

No. 69611

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAN SCHWARTZ, in his official capacity as

Treasurer of the State of Nevada,

Appellant,

v.

HELEN QUAN LOPEZ, *et al.*,

Appellees.

Electronically Filed
Apr 21 2016 08:46 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

On direct appeal from the First Judicial District Court of the State of Nevada in and
for Carson City

**BRIEF OF AMICI CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND, LAS VEGAS NAACP, AND SOUTHERN POVERTY LAW
CENTER**

IN SUPPORT OF PLAINTIFFS-APPELLEES

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that *amici* Mexican-American Legal Defense and Educational Fund, Las Vegas NAACP, and Southern Poverty Law Center are entities described in NRAP 26(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Amici have no partner corporations, and no publicly held company owns 10% or more of their stock. Chris Wicker (Nevada Bar No. 1037) is the only attorney appearing for *amici* in this case, and no others are expected to appear in this Court in this case. Woodburn and Wedge is the only law firm whose partners or associates have appeared for the party or amicus in the case or are expected to appear in this Court in this case.

DATED this 19th day of April, 2016,

WOODBURN AND WEDGE

By: /s/ W. Chris Wicker
W. Chris Wicker, Esq.
Nevada Bar No. 1037
Counsel for Amici Curiae Mexican-
American Legal Defense and Educational
Fund, Las Vegas NAACP, and Southern
Poverty Law Center

TABLE OF CONTENTS

I.	NEVADA PUBLIC SCHOOLS SERVE A GROWING STUDENT POPULATON, INCLUDING INCREASING NUMBERS OF AT-RISK AND ELL STUDENTS	5
II.	AT-RISK AND ELL STUDENTS REQUIRE ADDITIONAL EDUCATION RESOURCES	8
	A. The Nevada Legislature Has Recognized that At-Risk and ELL Students Require Additional Education Resources.	8
	B. Increased Spending Improves Outcomes for At-Risk and ELL Students.	14
III.	ESAs WILL HARM, NOT BENEFIT, NEVADA’S AT-RISK AND ELL STUDENTS.....	18
	A. ESAs Will Not Benefit At-Risk and ELL Students.	18
	B. ESAs Will Cause the Loss of Critically Needed Funding For At-Risk and ELL Students.....	20

TABLE OF AUTHORITIES

Page

CASES

<u>Guinn v. Legislature of State of Nev. (Guinn I)</u> , 119 Nev. 277, 71 P.3d 1269 (2003), <i>decision clarified on denial of reh’g sub nom. Guinn v. Legislature of State of Nev.</i> , 119 Nev. 460, 76 P.3d 22 (2003) <i>overruled on other grounds by Nevadans for Nevada v. Beers</i> , 122 Nev. 930, 142 P.3d 339 (2006).....	25
<u>Lopez v. Schwartz</u> , Case No. 15 OC 00207, Order Granting Motion for Preliminary Injunction, in the First Judicial District Court of the State of Nevada in and for Carson City	19, 21, 23

STATUTES AND RULES

Nev. Rev. Stat. 387.121 (2014).....	25
-------------------------------------	----

MISCELLANEOUS

Brian Sandoval, Governor, State of Nevada, State of the State (Jan. 15, 2015) (transcript available at governing.com)	12, 13
C. KIRABO JACKSON ET AL., THE EFFECT OF SCHOOL FINANCE REFORMS ON THE DISTRIBUTION OF SPENDING, ACADEMIC ACHIEVEMENT, AND ADULT OUTCOMES 44 (Nat’l Bureau of Econ. Research, Working Paper No. 20118, 2014)	9
CLARK COUNTY SCHOOL DISTRICT, CLOSING THE LITERACY GAPS 18 (Sep. 2014) (citing Nevada Department of Education. (2012). <i>Nevada ESEA Flexibility Waiver</i> . U.S. Department of Education).....	7, 8, 18, 23
Dan Schwartz, Nevada State Treasurer, <i>Treasurer Dan Schwartz Issues Statement on Today’s Hearing Challenging Nevada’s ESA Program</i> , January 6, 2016, http://www.nevadatreasurer.gov/PublicInfo/PR/2016_News_Releases/	22
David Card and A. Abigail Payne, <i>School Finance Reform, the Distribution of School Spending, and the Distribution of Student Test Scores</i> , 83 J. Pub. Econ. 49 (2002).....	17

David G. Sciarra, <i>Education Savings Accounts Won't Help Students</i> , LAS VEGAS REVIEW-JOURNAL, February 15, 2016	24
Educate Nevada Now, <i>Most ESA Applicants are from High Family Income Zip Codes</i> , http://www.educatenevadanow.com/wp-content/uploads/2016/03/ESA_Applcnt_Zip_Data_FINAL_3.11.2016.pdf ..	20, 21
Educate Nevada Now, <i>Nevada ESAs: In Clark and Washoe, Private Schools Out of Reach for Most Families</i> , https://t.e2ma.net/message/xgldx/5u549l	19
Education Law Center, <i>Is School Funding Fair? A National Report Card</i> , Rutgers Graduate School of Education, 5 th Ed., 2015.....	22, 23
Geoff Dornan, <i>Loan Approved to Jump Start Voucher Program</i> , NEVADA APPEAL, August 12, 1015, http://www.nevadaappeal.com/news/17672675-113/loan-approved-to-jump-start-voucher-program	22, 23
Ian Whitaker, <i>Data: Majority of Nevadans Seeking School Vouchers Live in Upscale Suburbs</i> , LAS VEGAS SUN, October 29, 2015	20
Institute of Education Sciences, <i>Elementary/Secondary Information System</i> , NATIONAL CENTER FOR EDUCATION STATISTICS (2015), http://nces.ed.gov/ccd/elsi/ , data retrieved from IES, ElSi, NCES Table Generator on March 14, 2016	6, 7
JOHN AUGENBLICK ET AL., <i>ESTIMATING THE COST OF AN ADEQUATE EDUCATION IN NEVADA</i> , Augenblick, Palaich and Associates, Inc. (Aug. 2006)	9, 10
JOHN AUGENBLICK ET AL., <i>PROFESSIONAL JUDGMENT STUDY REPORT 27</i> , Augenblick, Palaich and Associates, Inc. (Jan. 2015).....	11, 12
Julien Lafortune et al., <i>School Finance Reform and the Distribution of Student Achievement</i> (Nat'l Bureau of Econ. Research, Working Paper No. 22011, 2016)	17
Kristen Harknett et al., <i>Do Public Expenditures Improve Child Outcomes in the U.S.A? Comparison Across Fifty States</i> (Ctr. For Policy Research, Maxwell Sch. Of Citizenship and Pub. Aff., Syracuse Univ., Working Paper Series No. 53, 2003)	17

LEGISLATIVE COUNSEL BUREAU, BULLETIN NO. 15-5: SUMMARY OF RECOMMENDATIONS AND REPORT OF TASK FORCE ON K-12 PUBLIC EDUCATION FUNDING (2015)	11, 12
Neal Morton, <i>Budget shortfall drives Clark County School District class-size increase</i> , LAS VEGAS REVIEW-JOURNAL, May 20, 2015.....	24
Neal Morton, <i>CCSD to consider new two-year contract that may ease chronic teacher shortage</i> , LAS VEGAS REVIEW-JOURNAL, Jan. 9, 2016	24
Neal Morton, <i>Clark County School District says no to pay raises</i> , LAS VEGAS REVIEW-JOURNAL, June 29, 2015	24
Rob Greenwald et al., <i>The Effect of School Resources on Student Achievement</i> , 66 Rev. Educ. Res. 361 (1996)	17
U.S. Census Bureau, Cumulative Estimates of Resident Population Change for the United States, Regions, States, and Puerto Rico and Region and State Rankings: April 1, 2010 to July 1, 2015, U.S. CENSUS BUREAU (2015), http://www.census.gov/popest/data/state/totals/2015/index.html	5, 6
Senate Bill 504, 78 th Session (2015 Nev. Leg.).....	13
Senate Bill 508, 78 th Session (2015 Nev. Leg.).....	13, 14
Whitney C. Allgood, <i>The Need for Adequate Resources for At-Risk Children</i> (Econ. Policy Inst., Working Paper No. 277, 2006).....	17

INTEREST OF AMICI

Amici are a diverse group with the mission of supporting the success of all students, but especially economically disadvantaged and English Language Learner (“ELL”) students. *Amici* are civil rights organizations and believe that their collective experience on advancing educational opportunity for vulnerable school children will be of assistance to this Court.

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (“MALDEF”)

The Mexican American Legal Defense and Educational Fund (“MALDEF”) is a national civil rights organization established in 1968. Its principal objective is to secure the civil rights of Latinos living in the United States through litigation, advocacy, and education. MALDEF litigates nationally to advance the education rights of Latino and African-American students, children in poverty, foster youth, and children with limited English. MALDEF seeks to ensure educational equity and opportunity for these children and to prevent discrimination based on national origin, race, or other improper bases.

LAS VEGAS NAACP

The Las Vegas Branch of the National Association for the Advancement of Colored People (“Las Vegas NAACP”) is a 501 (c) (4) chartered unit of the national NAACP, the nation’s largest and oldest civil rights organization. It

pursues the mission to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination throughout the greater Las Vegas, Nevada area.

One of the long-standing goals of the NAACP in Las Vegas and nation-wide is to advocate for all children to have access to high quality, public education. Among its members are parents, students, teachers who would be negatively impacted by the current funding formula.

SOUTHERN POVERTY LAW CENTER (“SPLC”)

The Southern Poverty Law Center (“SPLC”), founded in 1971, is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. SPLC represents children in poverty, children with disabilities, children of color, and children with limited English proficiency unable to access the opportunities and resources they need to be successful. SPLC works to ensure educational equity and opportunity for these children, particularly as states transform the educational landscape by shifting public resources to private schools through voucher programs like the one at issue in this case. SPLC is based in Montgomery, Alabama, and has offices that engage in education advocacy in Alabama, Florida, Louisiana, and Mississippi.

INTRODUCTION

Based on *Amici*'s combined and extensive experience with the education of students in poverty and those learning English, *Amici* respectfully submit this brief in support of Plaintiffs-Appellees to inform the Court about the characteristics and needs of students attending Nevada public schools and to assist the Court in understanding the impact of Senate Bill 302 ("S.B. 302") on public school funding. S.B. 302 authorizes the establishment of Education Savings Accounts ("ESAs") to pay for private school and other private education expenses with funds diverted from the budgets of Nevada public schools. As the district court below found when it preliminarily enjoined S.B. 302, ESAs would reduce the funding and resources currently available to educate the 460,000 children attending Nevada public schools and cause them irreparable harm.

Amici will focus on four issues critical to evaluating the impact of S.B. 302 on Nevada public school students. First, Nevada's public school student demographics are fast-changing, with rapid growth in the number of students overall and the percentage of those students who are in poverty or economically disadvantaged (at-risk students). Indications are that the Nevada public schools will also continue to experience growth in the proportion of students who are not

proficient in English (English language learner or “ELL” students).

Second, at-risk and ELL students require additional programs and services to afford them the opportunity to achieve at the level required by Nevada’s academic standards and to prepare them for civic responsibilities and participation in the State’s 21st century economy. In recent years, the Nevada Legislature has recognized the need for specific programs and services targeted to address the extra educational needs of these students. Moreover, a robust body of education research confirms that the provision of these targeted interventions through increased spending improves outcomes for at-risk and ELL students.

Third, any reduction in public school funding below current levels – as would occur under S.B. 302 – would deprive Nevada students of critical education resources, especially for the growing numbers of at-risk students and ELLs requiring additional programs and services. It is well documented that Nevada public school funding is among the lowest in the nation and in need of reform, a condition recognized by the Legislature itself. When every dollar is critical, particularly given student demographics and needs, any reduction in funding – and ensuing cuts to staff, programs, and services – will cause educational harm to public school students, especially those most in need, as the district court found.

Finally, ESAs will be of little, if any, benefit to Nevada's hundreds of thousands of at-risk and ELL students. The limited number of private schools in Nevada are expensive, not located in or near impoverished neighborhoods, and able to deny admission to students who are academically at-risk and in need of extra educational services.

For these reasons, *Amici* respectfully request that this Court prevent the implementation of S.B. 302 by affirming the preliminary injunction entered by the district court below.

I. NEVADA PUBLIC SCHOOLS SERVE A GROWING STUDENT POPULATION, INCLUDING INCREASING NUMBERS OF AT-RISK AND ELL STUDENTS

As one of the fastest-growing states in the nation, Nevada has experienced a surge in student enrollment in the public schools. See U.S. Census Bureau, Cumulative Estimates of Resident Population Change for the United States, Regions, States, and Puerto Rico and Region and State Rankings: April 1, 2010 to July 1, 2015, U.S. CENSUS BUREAU (2015), <http://www.census.gov/popest/data/state/totals/2015/index.html>. Over the five-year period from April 1, 2010 to July 1, 2015, Nevada's population grew by 7%, making it the seventh fastest-growing state over this timeframe. From the 2005-06

to 2013-14 school year, Nevada's total enrollment in the public schools increased by 9%, from 413,253 to 451,831 students. See Institute of Education Sciences, Elementary/Secondary Information System, NATIONAL CENTER FOR EDUCATION STATISTICS (2015), <http://nces.ed.gov/ccd/elsi/>, data retrieved from IES, ELSi, NCES Table Generator on March 14, 2016 [hereinafter "National Center for Education Statistics"]. Over the same period, the average national increase in public school enrollment was only 2%. Id. Nevada student enrollment growth was 4.5 times the national average.

The steep growth in Nevada public school enrollment from 2005-06 to 2013-14 includes a substantial increase in economically disadvantaged (at-risk) students, identified as those eligible for free and reduced price lunch, English language learner ("ELL") students, and students with disabilities. Id. In less than a decade, the number of economically disadvantaged, at-risk students ballooned from 170,437 in 2005-06 to 238,936 in 2013-14. This change represents a staggering 40% increase – nearly double the 23% increase in public schools nationwide over this timeframe – and results in a majority of Nevada students being at-risk. Id.

Nevada's ELL population has also grown rapidly. Nevada is the third-

fastest-growing state in terms of ELL students. CLARK COUNTY SCHOOL DISTRICT, CLOSING THE LITERACY GAPS 18 (Sep. 2014) (citing Nevada Department of Education. (2012). *Nevada ESEA Flexibility Waiver*. U.S. Department of Education) [hereinafter “CCSD, CLOSING THE LITERACY GAPS”]. In 2005-06, Nevada’s ELL population was 63,856 students, but by 2013-14 the population rose by 7% to 68,053 students, or 15% of the total student population. See National Center for Education Statistics. Over the same time period, the number of ELL students nationwide increased by 5%. Id.

The number of special education students in the Nevada public school system similarly increased by 14% from 45,763 in the 2005-06 school year to 52,052 in the 2013-14 school year. Over the same period, the nationwide trend moved in the opposite direction, with the number of special education students in public schools across the country decreasing by an average of 4%. Id.

These statewide trends are driven by trends in Clark County School District (“CCSD”), the nation’s fifth largest school district. CCSD served approximately 314,643 students in 2013-14, representing over 70% of the State’s students. CCSD, CLOSING THE LITERACY GAPS, at 6. With the extensive growth of greater Las Vegas, it is one of the fastest growing districts in the nation. Id. CCSD has

opened more than 110 new schools since 2000 and operated 357 schools in 2013-14. Id. CCSD enrollment increased by 48,195 students from 2002-03 to 2013-14, growing by an average of more than 4,300 students annually. Id.

CCSD has also experienced a shift in student demographics. Id. Over half of the district's students are at-risk through economic disadvantage, and many CCSD schools serve high concentrations of at-risk and ELL students. Id. The percentage of students qualifying for free and reduced price lunch rose dramatically from 35.6% in 2003-04 to 53.5% in 2012-13. Id. Moreover, of the 311,000 students enrolled in CCSD in 2012-13, over 51,300 students (or 16.5%) were identified as ELL students. Id. Nearly 11% of CCSD students are students classified with a disability who are provided special education through an Individualized Education Program ("IEP"). Id.

II. AT-RISK AND ELL STUDENTS REQUIRE ADDITIONAL EDUCATION RESOURCES

A. The Nevada Legislature Has Recognized that At-Risk and ELL Students Require Additional Education Resources.

It is well established that students at-risk through household and community poverty and ELL students require additional education resources – in the form of targeted programs, services, and interventions – to be afforded a meaningful

opportunity to achieve state academic standards. See, e.g., C. KIRABO JACKSON ET AL., THE EFFECT OF SCHOOL FINANCE REFORMS ON THE DISTRIBUTION OF SPENDING, ACADEMIC ACHIEVEMENT, AND ADULT OUTCOMES 44 (Nat'l Bureau of Econ. Research, Working Paper No. 20118, 2014) [hereinafter "Jackson Report"]. In recent years, the State of Nevada has taken at least five steps that recognize and affirm the need for additional resources and interventions for the growing population of at-risk and ELL students in Nevada's public schools.

First, a 2006 report commissioned by a legislative committee studied the Nevada Plan, the state's school funding formula enacted in 1967. The report proposed reforms to address the changing student demographics and evolving educational goals and academic mandates faced by the state's public schools. JOHN AUGENBLICK ET AL., ESTIMATING THE COST OF AN ADEQUATE EDUCATION IN NEVADA 1, Augenblick, Palaich and Associates, Inc. (Aug. 2006) [hereinafter "Augenblick Report"]. The report recommended revising the Nevada Plan funding formula to reflect the costs of qualified teachers, support staff and other programs necessary to give all students the opportunity to achieve state curriculum and assessment standards. Id. at iv, 69, 71, 73. It also examined the cost of necessary programs, services and interventions for at-risk students, students with disabilities,

and ELL students, and recommended additional funding be provided for these students through the state funding formula.¹ In a 2015 update of this study, the researchers reexamined the cost of providing bilingual education programs to Nevada’s ELL students, taking into consideration various levels of ELL student performance, more detailed assessments of ELL students, and new state standards, and recommended that those additional costs also be included by the Legislature in future reform to the state school funding formula.² JOHN AUGENBLICK ET AL., PROFESSIONAL JUDGMENT STUDY REPORT 27, Augenblick, Palaich and Associates, Inc. (Jan. 2015) [hereinafter “Augenblick Report Update”]. The 2015 update also revisited the 2006 analysis of the additional cost of programs and services for at-risk students and renewed the recommendation that those costs be included in the state school funding formula. Id. at 18, 96.

Second, in January 2015, the Legislative Counsel Bureau of the

¹ In the 2006 report, the additional costs for at-risk students, students with disabilities, and ELL students are represented as “weights,” or a percentage of the “base” cost of educating students with no special educational needs. For example, the report recommended a weight of between .29 and .35 of the base cost for at-risk students, and between .56 and .47 for ELL students, depending on the size of the school district. See Augenblick Report at 71.

² The report recommended a weight for ELL students as a percentage of the base cost, representing the additional cost for bilingual education programs. See Augenblick Report Update at 27.

Nevada Legislature released the report and recommendations of the fifteen-member Task Force on K-12 Public Education Funding established pursuant to Senate Bill 500 of the 77th (2013) Session of the Nevada Legislature [hereinafter “S.B. 500”]. See LEGISLATIVE COUNSEL BUREAU, BULLETIN NO. 15-5: SUMMARY OF RECOMMENDATIONS AND REPORT OF TASK FORCE ON K-12 PUBLIC EDUCATION FUNDING 1 (2015) [Hereinafter “TASK FORCE ON K-12 PUBLIC EDUCATION FUNDING REPORT”]. This Report recommended the Legislature significantly revise the Nevada Plan funding formula, which had not been updated since 1967. The recommendations included determining the cost of programs, services and interventions to address the needs of at-risk and ELL students and students with disabilities, and reflecting those costs through weights for those students in the state funding formula.³ Id. at 5, 12. At the heart of the Task Force Report is the recommendation that the Legislature reform the Nevada Plan formula to provide weighted funding for at-risk and ELL students and students with disabilities, initially as a categorical grant outside of the State’s K-12 funding formula with a transition to providing it within a revised Nevada Plan funding formula at a future

³ The Augenblick Report Update recommended a funding model that would apply a weight of not less than 1.50 for ELL and at-risk students, and a weight of 2.0 for all students with disabilities. Id. at 5, 12.

date. Id. at 11, 13.

Third, in his 2015 State of the State address, Governor Brian Sandoval also recommended school funding reforms to include funding for the additional resources needed by the State’s at-risk and ELL students. Noting the dramatic enrollment growth and changes in student demographics in the public schools, the Governor called for the Nevada Plan funding formula to be “modernized to consider the needs of individual students.” Brian Sandoval, Governor, State of Nevada, State of the State (Jan. 15, 2015) (transcript available at governing.com) [known as “Sandoval State of the State”]. Governor Sandoval pronounced that “[a] better alternative uses ‘weighted formulas’ where students with differing needs would receive additional dollars based on a percentage of the base amount.” Id. The Governor further called on the Legislature to establish, in the second year of the 2015-17 biennium, weighted funding for special education students followed by weights for other at-risk student categories in subsequent years. Id.

Fourth, in 2015, the Legislature enacted Senate Bill 508 (“S.B. 508”), which codified, commencing with Fiscal Year 2016-17, the objective of moving the State to a weighted funding formula in order to provide additional resources for disadvantaged students. The Legislature expressly acknowledges that certain

student populations need additional resources, as the bill states:

It is the intent of the Legislature . . . to provide additional resources to the Nevada Plan expressed as a multiplier . . . to meet the unique needs of certain categories of pupils, including without limitation, limited English proficient pupils, pupils who are at risk and gifted and talented.

S.B. 508, Sec. 4, 78th Session (2015 Nev. Leg.).

Section 4 of S.B. 508 provides that these additional resources will be expressed through weights – or a multiplier of the basic support guarantee or base cost in the Nevada Plan – for at-risk and ELL students and students with disabilities. S.B. 508 further directs the Department of Education to review and consider the recommendations made by the Task Force on K-12 Public Education in designing a plan to move to a weighted formula with expected full implementation no later than Fiscal Year 2021-22. The Legislative Committee on Education will then consider these recommendations. Id. at Sec. 28(2).

Finally, in 2013, the Legislature enacted a categorical grant program to pilot additional resources to schools serving high populations of ELL students. Senate Bill 504 (“S.B. 504”), enacted in 2013, established the Zoom Schools program for ELL students to provide “services and instruction which is designed to address the academic needs of such children so that those children attain proficiency in the English language and improve their overall academic and linguistic achievement

and proficiency.” S.B. 504, 78th Session (2015 Nev. Leg.). In the budget for the 2016-17 biennium, the Legislature also increased funding to sustain and expand the Zoom Schools categorical program.

In sum, these actions demonstrate legislative and executive branch recognition of the critical and urgent need to ensure that funding is available for the additional programs, services, and interventions necessary to afford Nevada’s sizeable and growing population of at-risk and ELL students and students with disabilities a meaningful opportunity to succeed in school.

B. Increased Spending Improves Outcomes for At-Risk and ELL Students.

A compelling body of empirical research supports the need to ensure that Nevada’s public schools have the financial ability to obtain additional resources to educate disadvantaged student populations. This research shows that the delivery of additional resources through increased funding has a significant and positive impact on outcomes for at-risk and ELL students.

In 2014, a research team led by C. Kirabo Jackson published a landmark longitudinal analysis of increases in education spending in 28 states from 1971 through 2010. Jackson Report at 1. The study examined the effects of increases in spending on subsequent educational and economic attainment in adulthood by

using newly released data on per-pupil spending at the school district level going back to 1967, five years before the first reforms. Id. at 2-3.

The results of the Jackson Report revealed that the benefits associated with increased education spending are concentrated among children from poor families; thus, for economically disadvantaged or at-risk students, there is a meaningful causal relationship between such spending and improvements in long-term educational outcomes, adult earnings, family income, and poverty status. Id. at 35. In particular, for at-risk students, “increasing per-pupil spending by 20 percent for a child’s entire K-12 schooling career increases high school completion by 22.9 percentage points; increases the overall number of years of education by 0.928; increases adult earnings by about 24.6 percent; increases annual family income by 52.2 percent; and reduces the incidence of adult poverty by 19.7 percentage points.” Id. at 44.

Significantly, the study found that these “improvements are larger with larger spending increases.” Id. at 35. The Jackson Report also noted that the “magnitude of these effects for children from poor families are large enough to eliminate the high-school completion gap[,] . . . [the] years of educational attainment gap[, and] . . . the wage gap between children from low- and high-

income families.” Id. at 36-38.

These results confirm the appropriateness – and necessity – of recent attention given by Nevada lawmakers to promoting the availability of additional education resources for the State’s at-risk and ELL students. The Jackson Report concluded that, while “many have questioned whether increased school spending can really help improve the educational and lifetime outcomes of children from disadvantaged backgrounds,” these results “demonstrate that it can.”⁴ Id. at 5. The Jackson report is supported by a growing body of research, including a report by

⁴ See also, Whitney C. Allgood, *The Need for Adequate Resources for At-Risk Children* 73-103 (Econ. Policy Inst., Working Paper No. 277, 2006) (reviewing extensive studies correlating pre-kindergarten programs, lower class sizes, teacher qualifications, teacher working conditions, and other academic supports with improved student outcomes); David Card and A. Abigail Payne, Abstract, *School Finance Reform, the Distribution of School Spending, and the Distribution of Student Test Scores*, 83 J. Pub. Econ. 49, 49 (2002) (finding that court declarations of unconstitutionality “increased the relative funding of low-income districts,” which led to “a narrowing of test score outcomes”); Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 Rev. Educ. Res. 361, 362 (1996) (peer-reviewed study concluding that “a broad range of school inputs are positively related to student outcomes, and that the magnitude of the effects are sufficiently large to suggest that moderate increases in spending may be associated with significant increases in achievement”); Kristen Harknett et al., *Do Public Expenditures Improve Child Outcomes in the U.S.A? Comparison Across Fifty States* 17 (Ctr. For Policy Research, Maxwell Sch. Of Citizenship and Pub. Aff., Syracuse Univ., Working Paper Series No. 53, 2003) (finding “particularly strong and positive effects” between additional education expenditures and student test scores and adolescent behavior).

Julien LaFortune, concluding that increases in education spending in districts serving high concentrations of at-risk students yield improved outcomes for students and narrow the gaps in achievement with more affluent school districts.

Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement* 6, 26, 29, 33 (Nat'l Bureau of Econ. Research, Working Paper No. 22011, 2016).

Further, the research on the correlation between increased education spending and outcomes has particular relevance to African-American and Hispanic students. African-American and Hispanic students are overrepresented in the population of economically disadvantaged students.⁵ CCSD, CLOSING THE LITERACY GAPS at 8. The data suggest that there are currently gaps in achievement between Nevada's ELL, at-risk and African-American students and students generally. *Id.* at 24. Historical data also show that the students who struggle most tend to be ELL students, students from high-poverty communities, and African-American students. *Id.* at 5. Thus, the race-based achievement gap correlates to the achievement gap based on socioeconomic status. The need for additional

⁵ During the 2012-13 school year, 53.5% of CCSD students were economically disadvantaged due to household poverty. African-American and Hispanic students were overrepresented in this subpopulation with 66.4% and 70.6%, respectively.

spending in the form of programs, services, and interventions for ELL and at-risk students, as recently recognized by the Nevada Executive and Legislature, implicates African-American and Hispanic students as well.

III. ESAS WILL HARM, NOT BENEFIT, NEVADA’S AT-RISK AND ELL STUDENTS

As the district court found, S.B. 302 will reduce funding critically needed to educate the growing enrollment of students in the Nevada public schools. As a result, S.B. 302 will cause irreparable harm to Nevada students. Lopez v. Schwartz, Case No. 15 OC 00207, Order Granting Motion for Preliminary Injunction, in the First Judicial District Court of the State of Nevada in and for Carson City at 10. This harm will impact the substantial and growing populations of at-risk and ELL students.

A. ESAs Will Not Benefit At-Risk and ELL Students.

Recent analysis of data related to S.B. 302 demonstrates that, for several reasons, ESAs will not benefit at-risk and ELL students.

First, most Nevada private schools charge tuition that is significantly higher than the annual amount of public school funding that will be deposited into ESAs by the State Treasurer. See Educate Nevada Now, *Nevada ESAs: In Clark and Washoe, Private Schools Out of Reach for Most Families*,

<https://t.e2ma.net/message/xgldx/5u549l>. Second, the enrollment data indicate that transportation to many of the private schools may not be available to students from lower income neighborhoods. See Educate Nevada Now, *Most ESA Applicants are from High Family Income Zip Codes*,

http://www.educatenevadanow.com/wp-content/uploads/2016/03/ESA_Applcnt_Zip_Data_FINAL_3.11.2016.pdf

[hereinafter “ENN Report on ESA Applications”]. Third, the private schools are free to deny admission for any reason, including whether the student is academically at-risk, in need of special education or bilingual education programs and services, or requires additional interventions and supports. Id. Fourth, recent analysis of data from the State Treasurer’s “pre-application” process for ESAs shows that households residing in zip codes with high poverty and high numbers of ELL students are largely unrepresented in the pre-application pool for ESAs. Id.; see also Ian Whitaker, *Data: Majority of Nevadans Seeking School Vouchers Live in Upscale Suburbs*, LAS VEGAS SUN, October 29, 2015, <http://lasvegassun.com/news/2015/oct/29/data-majority-nevadans-seeking-school-vouchers-liv/>.

Among the over 4,000 pre-applications filed between August and December

2015, only 28 are from Nevada’s 18 poorest zip codes, or those with median incomes below \$25,000. See ENN Report on ESA Applications. On the other hand, most of the pre-applications, 3,135 or 75%, came from households residing in zip codes with incomes between \$50,000 and \$100,000. See ENN Report on ESA Applications.

As this data shows, ESAs will provide little or no benefit for the majority of Nevada students, who are at-risk and ELL students and students with disabilities, and who currently attend – and will largely continue to attend – Nevada’s public schools.

B. ESAs Will Cause the Loss of Critically Needed Funding For At-Risk and ELL Students.

As the district court found, S.B. 302 will divert funding from public school budgets below the levels appropriated as “sufficient” by the Legislature in the current biennium budget. Lopez v. Schwartz, Case No. 15 OC 00207, Order Granting Motion for Preliminary Injunction, in the First Judicial District Court of the State of Nevada in and for Carson City at 10. As discussed above, the Nevada Legislature has repeatedly recognized the need to ensure funding to provide targeted resources for the significant and growing enrollment of at-risk and ELL students in Nevada public schools. Lawmakers have also acknowledged that the

current funding formula – the Nevada Plan – is woefully outdated and in urgent need of reform and that those reforms must include additional resources and spending targeted to the State’s disadvantaged student populations. See discussion at II. A., *supra*.⁶

Further, based on the approximate number of pre-applicants to the program, an estimated \$20 million would be taken from public school budgets across the state to fund ESAs in just the first year of implementation.⁷ The Treasurer’s Office has estimated that, if all current private school and home school students obtain an ESA, over \$200 million will be lost to the public schools. Geoff Dornan, *Loan Approved to Jump Start Voucher Program*, NEVADA APPEAL, August 12, 2015, <http://www.nevadaappeal.com/news/17672675-113/loan->

⁶ Numerous studies have found Nevada’s public school funding to be among the lowest in the nation, and lacking in the allocation of funding targeted to the additional education needs of at-risk students. See, e.g., Education Law Center, *Is School Funding Fair? A National Report Card*, Rutgers Graduate School of Education, 5th Ed., 2015 [hereinafter “National Report Card”].

⁷ With approximately 4,100 pre-applications, multiplied by the lowest allotment of \$5,100 per pupil, the amount diverted equals \$20,910,000. However, since some students may receive a higher allotment, the total funding that would be diverted in the first year is likely higher. See Dan Schwartz, Nevada State Treasurer, *Treasurer Dan Schwartz Issues Statement on Today’s Hearing Challenging Nevada’s ESA Program*, January 6, 2016, http://www.nevadatreasurer.gov/PublicInfo/PR/2016_News_Releases/ (Treasurer’s Office notes they received over 4,100 applications during the open enrollment period).

[approved-to-jump-start-voucher-program](#) (citing comment by Grant Hewitt, Treasurer’s Chief of Staff). Given the State’s recognition that the public school funding currently available is already limited, any diversion of that funding will cost Nevada’s at-risk and ELL students critically needed educational resources. Lopez v. Schwartz, Case No. 15 OC 00207, Order Granting Motion for Preliminary Injunction, in the First Judicial District Court of the State of Nevada in and for Carson City at 4-5. Indeed, this is an overarching reason why the district court found that the ESA program authorized by S.B. 302 would cause “irreparable harm” to Nevada’s public schools and its students. Id. at 13-14; see also, CCSD, CLOSING THE LITERACY GAPS at 4.

It is clear, therefore, that S.B. 302 will result in a deprivation of resources crucial for student success, such as access to early childhood programs, sufficient bilingual education, and qualified teachers for every classroom and subject. National Report Card at 19. In Nevada, resource allocation indicators show that the quality and breadth of educational opportunities available for students under the *current* school financing system are already limited. Id. at 14-16. Nevada lawmakers have taken action in recognition that additional resources are crucial not only for students at-risk due to economic disadvantage, but also for ELL and

special education students.

Faced with growing populations of at-risk and ELL students and students with disabilities, every dollar provided for the operation of the public school system is critical. If money allocated by the Nevada Legislature for the public school system is diverted to subsidize private school tuition for students who are largely from more affluent backgrounds, essential resources for the neediest students – resources that are already limited in high poverty districts – will be reduced, curtailed, or eliminated. Any funding reduction that could lead to the loss of programs, teachers, support staff, and services will impair the delivery of resources to the Nevada students who are most at-risk academically, and to all public school students more generally. See Neal Morton, *Budget shortfall drives Clark County School District class-size increase*, LAS VEGAS REVIEW-JOURNAL, May 20, 2015; Neal Morton, *Clark County School District says no to pay raises*, LAS VEGAS REVIEW-JOURNAL, June 29, 2015; Neal Morton, *CCSD to consider new two-year contract that may ease chronic teacher shortage*, LAS VEGAS REVIEW-JOURNAL, Jan. 9, 2016; see also David G. Sciarra, *Education Savings Accounts Won't Help Students*, LAS VEGAS REVIEW-JOURNAL, February 15, 2016.

The Nevada Supreme Court has found that education is a basic right under

the State Constitution. Guinn v. Legislature of State of Nev. (Guinn I), 119 Nev. 277, 286, 71 P.3d 1269 (2003), *decision clarified on denial of reh’g sub nom. Guinn v. Legislature of State of Nev.*, 119 Nev. 460, 76 P.3d 22 (2003) *overruled on other grounds by Nevadans for Nevada v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006). As the Nevada Legislature has further enshrined in state law, “the proper objective of state financial aid to public education is to ensure each Nevada child a reasonably equal educational opportunity.” See Nev. Rev. Stat. 387.121 (2014). That purpose will be thwarted by the ESA program. If S.B. 302 is implemented, it is the at-risk and ELL students and students with disabilities in Nevada – those most in need of vital academic supports – who will suffer the greatest harm and whose educational opportunities will shrink in its wake.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to affirm the district court’s decision.

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,374 words.

3. Finally, I hereby certify that I have read this *Amici Curiae* brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of April, 2016.

WOODBURN AND WEDGE
By: /s/ W. Chris Wicker
W. Chris Wicker, Esq.
Nevada Bar No. 1037
Counsel for Amici Curiae Mexican-
American Legal Defense and Educational
Fund, Las Vegas NAACP, and Southern
Poverty Law Center

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRCP 5(b) that, on this 19th day of April, 2016, I caused the foregoing BRIEF FOR THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, LAS VEGAS NAACP, AND SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES to be electronically filed with the Court and, therefore, to be served by way of the Court's eFlex electronic filing system to the parties listed below:

Matthew T. Dushoff
Timothy D. Keller
Lisa J. Zastrow
Leon M. Greenberg
KOLESAR &
LEATHAM, CHTD.

Robert L. Eisenberg
LEMONS GRUNDY &
EISENBERG

Ketan D. Bhirud
ATTORNEY GENERAL
LAS VEGAS

Leon M. Greenberg
LEON GREENBERG
PROFESSIONAL
CORPORATION

Francis C. Flaherty
Kristen L. Hollar
DYER, LAWRENCE,
PENROSE, FLAHERTY,
DONALDSON &
PRUNTY

Amanda Morgan
David G. Sciarra
EDUCATION LAW
CENTER

Paul D. Clement
BANCROFT PLLC

Joseph Tartakovsky
Lawrence J.C. VanDyke
ATTORNEY GENERAL
CARSON CITY

Thomas Paul Clancy
Tamerlin J. Godley
Laura E. Mathe
MUNGER, TOLLES &
OLSON LLP

Justin C. Jones
Don Springmeyer
WOLF, RIFKIN,
SHAPIRO, SCHULMAN
& RABKIN, LLP

By: Kelly Weaver
Kelly Weaver