

“EXHIBIT A”

Dan Schwartz v. Hellen Quan Lopez et al.
NSC Case No. 69611

Exhibit to:
Unopposed Motion to Reset Oral Argument for
the Last Week of July 2016

“EXHIBIT A”

Lawrence VanDyke

From: Lawrence VanDyke
Sent: Tuesday, June 14, 2016 8:38 AM
To: 'Amy Rose'
Cc: Ketan D. Bhirud; Jordan T. Smith; ACLU-Vouchers@cov.com; Heather Weaver; Richard Katskee
Subject: RE: Notice of Appeal

Thank you, Amy. Understood. As already explained below, we will not represent to the Court that you have informed us whether or not you plan to file an appeal. We will only apprise the Court of the State's expectation—i.e., that we believe you will appeal, but that we don't know when.

Regarding the rest of your email, all of our discussions were based on the shared assumption that you would file a Notice of Appeal on either Friday or Monday. Given that you have not done so, and cannot definitively say when you will, we need to return to our original plan of filing our motion in the Lopez case right away to avoid prejudicing the Court in deciding our motion. We cannot delay any longer. Once you file your appeal, we can attempt to again coordinate on submitting an agreed-upon expedited briefing schedule to the Court, or we can file our own proposals if we cannot timely reach agreement.

Thank you again!

Lawrence VanDyke
Nevada Solicitor General

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T: (775) 684-1233 • LVanDyke@ag.nv.gov

- Lawrence

From: Amy Rose [mailto:rose@aclunv.org]
Sent: Monday, June 13, 2016 3:45 PM
To: Lawrence VanDyke
Cc: Ketan D. Bhirud; Jordan T. Smith; ACLU-Vouchers@cov.com; Heather Weaver; Richard Katskee
Subject: Re: Notice of Appeal
Importance: High

Hi Lawrence,

Please understand that I did not, and do not, give you authority to represent to the Court that the *Duncan* plaintiffs will or will not file an appeal. All of my discussions with you have been about the potential of filing, and I have never represented that we will in fact file or given you a hard date that we will file, if we chose to do so. In fact, you and I both discussed that everything we said would have to be taken back to our respective teams for final decision.

When we last spoke on Friday, we discussed possible briefing and oral argument schedules should the court choose to consolidate the *Duncan* case with the *Lopez* case, if the *Duncan* plaintiffs filed an appeal. We also discussed that you would draft a joint request for a proposed briefing schedule and would not file it before we had a chance to review it. These discussions were made in light of the Court's indication that if the *Duncan* case filed an appeal, it would like to hear the case together with the *Lopez* appeal at the already scheduled July 8th oral argument. You and I both determined that this

presented a potential for an incredibly short briefing period - something adverse to both of us - and thus engaged in the conversation regarding the joint request.

You and I also discussed the fact that you had already represented to the Court in your motion for expedited hearing that you needed a decision by July 8th to implement the voucher program by August 1st. As the *Lopez* oral argument is only scheduled to be heard July 8th, and this is when you represented you needed a decision by, you said you would inform the court in the joint request, something to the effect of, moving the hearing date to the last week of July or shortly thereafter, will have no more effect on the implementation of the program than a July 8th hearing will have.

Please feel free to call me if you would like to discuss.

Thanks,

Amy M. Rose
Legal Director

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From: Lawrence VanDyke <LVanDyke@ag.nv.gov>
Date: Monday, June 13, 2016 at 2:53 PM
To: Amy Rose <rose@aclunv.org>
Cc: Ketan Bhirud <KBhirud@ag.nv.gov>, "Jordan T. Smith" <JSmith@ag.nv.gov>
Subject: RE: Notice of Appeal

Amy – As I mentioned last week, while we would like to coordinate on this with you all if possible, we are very concerned with any further delay in getting this teed up to the Supreme Court. We have already delayed filing our motion by more than a week to try to coordinate with you, and you keep pushing back your anticipated date for filing your Notice of Appeal.

We can't delay getting this before the Court any longer, so whether or not you file your Notice of Appeal today, we will be filing our motion first thing tomorrow morning asking the Court to move the *Lopez* argument date from July 8 to the last week of July, and notifying the Court that we have conferred with counsel for the Duncan plaintiffs and, while we expect that you all will file an appeal, you have not yet filed it and have not been able to commit to a date by which you will do so. That way the Court has the opportunity to move the oral argument date to facilitate the consolidated argument that it has asked for, and we will just have to file another motion in the Duncan case to set an expedited briefing schedule once you all file your Notice of Appeal.

Thank you,

Lawrence

From: Amy Rose [<mailto:rose@aclunv.org>]
Sent: Monday, June 13, 2016 1:14 PM
To: Lawrence VanDyke
Cc: Ketan D. Bhirud; Jordan T. Smith
Subject: Re: Notice of Appeal

Thanks Lawrence. Still working some things out on our end. Can you send the draft as soon as you're done? I know our whole legal team will want to review it and a number of people are on east coast time.

Amy M. Rose
Legal Director

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From: Lawrence VanDyke <LVanDyke@ag.nv.gov>
Date: Monday, June 13, 2016 at 11:44 AM
To: Amy Rose <rose@aclunv.org>
Cc: Ketan Bhirud <KBhirud@ag.nv.gov>, "Jordan T. Smith" <JSmith@ag.nv.gov>
Subject: Notice of Appeal

Amy – just checking in to confirm that you all are still planning to file your Notice of Appeal today. We are putting the final touches on our draft unopposed motion to consolidate oral argument and set an expedited briefing schedule, which we plan to file today after you file our NoA. I plan to send a draft of that document to you and the Lopez plaintiffs later today before we file.

Thank you!

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

v.

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., and
SARAH SOLOMON AND BRIAN
SOLOMON, individually and on behalf
of their minor children, D.S. and K.S.,

Respondents.

Supreme Court No. 69611

District Court No. 15-OC-00207-1B
Electronically Filed
Jun 14 2016 08:46 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**UNOPPOSED MOTION TO
RESET ORAL ARGUMENT FOR
THE LAST WEEK OF JULY
2016**

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The State of Nevada, by and through the Attorney General of Nevada, respectfully moves this Court to reset oral argument in this case from July 8, 2016, to the last week of July. The State makes this request because of this Court’s stated preference to hear oral argument in both of the Educational Savings Account (ESA) cases—*Lopez* and *Duncan*—on the same day, and because arguing counsel for the State, Mr. Paul D. Clement, will be out of the country on July 8.

BACKGROUND

The instant appeal, *Schwartz v. Lopez*, involves Nevada’s defense of its new ESA program against constitutional challenges brought under Article XI, Sections 2 and 6. The *Lopez* appeal is fully briefed and ready for oral argument. The second ESA case, *Duncan v. Nevada*, involves challenges brought under Sections 2 and 10 of Article XI. On May 18, 2016, the district court in that case granted Nevada’s motion to dismiss. Counsel for the State has repeatedly conferred with counsel for the *Duncan* plaintiffs and expects them to appeal the district court decision in that case.¹ But they have not yet filed their notice of appeal nor have they been able to commit to a date by which they will. *See* July 13, 2016 and July

¹ Counsel for the *Duncan* plaintiffs has made clear that they have not authorized the State “to represent to the Court [whether] the *Duncan* plaintiffs will or will not file an appeal.” *See* Exhibit A. Consistent with that, the State makes no representation to the Court regarding the *Duncan* plaintiffs’ position as to whether or not they will appeal. Rather, the State is merely stating *its* position that it fully expects the *Duncan* plaintiffs to appeal.

14, 2016 email correspondence (attached as Exhibit A). Nonetheless, the State has filed this motion to enable the Court to consider whether to move the July 8 oral argument for the reasons provided below.

On May 20, 2016, Appellant moved this Court to schedule oral argument in *Lopez* for June 6 or 7, 2016. Appellant explained that, if this Court decides to lift the preliminary injunction, the Treasurer would need such a ruling by July 8, 2016, for him to fund ESAs on the first scheduled funding date for the coming school year: August 1, 2016. Appellant also noted that arguing counsel for the State, Mr. Clement, would be unavailable between June 23 and July 11, 2016.

On May 24, 2016, this Court issued a notice setting oral argument in *Lopez* for July 8, 2016. The next day, May 25, 2016, this Court issued an order denying Appellant's request to set oral argument for June 6 or 7. This Court explained that July 8 was "the earliest possible date this court can reasonably hear the merits of this case." Order at 1. This Court also advised that, if an appeal is taken in *Duncan*, "this court would prefer to hear oral argument in that case on July 8, 2016, as well." *Id.* at 2 n.1.

ARGUMENT

The State's motion to reset argument to the last week of July is unopposed. Counsel for Respondents has advised that they take no position on the request.

Resetting the oral argument to the last week of July would allow the State's counsel of choice, Mr. Clement, to present argument in this Court. As Appellant noted in his May 20 motion, Mr. Clement is unavailable on July 8. The State's understanding is that July 8 is "the earliest date this court can reasonably hear" oral argument in *Lopez*, but that July 8 is not the only date the Court can do so. Order at 1.

Resetting the argument to the last week of July may also accommodate this Court's preference to hear argument in *Lopez* and *Duncan* on the same day. The district court in *Duncan* granted Nevada's motion to dismiss on May 18. To date, the *Duncan* plaintiffs have not filed a notice of appeal, but based on discussions with their counsel, counsel for the State believes they plan to file an appeal. Assuming that the *Duncan* plaintiffs appeal, resetting the *Lopez* argument would make it more likely that *Duncan* could be briefed in time to be argued with *Lopez*. Even if the notice of appeal were filed in *Duncan* today (*i.e.*, June 14), that would leave only three weeks before July 8 for the Court to receive briefing from the parties and the several *amici* that would want to file briefs. Because the *Duncan* plaintiffs could file their notice of appeal anytime this month, resetting the oral argument in *Lopez* to the last week of July would make it far more likely that the Court could hear *Lopez* and *Duncan* together.

The State appreciates this Court’s statement that it “will expedite a decision in this matter to the extent this court’s docket permits.” Order at 2. The State remains committed to resolving these challenges expeditiously. Resetting the oral argument to the last week of July, as opposed to July 8, would not materially further affect the timing of the Treasurer’s funding of ESAs in the event this Court lifts the preliminary injunction entered in *Lopez*.

CONCLUSION

The State’s unopposed motion to reset oral argument in *Lopez* to the last week of July 2016 should be granted.

In the event the Court cannot hear argument the last week of July, the State respectfully requests that the Court vacate the July 8 argument date and direct the Clerk to confer with the parties concerning available argument dates thereafter.

Dated: June 14, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Lawrence VanDyke

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on June 14, 2016.

The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within three calendar days to the following non-CM/ECF participants:

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/s/ Janice M. Riherd

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