into the State Distributive School Account ("DSA"), which is an account within the state general fund.

The DSA, in addition to receiving such appropriations from the general fund, also receives money from other sources, including the Permanent School Fund ("PSF"). The legislature created the PSF to implement Article 11, Section 3 of the Nevada Constitution, which provides that specified property, including lands granted by Congress to Nevada for educational purposes and the proceeds derived from these sources, are pledged for educational purposes and the money therefrom must not be

1 transferred to other funds for other uses. Section 3 money is kept in the PSF, and  
2 interest on Section 3 money is transferred to the DSA.

3 The interest on the PSF constitutes a small portion of the funds in the DSA. In  
4 2014, of the \$1.4 billion in the DSA that came from the State Government, \$1.1 billion,  
5 or 78 percent, came from the general fund, and \$1.6 million, or 0.14%, came from the  
6 PSF.<sup>1</sup>

7 In June 2015, the legislature enacted Senate Bill 515 ("SB 515") to ensure  
8 sufficient funding for K-12 public education for the 2015-2017 biennium. The legislature  
9 established an estimated weighted average basic support guarantee of \$5,710 per pupil  
10 for FY 2015-16 and \$5,774 per pupil for FY 2016-17.<sup>2</sup> The legislature appropriated \$1.1  
11 billion from the general fund for the DSA for FY 2015-16 and more than \$933 million for  
12 FY 2016-17, for a total of more than \$2 billion for the biennium.

### 13 14 **Senate Bill 302**

15 As part of the education reform measures enacted in 2015, the legislature passed  
16 and the governor signed SB 302 which authorized the State Treasurer to use public  
17 school funds to create private accounts called education saving accounts ("ESAs"). The  
18 money in these accounts may only be used to pay for non-public education expenses,  
19 including but not limited to private school tuition, tutoring, home-based education  
20 curricula, and transportation.

21 Under SB 302 the State Treasurer may enter into written agreements with a  
22 parent of a school aged child who has been enrolled in a Nevada public school for not  
23 less than 100 consecutive school days. If a written agreement is entered into, the parent  
24 must establish an ESA on behalf of the child, and the treasurer must deposit the grant  
25 money into the ESA. For a child with a disability, or a child who lives in a low income

26  
27 <sup>1</sup>See [http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf)  
28 [DSA-SummaryForBiennium.pdf](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf).

<sup>2</sup>Id. Section 7.

1 household, the amount of the grant is 100% of the statewide average basic support per  
2 pupil; for all other children the amount of the grant is 90% of the statewide average  
3 basic support per pupil. For the 2015-16 school year the grant amounts will be \$5,710  
4 per disabled or low income pupil, and \$5,139 for all other pupils. Funds deposited into  
5 ESAs are subtracted from the legislative appropriation to fund the school district in  
6 which the child who is receiving the ESA grant resides.

7 Under SB 302 general fund money appropriated to fund the operation of the  
8 public schools will be used to fund education savings accounts.

9 SB 302 does not limit the number of ESAs that can be established, cap the  
10 amount of public school funding that can be transferred to ESAs, or impose any  
11 household income limitations on eligibility.

## 12 13 **PRINCIPLES OF LAW**

### 14 **Judicial Deference**

15 Judicial deference to duly enacted legislation is derived from three “first  
16 principles” of state constitutional jurisprudence.<sup>3</sup>

17 First, all political power originates with the people.<sup>4</sup>

18 Second, unlike the Constitution of the United States which granted specific  
19 powers to the federal government and retained all other powers in the people, the  
20 Nevada Constitution granted all of the people’s political power to the government of  
21 Nevada except as limited in the Nevada Constitution.<sup>5</sup> The Nevada government consists  
22 of three branches, the legislative, executive, and judicial. The public officials the people  
23 elect to the constitutional offices in each branch exercise all of the people’s political

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24  
25 <sup>3</sup>*Gibson v. Mason*, 5 Nev. 283, 291-99, 1869 Nev. LEXIS 46 (1869); *King v.*  
26 *Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948). See *Bush v. Holmes*, 919  
27 So.2d 392, 414 (FL 2006) Bell, J. Dissent.

28 <sup>4</sup>*Gibson* at 291.

<sup>5</sup>*Id.*

1 power except for those powers expressly denied by the Nevada Constitution.<sup>6</sup> Each  
2 branch is endowed with and confined to the execution of powers peculiar to itself, and  
3 each branch is supreme within its respective sphere.<sup>7</sup> Thus, the legislature is supreme in  
4 its field of making the law so long as it does not contravene some express or necessarily  
5 implied limitation appearing in the constitution itself.<sup>8</sup> The people's grant of powers  
6 upon the legislature was general in terms with specified restrictions.<sup>9</sup> The legislature has  
7 general legislative or policy-making power over such issues as the education of Nevada's  
8 children except as those powers are specifically limited by an express or necessarily  
9 implied provision in the Nevada Constitution or the U.S. Constitution.<sup>10</sup>

10 Third, because general legislative or policy-making power is vested in the  
11 legislature, the power of judicial review over legislative enactments is strictly limited.  
12 "Statutes are presumed to be valid, and the challenger bears the burden of showing that  
13 a statute is unconstitutional."<sup>11</sup> "When making a facial challenge to a statute, the  
14 challenger generally bears the burden of demonstrating that there is no set of  
15 circumstances under which the statute would be valid."<sup>12</sup> "In case of doubt, every  
16 possible presumption will be made in favor of the constitutionality of a statute, and  
17 courts will interfere only when the Constitution is clearly violated."<sup>13</sup> "Further, the

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18  
19 <sup>6</sup>*Id.* at 291-92.

20 <sup>7</sup>*Id.* at 292.

21 <sup>8</sup>*Gibson* at 292; *King* at 542.

22 <sup>9</sup>*Gibson* at 292.

23 <sup>10</sup>*King* at 542.

24 <sup>11</sup>*Busefink v. State*, 128 Nev. A.O. 49, 286 P.3d 599, 602, (2012), citing *Flamingo*  
25 *Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009)  
(quoting *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)).

26 <sup>12</sup>*Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep't of Taxation*, 130 Nev. A.O.  
27 73, 334 P.3d 392, 398 (2014).

28 <sup>13</sup>*List v. Whisler*, 99 Nev. 133, 137-138, 660 P.2d 104, 106 (1983), citing *City of*  
*Reno v. County of Washoe*, 94 Nev. 327, 333-334, 580 P.2d 460 (1978);

1 presumption of constitutional validity places upon those attacking a statute the burden  
2 of making a clear showing that the statute is unconstitutional.”<sup>14</sup> The Nevada Supreme  
3 Court has “concede[d] the elasticity of the [Nevada] constitution, as a living thing, to be  
4 interpreted in the light of new and changing conditions,” and that the Supreme Court  
5 “may not condemn legislation simply because the object or purpose is new (no matter  
6 how astonishing or revolutionary) so long as a constitutional limitation is not  
7 violated....”<sup>15</sup>

### 8 9 **Preliminary Injunction**

10 A preliminary injunction may issue “upon a showing that the party seeking it  
11 enjoys a reasonable probability of success on the merits and that the defendant’s  
12 conduct, if allowed to continue, will result in irreparable harm for which compensatory  
13 damage is an inadequate remedy.”

### 14 15 **ANALYSIS**

16 Plaintiff Parents have made a facial challenge to SB 302. Using the above  
17 principles of law the court must decide whether Plaintiff Parents have made a clear  
18 showing that SB 302 violates one or more specified sections of Article 11 of the Nevada  
19 Constitution, and that the plaintiffs will suffer irreparable harm.

20  
21  
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23  
24 *Mengelkamp v. List*, 88 Nev. 542, 545, 501 P.2d 1032 (1972); *State of Nevada v.*  
25 *Irwin*, 5 Nev. 111 (1869).

26 <sup>14</sup>*List v. Whisler* at 138, citing *Ottenheimer v. Real Estate Division*, 97 Nev. 314,  
27 315-316, 629 P.2d 1203 (1981); *Damus v. County of Clark*, 93 Nev. 512, 516, 569  
28 P.2d 933 (1977); *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530  
P.2d 108 (1974).

<sup>15</sup>*King* at 543.

1 **Reasonable Probability of Success on the Merits**

2  
3 *Plaintiff Parents have not clearly shown that SB 302 violates Article 11, Section 3.*

4  
5 Plaintiff Parents pointed out that Article 11, Section 3 provides that funds from  
6 sources specified in Section 3 are “pledged for educational purposes and the money  
7 therefrom must not be transferred to other funds for other uses.” They cited *State ex rel.*  
8 *Keith v. Westerfield*<sup>16</sup> for the proposition that funds appropriated for the public schools  
9 under Article 11 can only be used for the support of the public schools and no portion of  
10 those funds can be used for non-public school expenditures “without disregarding the  
11 mandates of the constitution.”<sup>17</sup> Plaintiff Parents argued that because SB 302, Section  
12 16.1 directs the State Treasurer to transfer into ESAs the basic support guarantee per-  
13 pupil funding appropriated by the legislature for the operation of the school district in  
14 which the ESA-eligible child resides, SB 302, Section 16.1 violates Article 11, Section 3.

15 The Treasurer countered that SB 302 does not mandate the use of Section 3  
16 money for the ESA program, and the Distributive School Account has sufficient money  
17 to fund the ESA program without using Section 3 money. The Treasurer argued that  
18 based upon these facts the Plaintiff Parents have not met their burden of proof.

19 The court concludes the Treasurer’s argument is correct. Because SB 302 does  
20 not require the use of Section 3 money for the ESA program, the ESA program can be  
21 funded without Section 3 money, and therefore Plaintiff Parents have not met their  
22 burden of clearly proving that there is no set of circumstances under which the statute  
23 would be valid, and therefore Plaintiff Parents have failed to show a reasonable  
24 likelihood of success on the merits on the Article 11, Section 3 issue.

25 The Treasurer also argued that the ESA program was created for and serves  
26 educational purposes. The court concludes this argument lacks merit because the

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27 <sup>16</sup>23 Nev. 468 (1897).

28 <sup>17</sup>*Id.* at 121.



1 Nevada Supreme Court held in *State ex rel. Keith v. Westerfield* that the legislature is  
2 prohibited from using Article 11 Section 3 funds for any purpose except that immediately  
3 connected with the public school system.

4 The court concludes the other arguments made by the Treasure on the Article 11,  
5 Section 3 issue also lack merit.

6  
7 *Plaintiff Parents have clearly shown that SB 302 violates Article 11, Sections 6.1 and*  
8 *6.2.*

9 Plaintiff Parents argued SB 302, Section 16(1) violates Article 11, Sections 6.1 and  
10 6.2 because general funds appropriated to fund the operation of the public schools must  
11 only be used to fund the operation of the public schools, but under SB 302 some amount  
12 of general funds appropriated to fund the operation of the public schools will be diverted  
13 to fund education saving accounts.

14 Under SB 302 general fund money appropriated to fund the operation of the  
15 public schools will be used to fund education savings accounts. The legislature  
16 recognized that general fund money appropriated to fund the operation of public schools  
17 would be used to fund education savings accounts. This is evidenced by the legislature's  
18 amendment of NRS 387.045 which provides:

19 1. No portion of the public school funds or of the money specially  
20 appropriated for the purpose of public schools shall be devoted to any  
other object or purpose.

21 2. No portion of the public school funds shall in any way be segregated,  
22 divided or set apart for the use or benefit of any sectarian or secular society  
or association.

23 The legislature amended that statute to make an exception so funds appropriated for  
24 public schools can be used to pay the education savings account grants established by SB  
25 302.

26 Sections 6.1 and 6.2 require the legislature to support public schools by direct  
27 legislative appropriation from the general fund before any other appropriation is  
28 enacted. Those sections do not expressly say that the general funds appropriated to fund



1 the operation of the public schools must only be used to fund the operation of the public  
2 schools. Sections 6.1 and 6.2 do however necessarily imply that the legislature must use  
3 the general funds appropriated to fund the operation of the public schools only to fund  
4 the operation of the public schools.

5 Sections 6.1 and 6.2 mandate that the legislature make appropriations to fund the  
6 operation of the public schools. An "appropriation" is "the act of appropriating to ... a  
7 particular use;" or "something that has been appropriated; *specif*: a sum of money set  
8 aside or allotted by official or formal action for a specific use (as from public revenue by  
9 a legislative body that stipulates the amount, manner, and purpose of items of  
10 expenditure)...."<sup>18</sup> To "appropriate" means "to set apart for or assign to a particular  
11 purpose or use in exclusion of all others."<sup>19</sup> Therefore, Sections 6.1 and 6.2 require the  
12 legislature to set apart or assign money to be used to fund the operation of the public  
13 schools, to the exclusion of all other purposes. Because some amount of general funds  
14 appropriated to fund the operation of the public schools will be diverted to fund  
15 education saving accounts under SB 302, that statute violates Sections 6.1 and 6.2 of  
16 Article 11.

17 Plaintiff Parents have met their burden of clearly proving that there is no set of  
18 circumstances under which the statute would be valid, and therefore Plaintiff Parents  
19 have shown a reasonable likelihood of success on the merits on the Article 11, Sections  
20 6.1 and 6.2 issue.

21  
22 *Plaintiff Parents have clearly shown that SB 302 violates Article 11, Section 6.2.*

23 Plaintiff Parents argued SB 302 violates Article 11, Section 6.2 because: "The  
24 direct legislative appropriation can only be used 'to fund the operation of the public  
25  
26

---

27 <sup>18</sup>Webster's Third New International Dictionary 106 (2002).

28 <sup>19</sup>Id.

1 schools..., ”<sup>20</sup> but SB 302 diverts funds from the DSA thereby reducing the amount  
2 deemed sufficient by the legislature to fund public education.<sup>21</sup>

3 The Treasurer argued the legislature complied with Section 6.2 when it passed SB  
4 515 which guarantees a minimum fixed amount of funding through the hold harmless  
5 guarantee and a minimum per-pupil amount of funding with no upper limit, i.e., the  
6 per-pupil basic support guarantee. The Treasurer pointed out that the legislature passed  
7 SB 515 just three days after it passed SB 302, and that “when the legislature enacts a  
8 statute, [the Nevada Supreme Court] presumes that it does so ‘with full knowledge of  
9 existing statutes relating to the same subject.’ ”<sup>22</sup>

10 The court concludes Plaintiff Parents’ argument is correct. Under Sections 6.1  
11 and 6.2 the legislature must appropriate from the general fund an amount for the  
12 operation of the public schools. The legislature appears to have appropriated money  
13 from the general fund into one account to fund the operation of the public schools and  
14 to fund ESAs. Because Section 6.2 requires the legislature to appropriate money to fund  
15 the operation of the public schools, it is necessarily implied that the money appropriated  
16 to fund the operation of the public schools will be used to fund the operation of the  
17 public schools and not for other purposes. SB 302’s diversion of funds from the Section  
18 6 direct legislative appropriation from the general fund to fund the operation of the  
19 public schools reduces the amount deemed sufficient by the legislature to fund public  
20 education and therefore violates Article 11, Section 6.2.

21 Plaintiff Parents have met their burden of clearly proving that there is no set of  
22 circumstances under which SB 302 would be valid, and therefore Plaintiff Parents have

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23  
24 <sup>20</sup>Pls.’ Mot. For Prelim. Inj. p. 11.

25 <sup>21</sup>Pls.’ Reply on Its Mot. For Prelim. Inj. p. 1.

26 <sup>22</sup>*Division of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d  
27 482, 486 (2000) citing *City of Boulder v. General Sales Drivers*, 101 Nev. 117,  
28 118-19, 694 P.2d 498, 500 (1985).

1 shown a reasonable likelihood of success on the merits on the Article 11, Sections 6.2  
2 issue.

3  
4 *SB 302 does not create a non-uniform system of schools, or use public funds to create a*  
5 *system of education other than the type mandated in Article 11 Section 2.*

6 Article 11 Section 2 requires the legislature establish and maintain a “uniform  
7 system of common schools.” Plaintiff Parents argued the Legislature has enacted an  
8 extensive framework of requirements to ensure the public schools are open to all  
9 children and meet performance and accountability standards. They argued SB 302  
10 allows public school funds to pay for private schools and other entities that are not  
11 subject to the requirements applied to public schools, are unregulated, and not uniform.  
12 For example, they argue, the private schools, online programs and parents receiving  
13 public school funds under SB 302 do not have to use the state adopted curriculum  
14 taught in public schools; meet public school teaching requirements; comply with other  
15 educational standards and accountability requirements established for public schools;  
16 and they do not have to accept all students so they may discriminate based on a  
17 student’s religion or lack thereof, academic achievement, English language learner  
18 status, disability, homelessness or transiency, gender, gender identity and sexual  
19 orientation.

20 Plaintiffs also alleged that in mandating the establishment of a public school  
21 system, the Nevada Constitution has, in the same breath, forbidden the Legislature from  
22 establishing a separate, publicly-funded alternative to Nevada’s uniform system of  
23 public schools. They cited *State v. Javier C.*<sup>23</sup> for the proposition that “Nevada follows  
24 the maxim ‘*expressio unius est exclusio alterius*,’ the expression of one thing is the  
25 exclusion of another”; and *King v. Bd. of Regents of Univ. of Nev.*<sup>24</sup> for the proposition  
26 that “[t]his rule applies as forcibly to the construction of written Constitutions as other

27  
28 <sup>23</sup>128 Nev. A.O. 50, 289 P.3d 1194, 1197 (2012).

<sup>24</sup>65 Nev. 533, 556, 200 P.2d 221 (1948).

1 instruments.” Plaintiff Parents argued that under this principle, the legislature may not  
2 enact statutes that achieve constitutional goals by means different from those explicitly  
3 provided for in the Constitution. The Nevada Supreme Court held that “[e]very positive  
4 direction” in the Nevada Constitution “contains an implication against anything  
5 contrary to it which would frustrate or disappoint the purpose of that provision.”<sup>25</sup>

6 Plaintiff Parents have failed to show that the ESA program is contrary to or would  
7 frustrate or disappoint the Article 11, Section 2 mandate that the legislature provide a  
8 uniform system of common schools. SB 302 does not do away with public schools.  
9 Therefore the *expressio unius est exclusio alterius* maxim does not prohibit the  
10 legislature from providing students with options not available in the public schools.

11 Article 11, Section 1 requires the legislature to encourage by all suitable means the  
12 promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and  
13 moral improvements. Plaintiff Parents’ argument would limit the legislature and stunt  
14 the “encourage by all suitable means” provision of section 2.

15 The court concludes that Plaintiff Parents have failed to show that Article 11,  
16 Section 2 prohibits the legislature from enacting SB 302. Therefore, Plaintiff Parents  
17 have failed to show a likelihood of success on the merits on this issue.

### 18 19 **Irreparable Harm**

20 Plaintiff Parents argued the irreparable injury element for a preliminary  
21 injunction is met because SB 302 violates the Nevada Constitution, and cited several  
22 cases in support of their argument.<sup>26</sup>

23 The Treasurer argued the court must weigh the potential hardship to the relative  
24 parties and others, and the public interest, and cited cases in support of this proposition.

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25  
26 <sup>25</sup>*Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (citation  
omitted).

27 <sup>26</sup>*City of Sparks v. Sparks Mun. Court*, 129 Nev. A.O. 38, 302 P.3d 1118, 1124  
28 (2013); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9<sup>th</sup> Cir. 1997); *Eaves*  
v. *Bd. Of Clark Cnty Comm’rs*, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980).

The court concludes that the diversion of any funds in violation of Article 11, Section 6 will cause irreparable harm to students in Nevada. The court concludes Plaintiff Parents have demonstrated irreparable harm and that on balance the potential hardship to Plaintiff Parents' children outweighs the interests of the Treasurer and others.

## CONCLUSION

Having examined the submissions of the parties and the amicus briefs, and having heard oral argument by the parties, this court concludes Plaintiff Parents have failed to carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302 violates Article 11, Sections 6.1 and 6.2 and that irreparable harm will result if an injunction is not entered.

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1  
2  
3 **ORDER**

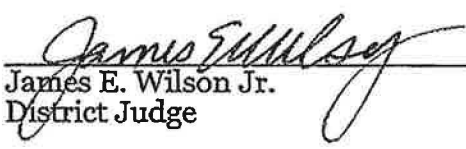
4 **IT IS ORDERED:**

5 Plaintiff Parents' Motion for Preliminary Injunction is granted.

6 State Treasurer Dan Schwartz will be preliminarily enjoined from implementing  
7 the provisions of SB 302.

8 The parties confer and by January 18, 2016 arrange with the court's judicial  
9 assistant to set a hearing on the issue of security and to set the trial on the merits. The  
10 parties may appear by telephone if no evidence will be offered at the hearing on the issue  
11 of security.

12 January 11, 2016.

13   
14 James E. Wilson Jr.  
15 District Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
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28

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and I certify that on January 11, 2016, I deposited for mailing at Carson City, Nevada, and emailed, a true and correct copy of the foregoing Order and addressed to the following:

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12 \*Motion for admission *pro hac vice* pending

13 *Attorneys for Defendant*  
14  
15

16 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
17 **IN AND FOR CARSON CITY**

18 HELLEN QUAN LOPEZ, et al.,

19 Plaintiffs,

20 v.

21 DAN SCHWARTZ, in his official capacity as  
22 Treasurer of the State of Nevada,

23 Defendant.

Case No. 15-OC-00207-1B

Dept. No. II

24 **DEFENDANT'S NOTICE OF ENTRY OF ORDER**

25 **GRANTING MOTION FOR PRELIMINARY INJUNCTION**

26 TO: All parties and their counsel of record:

27 PLEASE TAKE NOTICE that on January 11, 2016, the Court entered its Order  
28 Granting Motion for Preliminary Injunction.

REC'D & FILED

2016 JAN 15 PM 3:44

SUSAN MERRIWEATHER  
CLERK

BY  DEPUTY

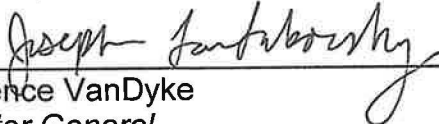


1 A copy of the Order is attached hereto as Exhibit "1" and incorporated herein by  
2 reference.

3 DATED this 15<sup>th</sup> day of January, 2016.

4 Respectfully submitted,

5 Adam Paul Laxalt  
6 Attorney General

7 By:   
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9 Solicitor General

10 Joseph Tartakovsky

11 Deputy Solicitor General

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28 \*Motion for admission *pro hac vice* forthcoming

*Attorneys for Defendants*

**EXHIBIT**

**1**

**EXHIBIT**

**1**

REC'D & FILED

2016 JAN 11 PM 2:33

SUSAN MERRIWETHER  
CLERK

BY SN DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY

HELLEN QUAN LOPEZ, individually  
and on behalf of her minor child, C.Q.;  
MICHELLE GORELOW, individually  
and on behalf of her minor children,  
A.G. and H.G.; ELECTRA  
SKRYZDLEWSKI, individually and on  
behalf of her minor child, L.M.;  
JENNIFER CARR, individually and on  
behalf of her minor children, W.C.,  
A.C., and E.C.; LINDA JOHNSON,  
individually and on behalf of her minor  
child, K.J.; SARAH and BRIAN  
SOLOMON, individually and on behalf  
of their minor children, D.S. and K.S.,

CASE NO: 15 OC 00207 1B

DEPT.: 2

Plaintiffs,

vs.

ORDER GRANTING MOTION FOR  
PRELIMINARY INJUNCTION

DAN SCHWARTZ, IN HIS OFFICIAL  
CAPACITY AS TREASURER OF THE  
STATE OF NEVADA,

Defendant.

PROCEDURAL BACKGROUND

Before the Court is Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs are parents whose children attend Nevada public schools. Plaintiff Parents seek an injunction to stop the State Treasurer from implementing Senate Bill 302 ("SB 302") which authorizes educational savings accounts. Plaintiff Parents alleged SB 302 violates certain sections of Article 11 of the Nevada Constitution. State Treasurer Dan Schwartz

1 opposed the motion. The court authorized the filing of several amicus briefs, and denied  
2 a motion to intervene. The court held a hearing on the motion.

### 3 4 ISSUES AND CONCLUSIONS

5 As a preliminary matter, the court emphasizes that the issues before it do not  
6 include the educational or public policy merits of the education savings account  
7 provisions of SB 302. The educational and public policy issues were debated and voted  
8 upon by the legislature and approved by the governor. Courts have no super-veto power,  
9 based upon public policy grounds, over legislative enactments. Therefore, this court  
10 cannot consider whether the SB 302 provisions for education savings accounts are wise,  
11 workable, or worthwhile.

12 Plaintiff Parents argued SB 302 violates the Nevada Constitution in three ways:

13 First, it violates Article 11, Section 3 and Sections 6.1 and 6.2 because those  
14 sections prohibit the transfer of funds appropriated for the operation of the  
15 public schools to any other use.

16 Second, it violates Article 11, Section 6.2 because it removes from the  
17 public school system a portion of the funds the Legislature has "deemed  
18 sufficient" to maintain and operate the public schools.

19 Third, it violates Article 11, Section 2 because it creates a non-uniform  
20 system of schools, and uses public funds to create the non-uniform system of  
21 schools.

22 Having examined the submissions the parties and the amicus briefs, and having  
23 heard oral argument by the parties, this court concludes Plaintiff Parents have failed to  
24 carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada  
25 Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302  
26 violates Article 11, Sections 6.1 and 6.2, and that irreparable harm will result if an  
27 injunction is not entered. Therefore an injunction will issue to enjoin Treasurer  
28 Schwartz from implementing SB 302.

## FINDINGS OF FACT

### Public School Funding

The Nevada Constitution requires the legislature to support and maintain public schools by direct legislative appropriation from the general fund, and to provide the money the legislature deems to be sufficient, when combined with the local money, to fund the public schools for the next biennium. To fulfill its constitutional obligation to fund education, the legislature created the Nevada Plan, statutes which establish the process by which the legislature determines the biennial funding for education. Under the Nevada Plan the legislature establishes basic support guarantees for all school districts.

The basic support guarantee is the amount of money each school district is guaranteed to fund its operations. The amount for each school district is determined by the number of pupils in that school district. After the legislature determines how much money each local school district can contribute, the legislature makes up the difference between the district's contribution and the amount of the basic support guarantee.

Under NRS 387.1233(3), the so-called "hold harmless" provision, a school district must be funded based on the prior year's enrollment figure if the school district experiences a reduction in enrollment of five percent or more.

Funds appropriated by the legislature from the general fund sufficient to satisfy each district's basic support guarantee are deposited into the State Distributive School Account ("DSA"), which is an account within the state general fund.

The DSA, in addition to receiving such appropriations from the general fund, also receives money from other sources, including the Permanent School Fund ("PSF"). The legislature created the PSF to implement Article 11, Section 3 of the Nevada Constitution, which provides that specified property, including lands granted by Congress to Nevada for educational purposes and the proceeds derived from these sources, are pledged for educational purposes and the money therefrom must not be

1 transferred to other funds for other uses. Section 3 money is kept in the PSF, and  
2 interest on Section 3 money is transferred to the DSA.

3 The interest on the PSF constitutes a small portion of the funds in the DSA. In  
4 2014, of the \$1.4 billion in the DSA that came from the State Government, \$1.1 billion,  
5 or 78 percent, came from the general fund, and \$1.6 million, or 0.14%, came from the  
6 PSF.<sup>1</sup>

7 In June 2015, the legislature enacted Senate Bill 515 ("SB 515") to ensure  
8 sufficient funding for K-12 public education for the 2015-2017 biennium. The legislature  
9 established an estimated weighted average basic support guarantee of \$5,710 per pupil  
10 for FY 2015-16 and \$5,774 per pupil for FY 2016-17.<sup>2</sup> The legislature appropriated \$1.1  
11 billion from the general fund for the DSA for FY 2015-16 and more than \$933 million for  
12 FY 2016-17, for a total of more than \$2 billion for the biennium.

### 13 14 **Senate Bill 302**

15 As part of the education reform measures enacted in 2015, the legislature passed  
16 and the governor signed SB 302 which authorized the State Treasurer to use public  
17 school funds to create private accounts called education saving accounts ("ESAs"). The  
18 money in these accounts may only be used to pay for non-public education expenses,  
19 including but not limited to private school tuition, tutoring, home-based education  
20 curricula, and transportation.

21 Under SB 302 the State Treasurer may enter into written agreements with a  
22 parent of a school aged child who has been enrolled in a Nevada public school for not  
23 less than 100 consecutive school days. If a written agreement is entered into, the parent  
24 must establish an ESA on behalf of the child, and the treasurer must deposit the grant  
25 money into the ESA. For a child with a disability, or a child who lives in a low income

26  
27 <sup>1</sup>See [http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf)  
28 [DSA-SummaryForBiennium.pdf](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf).

<sup>2</sup>Id. Section 7.

1 household, the amount of the grant is 100% of the statewide average basic support per  
2 pupil; for all other children the amount of the grant is 90% of the statewide average  
3 basic support per pupil. For the 2015-16 school year the grant amounts will be \$5,710  
4 per disabled or low income pupil, and \$5,139 for all other pupils. Funds deposited into  
5 ESAs are subtracted from the legislative appropriation to fund the school district in  
6 which the child who is receiving the ESA grant resides.

7 Under SB 302 general fund money appropriated to fund the operation of the  
8 public schools will be used to fund education savings accounts.

9 SB 302 does not limit the number of ESAs that can be established, cap the  
10 amount of public school funding that can be transferred to ESAs, or impose any  
11 household income limitations on eligibility.

## 12 13 PRINCIPLES OF LAW

### 14 Judicial Deference

15 Judicial deference to duly enacted legislation is derived from three “first  
16 principles” of state constitutional jurisprudence.<sup>3</sup>

17 First, all political power originates with the people.<sup>4</sup>

18 Second, unlike the Constitution of the United States which granted specific  
19 powers to the federal government and retained all other powers in the people, the  
20 Nevada Constitution granted all of the people’s political power to the government of  
21 Nevada except as limited in the Nevada Constitution.<sup>5</sup> The Nevada government consists  
22 of three branches, the legislative, executive, and judicial. The public officials the people  
23 elect to the constitutional offices in each branch exercise all of the people’s political

---

24  
25 <sup>3</sup>*Gibson v. Mason*, 5 Nev. 283, 291-99, 1869 Nev. LEXIS 46 (1869); *King v.*  
26 *Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948). See *Bush v. Holmes*, 919  
27 So.2d 392, 414 (FL 2006) Bell, J. Dissent.

28 <sup>4</sup>*Gibson* at 291.

<sup>5</sup>*Id.*

1 power except for those powers expressly denied by the Nevada Constitution.<sup>6</sup> Each  
2 branch is endowed with and confined to the execution of powers peculiar to itself, and  
3 each branch is supreme within its respective sphere.<sup>7</sup> Thus, the legislature is supreme in  
4 its field of making the law so long as it does not contravene some express or necessarily  
5 implied limitation appearing in the constitution itself.<sup>8</sup> The people's grant of powers  
6 upon the legislature was general in terms with specified restrictions.<sup>9</sup> The legislature has  
7 general legislative or policy-making power over such issues as the education of Nevada's  
8 children except as those powers are specifically limited by an express or necessarily  
9 implied provision in the Nevada Constitution or the U.S. Constitution.<sup>10</sup>

10 Third, because general legislative or policy-making power is vested in the  
11 legislature, the power of judicial review over legislative enactments is strictly limited.  
12 "Statutes are presumed to be valid, and the challenger bears the burden of showing that  
13 a statute is unconstitutional."<sup>11</sup> "When making a facial challenge to a statute, the  
14 challenger generally bears the burden of demonstrating that there is no set of  
15 circumstances under which the statute would be valid."<sup>12</sup> "In case of doubt, every  
16 possible presumption will be made in favor of the constitutionality of a statute, and  
17 courts will interfere only when the Constitution is clearly violated."<sup>13</sup> "Further, the

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18  
19 <sup>6</sup>*Id.* at 291-92.

20 <sup>7</sup>*Id.* at 292.

21 <sup>8</sup>*Gibson* at 292; *King* at 542.

22 <sup>9</sup>*Gibson* at 292.

23 <sup>10</sup>*King* at 542.

24 <sup>11</sup>*Busefink v. State*, 128 Nev. A.O. 49, 286 P.3d 599, 602,(2012), citing *Flamingo*  
25 *Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009)  
(quoting *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)).

26 <sup>12</sup>*Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep't of Taxation*, 130 Nev. A.O.  
27 73, 334 P.3d 392, 398 (2014).

28 <sup>13</sup>*List v. Whisler*, 99 Nev. 133, 137-138, 660 P.2d 104, 106 (1983), citing *City of*  
*Reno v. County of Washoe*, 94 Nev. 327, 333-334, 580 P.2d 460 (1978);



1 presumption of constitutional validity places upon those attacking a statute the burden  
2 of making a clear showing that the statute is unconstitutional.”<sup>14</sup> The Nevada Supreme  
3 Court has “concede[d] the elasticity of the [Nevada] constitution, as a living thing, to be  
4 interpreted in the light of new and changing conditions,” and that the Supreme Court  
5 “may not condemn legislation simply because the object or purpose is new (no matter  
6 how astonishing or revolutionary) so long as a constitutional limitation is not  
7 violated....”<sup>15</sup>

### 8 9 **Preliminary Injunction**

10 A preliminary injunction may issue “upon a showing that the party seeking it  
11 enjoys a reasonable probability of success on the merits and that the defendant’s  
12 conduct, if allowed to continue, will result in irreparable harm for which compensatory  
13 damage is an inadequate remedy.”

### 14 15 **ANALYSIS**

16 Plaintiff Parents have made a facial challenge to SB 302. Using the above  
17 principles of law the court must decide whether Plaintiff Parents have made a clear  
18 showing that SB 302 violates one or more specified sections of Article 11 of the Nevada  
19 Constitution, and that the plaintiffs will suffer irreparable harm.

20  
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*Mengelkamp v. List*, 88 Nev. 542, 545, 501 P.2d 1032 (1972); *State of Nevada v.*  
25 *Irwin*, 5 Nev. 111 (1869).

26 <sup>14</sup>*List v. Whisler* at 138, citing *Ottenheimer v. Real Estate Division*, 97 Nev. 314,  
27 315-316, 629 P.2d 1203 (1981); *Damus v. County of Clark*, 93 Nev. 512, 516, 569  
28 P.2d 933 (1977); *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530  
P.2d 108 (1974).

<sup>15</sup>*King* at 543.

1 **Reasonable Probability of Success on the Merits**

2  
3 *Plaintiff Parents have not clearly shown that SB 302 violates Article 11, Section 3.*

4  
5 Plaintiff Parents pointed out that Article 11, Section 3 provides that funds from  
6 sources specified in Section 3 are “pledged for educational purposes and the money  
7 therefrom must not be transferred to other funds for other uses.” They cited *State ex rel.*  
8 *Keith v. Westerfield*<sup>16</sup> for the proposition that funds appropriated for the public schools  
9 under Article 11 can only be used for the support of the public schools and no portion of  
10 those funds can be used for non-public school expenditures “without disregarding the  
11 mandates of the constitution.”<sup>17</sup> Plaintiff Parents argued that because SB 302, Section  
12 16.1 directs the State Treasurer to transfer into ESAs the basic support guarantee per-  
13 pupil funding appropriated by the legislature for the operation of the school district in  
14 which the ESA-eligible child resides, SB 302, Section 16.1 violates Article 11, Section 3.

15 The Treasurer countered that SB 302 does not mandate the use of Section 3  
16 money for the ESA program, and the Distributive School Account has sufficient money  
17 to fund the ESA program without using Section 3 money. The Treasurer argued that  
18 based upon these facts the Plaintiff Parents have not met their burden of proof.

19 The court concludes the Treasurer’s argument is correct. Because SB 302 does  
20 not require the use of Section 3 money for the ESA program, the ESA program can be  
21 funded without Section 3 money, and therefore Plaintiff Parents have not met their  
22 burden of clearly proving that there is no set of circumstances under which the statute  
23 would be valid, and therefore Plaintiff Parents have failed to show a reasonable  
24 likelihood of success on the merits on the Article 11, Section 3 issue.

25 The Treasurer also argued that the ESA program was created for and serves  
26 educational purposes. The court concludes this argument lacks merit because the

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27 <sup>16</sup>23 Nev. 468 (1897).

28 <sup>17</sup>*Id.* at 121.

1 Nevada Supreme Court held in *State ex rel. Keith v. Westerfield* that the legislature is  
2 prohibited from using Article 11 Section 3 funds for any purpose except that immediately  
3 connected with the public school system.

4 The court concludes the other arguments made by the Treasure on the Article 11,  
5 Section 3 issue also lack merit.

6  
7 *Plaintiff Parents have clearly shown that SB 302 violates Article 11, Sections 6.1 and*  
8 *6.2.*

9 Plaintiff Parents argued SB 302, Section 16(1) violates Article 11, Sections 6.1 and  
10 6.2 because general funds appropriated to fund the operation of the public schools must  
11 only be used to fund the operation of the public schools, but under SB 302 some amount  
12 of general funds appropriated to fund the operation of the public schools will be diverted  
13 to fund education saving accounts.

14 Under SB 302 general fund money appropriated to fund the operation of the  
15 public schools will be used to fund education savings accounts. The legislature  
16 recognized that general fund money appropriated to fund the operation of public schools  
17 would be used to fund education savings accounts. This is evidenced by the legislature's  
18 amendment of NRS 387.045 which provides:

19 1. No portion of the public school funds or of the money specially  
20 appropriated for the purpose of public schools shall be devoted to any  
other object or purpose.

21 2. No portion of the public school funds shall in any way be segregated,  
22 divided or set apart for the use or benefit of any sectarian or secular society  
or association.

23 The legislature amended that statute to make an exception so funds appropriated for  
24 public schools can be used to pay the education savings account grants established by SB  
25 302.

26 Sections 6.1 and 6.2 require the legislature to support public schools by direct  
27 legislative appropriation from the general fund before any other appropriation is  
28 enacted. Those sections do not expressly say that the general funds appropriated to fund

1 the operation of the public schools must only be used to fund the operation of the public  
2 schools. Sections 6.1 and 6.2 do however necessarily imply that the legislature must use  
3 the general funds appropriated to fund the operation of the public schools only to fund  
4 the operation of the public schools.

5 Sections 6.1 and 6.2 mandate that the legislature make appropriations to fund the  
6 operation of the public schools. An "appropriation" is "the act of appropriating to ... a  
7 particular use;" or "something that has been appropriated; *specif*: a sum of money set  
8 aside or allotted by official or formal action for a specific use (as from public revenue by  
9 a legislative body that stipulates the amount, manner, and purpose of items of  
10 expenditure)...."<sup>18</sup> To "appropriate" means "to set apart for or assign to a particular  
11 purpose or use in exclusion of all others."<sup>19</sup> Therefore, Sections 6.1 and 6.2 require the  
12 legislature to set apart or assign money to be used to fund the operation of the public  
13 schools, to the exclusion of all other purposes. Because some amount of general funds  
14 appropriated to fund the operation of the public schools will be diverted to fund  
15 education saving accounts under SB 302, that statute violates Sections 6.1 and 6.2 of  
16 Article 11.

17 Plaintiff Parents have met their burden of clearly proving that there is no set of  
18 circumstances under which the statute would be valid, and therefore Plaintiff Parents  
19 have shown a reasonable likelihood of success on the merits on the Article 11, Sections  
20 6.1 and 6.2 issue.

21  
22 *Plaintiff Parents have clearly shown that SB 302 violates Article 11, Section 6.2.*

23 Plaintiff Parents argued SB 302 violates Article 11, Section 6.2 because: "The  
24 direct legislative appropriation can only be used 'to fund the operation of the public  
25  
26

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27 <sup>18</sup>Webster's Third New International Dictionary 106 (2002).

28 <sup>19</sup>Id.

1 schools..., ”<sup>20</sup> but SB 302 diverts funds from the DSA thereby reducing the amount  
2 deemed sufficient by the legislature to fund public education.<sup>21</sup>

3 The Treasurer argued the legislature complied with Section 6.2 when it passed SB  
4 515 which guarantees a minimum fixed amount of funding through the hold harmless  
5 guarantee and a minimum per-pupil amount of funding with no upper limit, i.e., the  
6 per-pupil basic support guarantee. The Treasurer pointed out that the legislature passed  
7 SB 515 just three days after it passed SB 302, and that “when the legislature enacts a  
8 statute, [the Nevada Supreme Court] presumes that it does so ‘with full knowledge of  
9 existing statutes relating to the same subject.’ ”<sup>22</sup>

10 The court concludes Plaintiff Parents’ argument is correct. Under Sections 6.1  
11 and 6.2 the legislature must appropriate from the general fund an amount for the  
12 operation of the public schools. The legislature appears to have appropriated money  
13 from the general fund into one account to fund the operation of the public schools and  
14 to fund ESAs. Because Section 6.2 requires the legislature to appropriate money to fund  
15 the operation of the public schools, it is necessarily implied that the money appropriated  
16 to fund the operation of the public schools will be used to fund the operation of the  
17 public schools and not for other purposes. SB 302’s diversion of funds from the Section  
18 6 direct legislative appropriation from the general fund to fund the operation of the  
19 public schools reduces the amount deemed sufficient by the legislature to fund public  
20 education and therefore violates Article 11, Section 6.2.

21 Plaintiff Parents have met their burden of clearly proving that there is no set of  
22 circumstances under which SB 302 would be valid, and therefore Plaintiff Parents have  
23

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24 <sup>20</sup>Pls.’ Mot. For Prelim. Inj. p. 11.

25 <sup>21</sup>Pls.’ Reply on Its Mot. For Prelim. Inj. p. 1.

26 <sup>22</sup>*Division of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d  
27 482, 486 (2000) citing *City of Boulder v. General Sales Drivers*, 101 Nev. 117,  
28 118-19, 694 P.2d 498, 500 (1985).

1 shown a reasonable likelihood of success on the merits on the Article 11, Sections 6.2  
2 issue.

3  
4 *SB 302 does not create a non-uniform system of schools, or use public funds to create a*  
5 *system of education other than the type mandated in Article 11 Section 2.*

6 Article 11 Section 2 requires the legislature establish and maintain a “uniform  
7 system of common schools.” Plaintiff Parents argued the Legislature has enacted an  
8 extensive framework of requirements to ensure the public schools are open to all  
9 children and meet performance and accountability standards. They argued SB 302  
10 allows public school funds to pay for private schools and other entities that are not  
11 subject to the requirements applied to public schools, are unregulated, and not uniform.  
12 For example, they argue, the private schools, online programs and parents receiving  
13 public school funds under SB 302 do not have to use the state adopted curriculum  
14 taught in public schools; meet public school teaching requirements; comply with other  
15 educational standards and accountability requirements established for public schools;  
16 and they do not have to accept all students so they may discriminate based on a  
17 student’s religion or lack thereof, academic achievement, English language learner  
18 status, disability, homelessness or transiency, gender, gender identity and sexual  
19 orientation.

20 Plaintiffs also alleged that in mandating the establishment of a public school  
21 system, the Nevada Constitution has, in the same breath, forbidden the Legislature from  
22 establishing a separate, publicly-funded alternative to Nevada’s uniform system of  
23 public schools. They cited *State v. Javier C.*<sup>23</sup> for the proposition that “Nevada follows  
24 the maxim ‘*expressio unius est exclusio alterius*,’ the expression of one thing is the  
25 exclusion of another”; and *King v. Bd. of Regents of Univ. of Nev.*<sup>24</sup> for the proposition  
26 that “[t]his rule applies as forcibly to the construction of written Constitutions as other

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27 <sup>23</sup>128 Nev. A.O. 50, 289 P.3d 1194, 1197 (2012).

28 <sup>24</sup>65 Nev. 533, 556, 200 P.2d 221 (1948).

1 instruments.” Plaintiff Parents argued that under this principle, the legislature may not  
2 enact statutes that achieve constitutional goals by means different from those explicitly  
3 provided for in the Constitution. The Nevada Supreme Court held that “[e]very positive  
4 direction” in the Nevada Constitution “contains an implication against anything  
5 contrary to it which would frustrate or disappoint the purpose of that provision.”<sup>25</sup>

6 Plaintiff Parents have failed to show that the ESA program is contrary to or would  
7 frustrate or disappoint the Article 11, Section 2 mandate that the legislature provide a  
8 uniform system of common schools. SB 302 does not do away with public schools.  
9 Therefore the *expressio unius est exclusio alterius* maxim does not prohibit the  
10 legislature from providing students with options not available in the public schools.

11 Article 11, Section 1 requires the legislature to encourage by all suitable means the  
12 promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and  
13 moral improvements. Plaintiff Parents’ argument would limit the legislature and stunt  
14 the “encourage by all suitable means” provision of section 2.

15 The court concludes that Plaintiff Parents have failed to show that Article 11,  
16 Section 2 prohibits the legislature from enacting SB 302. Therefore, Plaintiff Parents  
17 have failed to show a likelihood of success on the merits on this issue.

### 18 19 **Irreparable Harm**

20 Plaintiff Parents argued the irreparable injury element for a preliminary  
21 injunction is met because SB 302 violates the Nevada Constitution, and cited several  
22 cases in support of their argument.<sup>26</sup>

23 The Treasurer argued the court must weigh the potential hardship to the relative  
24 parties and others, and the public interest, and cited cases in support of this proposition.

25  
26 <sup>25</sup>*Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (citation  
omitted).

27  
28 <sup>26</sup>*City of Sparks v. Sparks Mun. Court*, 129 Nev. A.O. 38, 302 P.3d 1118, 1124  
v. (2013); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9<sup>th</sup> Cir. 1997); *Eaves*  
*Bd. Of Clark Cnty Comm’rs*, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980).

The court concludes that the diversion of any funds in violation of Article 11, Section 6 will cause irreparable harm to students in Nevada. The court concludes Plaintiff Parents have demonstrated irreparable harm and that on balance the potential hardship to Plaintiff Parents' children outweighs the interests of the Treasurer and others.

## CONCLUSION

Having examined the submissions of the parties and the amicus briefs, and having heard oral argument by the parties, this court concludes Plaintiff Parents have failed to carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302 violates Article 11, Sections 6.1 and 6.2 and that irreparable harm will result if an injunction is not entered.

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3 **ORDER**

4 **IT IS ORDERED:**

5 Plaintiff Parents' Motion for Preliminary Injunction is granted.

6 State Treasurer Dan Schwartz will be preliminarily enjoined from implementing  
7 the provisions of SB 302.

8 The parties confer and by January 18, 2016 arrange with the court's judicial  
9 assistant to set a hearing on the issue of security and to set the trial on the merits. The  
10 parties may appear by telephone if no evidence will be offered at the hearing on the issue  
11 of security.

12 January 11, 2016.

13   
14 James E. Wilson Jr.  
15 District Judge  
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**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and I certify that on January 11, 2016, I deposited for mailing at Carson City, Nevada, and emailed, a true and correct copy of the foregoing Order and addressed to the following:

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Gina Winder  
Judicial Assistant

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 15<sup>th</sup> day of January, 2016, I deposited for mailing at Carson City, Nevada, a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION, addressed to:

DON SPRINGMEYER, ESQ.  
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An Employee of the State of Nevada

**FIRST JUDICIAL DISTRICT COURT MINUTES**

CASE NO. 15 OC 00207 1B

TITLE: HELLEN QUAN LOPEZ, INDIVIDUALLY AND ON BEHALF OF HER MIOR CHILD, C.Q.; MICHELLE GORELOW, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, A.G. AND H.G.; ELECTRA SKRYZDLEWSKI, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, L.M.; JENNIFER CARR, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, W.C., A.C. AND E.C.; LINDA JOHNSON, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, K.J.; SARAH AND BRIAN SOLOMON , INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, D.S. AND K.S. VS DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA

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01/08/16 – DEPT. II – HONORABLE JAMES E. WILSON, JR.  
C. Franz, Clerk – Not Reported

**STATUS CHECK**

Present: Bradley Schrager via telephone, counsel for Plaintiffs; Lawrence Vandyke via telephone, counsel for Defendant, Dan Schwartz.

Statements were made Court and counsel.

**COURT ORDERED:** It is not going to advance and consolidate it.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

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**FIRST JUDICIAL DISTRICT COURT MINUTES**

CASE NO. 15 OC 00207 1B

TITLE: HELLEN QUAN LOPEZ, INDIVIDUALLY AND ON BEHALF OF HER MIOR CHILD, C.Q.; MICHELLE GORELOW, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, A.G. AND H.G.; ELECTRA SKRYZDLEWSKI, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, L.M.; JENNIFER CARR, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, W.C., A.C. AND E.C.; LINDA JOHNSON, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, K.J.; SARAH AND BRIAN SOLOMON , INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, D.S. AND K.S. VS DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA

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01/06/16 – DEPT. II – HONORABLE JAMES E. WILSON, JR.  
J. Harkleroad, Clerk – Not Reported

**PRELIMINARY INJUNCTION AND COUNTERMOTION TO DISMISS**

Present: Tamerlin Godley, David Sciarra, Don Springmeyer, Bradley Schragar, Justin Jones, Laura Matthew and Thomas Clancy, counsel for Pltf.; Lawrence Vandyke and Joseph Tartakovsky; Nevada Treasurer, Dan Schwartz.

Arguments made by Godley and Vandyke.

**COURT ORDERED:** Matter taken under submission.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

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# DISTRICT COURT CIVIL COVER SHEET

Carson City County, Nevada  
 Case No. 500000071B  
 (Assigned by Clerk's Office) Oct II

REC'D & FILED

2015 SEP -9 PM 2:00

## I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):  
 Hellen Quan Lopez, individually and on behalf of her minor child, C.Q.; Michelle Gorelow, individually and on behalf of her minor children, A.G. and H.G., et al

Defendant(s) (name/address/phone):  
 Dan Schwartz, in his Official Capacity as the Treasurer of the State of Nevada  
 BY [Signature] CLERK  
 DEPUTY

Attorney (name/address/phone):  
 Don Springmeyer, Esq.  
 Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP  
 3556 E. Russell Road, Las Vegas, NV 89120  
 (702) 341-5200

Attorney (name/address/phone):

## II. Nature of Controversy (please select the one most applicable filing type below)

### Civil Case Filing Types

<b>Real Property</b> <b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant <b>Title to Property</b> <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property <b>Other Real Property</b> <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<b>Negligence</b> <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence <b>Malpractice</b> <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	<b>Torts</b> <b>Other Torts</b> <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
<b>Probate</b> <b>Probate (select case type and estate value)</b> <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate <b>Estate Value</b> <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	<b>Construction Defect &amp; Contract</b> <b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect <b>Contract Case</b> <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	<b>Judicial Review/Appeal</b> <b>Judicial Review</b> <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency <b>Nevada State Agency Appeal</b> <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency <b>Appeal Other</b> <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
<b>Civil Writ</b> <b>Civil Writ</b> <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		<b>Other Civil Filing</b> <b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input checked="" type="checkbox"/> Other Civil Matters

*Business Court filings should be filed using the Business Court civil coversheet.*

09/09/15

Date

Signature of initiating party or representative

See other side for family-related case filings.