

“EXHIBIT FOUR (4)”

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

Exhibit to:
Docketing Statement
Civil Appeals

“EXHIBIT FOUR (4)”

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13 *Motion for admission *pro hac vice* pending

14 *Attorneys for Defendant*

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,

Case No. 15-OC-00207-1B

20 Dept. No. II

21 v.

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

23 Defendant.

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.

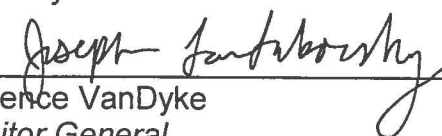
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SUSAN MCGUIRE WETHER
C. GRIBBLE CLERK
BY _____ DEPUTY

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

3 DATED this 15th day of January, 2016.

4 Respectfully submitted,

5 Adam Paul Laxalt
6 *Attorney General*

7 By: 
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28 *Motion for admission *pro hac vice* forthcoming

Attorneys for Defendants

EXHIBIT

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EXHIBIT

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CLERK

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6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR CARSON CITY**
8

9 **HELLEN QUAN LOPEZ, individually**
10 **and on behalf of her minor child, C.Q.;**
11 **MICHELLE GORELOW, individually**
12 **and on behalf of her minor children,**
13 **A.G. and H.G.; ELECTRA**
14 **SKRYZDLEWSKI, individually and on**
15 **behalf of her minor child, L.M.;**
16 **JENNIFER CARR, individually and on**
17 **behalf of her minor children, W.C.,**
18 **A.C., and E.C.; LINDA JOHNSON,**
19 **individually and on behalf of her minor**
20 **child, K.J.; SARAH and BRIAN**
21 **SOLOMON, individually and on behalf**
22 **of their minor children, D.S. and K.S.,**

23 **Plaintiffs,**

24 **vs.**

25 **DAN SCHWARTZ, IN HIS OFFICIAL**
26 **CAPACITY AS TREASURER OF THE**
27 **STATE OF NEVADA,**

28 **Defendant.**

CASE NO: 15 OC 00207 1B

DEPT.: 2

**ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION**

29 **PROCEDURAL BACKGROUND**

30 Before the Court is Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs are
31 parents whose children attend Nevada public schools. Plaintiff Parents seek an
32 injunction to stop the State Treasurer from implementing Senate Bill 302 ("SB 302")
33 which authorizes educational savings accounts. Plaintiff Parents alleged SB 302 violates
34 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.

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3 **FINDINGS OF FACT**

4 **Public School Funding**

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

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

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

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

24 The DSA, in addition to receiving such appropriations from the general fund, also
25 receives money from other sources, including the Permanent School Fund ("PSF"). The
26 legislature created the PSF to implement Article 11, Section 3 of the Nevada
27 Constitution, which provides that specified property, including lands granted by
28 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.¹

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 2016-17.² 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 ¹See [http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/
28 DSA-SummaryForBiennium.pdf](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf).

²Id. 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 PRINCIPLES OF LAW

13 **Judicial Deference**

14 Judicial deference to duly enacted legislation is derived from three “first
15 principles” of state constitutional jurisprudence.³

16 First, all political power originates with the people.⁴

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

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25 ³*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 ⁴*Gibson* at 291.

⁵*Id.*

1 power except for those powers expressly denied by the Nevada Constitution.⁶ 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.⁷ 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.⁸ The people's grant of powers
6 upon the legislature was general in terms with specified restrictions.⁹ 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.¹⁰

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."¹¹ "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."¹² "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."¹³ "Further, the

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19 ⁶*Id.* at 291-92.

20 ⁷*Id.* at 292.

21 ⁸*Gibson* at 292; *King* at 542.

22 ⁹*Gibson* at 292.

23 ¹⁰*King* at 542.

24 ¹¹*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 ¹²*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 ¹³*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.”¹⁴ 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....”¹⁵

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

26 ¹⁴*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).

¹⁵*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*¹⁶ 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.”¹⁷ 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

27 _____
28 ¹⁶23 Nev. 468 (1897).

¹⁷Id. 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)...”¹⁸ To “appropriate” means “to set apart for or assign to a particular
11 purpose or use in exclusion of all others.”¹⁹ 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 ¹⁸Webster’s Third New International Dictionary 106 (2002).
28

¹⁹Id.

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

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.’”²²

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

24 ²⁰Pls.’ Mot. For Prelim. Inj. p. 11.

25 ²¹Pls.’ Reply on Its Mot. For Prelim. Inj. p. 1.

26 ²²*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.*²³ 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.*²⁴ for the proposition
26 that “[t]his rule applies as forcibly to the construction of written Constitutions as other

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28 ²³128 Nev. A.O. 50, 289 P.3d 1194, 1197 (2012).

²⁴65 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.”²⁵

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.²⁶

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

27 ²⁶*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 (9th Cir. 1997); *Eaves*
v. *Bd. Of Clark Cnty Comm’rs*, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980).

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ORDER

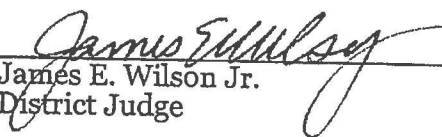
IT IS ORDERED:

Plaintiff Parents' Motion for Preliminary Injunction is granted.

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

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

January 11, 2016.


James E. Wilson Jr.
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:

Don Springmeyer, Esq.
Justin Jones, Esq.
Bradley Schrager, Esq.
Wolf, Rifkin, Shapiro, Schulman &
Rabkin LLP
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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 15th 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:

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An Employee of the State of Nevada

“EXHIBIT THREE (3)”

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

Exhibit to:
Docketing Statement
Civil Appeals

“EXHIBIT THREE (3)”

FIRST JUDICIAL DISTRICT COURT
IN AND FOR CARSON CITY, NEVADA

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SUSAN MEANWETHER
CLERK
BY C. GRIBBLE
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Case No. 15 0C 00207 1B

Dept. No.: II

**NOTICE OF ENTRY OF ORDER
GRANTING MOTION FOR
PRELIMINARY INJUNCTION**

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.

DON SPRINGMEYER
(Nevada Bar No. 1021)
JUSTIN C. JONES
(Nevada Bar No. 8519)
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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 11th day
4 of January 2016, a true and correct copy of which is attached hereto.
5

6 Dated this 12th day of January, 2016.

7 By:  (Nev. #10085)
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1 **CERTIFICATE OF SERVICE**

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

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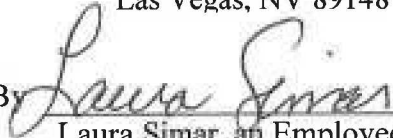
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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

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.,

Plaintiffs,

vs.

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

Defendant.

CASE NO: 15 OC 00207 1B
DEPT.: 2

ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION

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.

1 **FINDINGS OF FACT**

2
3 **Public School Funding**

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

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

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

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

23 The DSA, in addition to receiving such appropriations from the general fund, also
24 receives money from other sources, including the Permanent School Fund ("PSF"). The
25 legislature created the PSF to implement Article 11, Section 3 of the Nevada
26 Constitution, which provides that specified property, including lands granted by
27 Congress to Nevada for educational purposes and the proceeds derived from these
28 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.¹

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 2016-17.² 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 ¹See [http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/
28 DSA-SummaryForBiennium.pdf](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf).

²Id. 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 PRINCIPLES OF LAW

13 **Judicial Deference**

14 Judicial deference to duly enacted legislation is derived from three “first
15 principles” of state constitutional jurisprudence.³

16 First, all political power originates with the people.⁴

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

24
25 ³*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 ⁴*Gibson* at 291.

⁵*Id.*

1 power except for those powers expressly denied by the Nevada Constitution.⁶ 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.⁷ 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.⁸ The people's grant of powers
6 upon the legislature was general in terms with specified restrictions.⁹ 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.¹⁰

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."¹¹ "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."¹² "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."¹³ "Further, the

18
19 ⁶*Id.* at 291-92.

20 ⁷*Id.* at 292.

21 ⁸*Gibson* at 292; *King* at 542.

22 ⁹*Gibson* at 292.

23 ¹⁰*King* at 542.

24 ¹¹*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 ¹²*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 ¹³*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.”¹⁴ 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....”¹⁵

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.”

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.

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

26 ¹⁴*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).

¹⁵*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*¹⁶ 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.”¹⁷ 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

27
28

¹⁶23 Nev. 468 (1897).

¹⁷*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)....”¹⁸ To “appropriate” means “to set apart for or assign to a particular
11 purpose or use in exclusion of all others.”¹⁹ 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 ¹⁸Webster’s Third New International Dictionary 106 (2002).

28 ¹⁹Id.

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

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.’ ”²²

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 _____
24 ²⁰Pls.’ Mot. For Prelim. Inj. p. 11.

25 ²¹Pls.’ Reply on Its Mot. For Prelim. Inj. p. 1.

26 ²²*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,
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.*²³ 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.*²⁴ for the proposition
26 that “[t]his rule applies as forcibly to the construction of written Constitutions as other

27
28 ²³128 Nev. A.O. 50, 289 P.3d 1194, 1197 (2012).

²⁴65 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.”²⁵

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.²⁶

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

27
28 ²⁶*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 (9th Cir. 1997); *Eaves*
Bd. Of Clark Cnty Comm’rs, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980).

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 _____
15 James E. Wilson Jr.
16 District Judge
17
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1 **CERTIFICATE OF MAILING**

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

6
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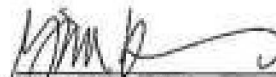
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24 

25 Gina Winder
26 Judicial Assistant
27
28

“EXHIBIT TWO (2)”

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

Exhibit to:
Docketing Statement
Civil Appeals

“EXHIBIT TWO (2)”

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.

1 **FINDINGS OF FACT**

2
3 **Public School Funding**

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

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

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

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

23 The DSA, in addition to receiving such appropriations from the general fund, also
24 receives money from other sources, including the Permanent School Fund ("PSF"). The
25 legislature created the PSF to implement Article 11, Section 3 of the Nevada
26 Constitution, which provides that specified property, including lands granted by
27 Congress to Nevada for educational purposes and the proceeds derived from these
28 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.¹

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 2016-17.² 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.

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

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

²Id. 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 PRINCIPLES OF LAW

13 **Judicial Deference**

14 Judicial deference to duly enacted legislation is derived from three “first
15 principles” of state constitutional jurisprudence.³

16 First, all political power originates with the people.⁴

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

24
25 ³*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 ⁴*Gibson* at 291.

⁵*Id.*

1 power except for those powers expressly denied by the Nevada Constitution.⁶ 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.⁷ 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.⁸ The people's grant of powers
6 upon the legislature was general in terms with specified restrictions.⁹ 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.¹⁰

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."¹¹ "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."¹² "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."¹³ "Further, the

18
19 ⁶*Id.* at 291-92.

20 ⁷*Id.* at 292.

21 ⁸*Gibson* at 292; *King* at 542.

22 ⁹*Gibson* at 292.

23 ¹⁰*King* at 542.

24 ¹¹*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 ¹²*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 ¹³*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.”¹⁴ 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....”¹⁵

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.”

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.

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

26 ¹⁴*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).

¹⁵*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*¹⁶ 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.”¹⁷ 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

27 _____
28 ¹⁶23 Nev. 468 (1897).

¹⁷*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
21 other object or purpose.
22 2. No portion of the public school funds shall in any way be segregated,
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)....”¹⁸ To “appropriate” means “to set apart for or assign to a particular
11 purpose or use in exclusion of all others.”¹⁹ 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

27 ¹⁸Webster’s Third New International Dictionary 106 (2002).

28 ¹⁹Id.

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

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.’”²²

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

24 ²⁰Pls.’ Mot. For Prelim. Inj. p. 11.

25 ²¹Pls.’ Reply on Its Mot. For Prelim. Inj. p. 1.

26 ²²*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).

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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.*²³ 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.*²⁴ for the proposition
26 that “[t]his rule applies as forcibly to the construction of written Constitutions as other

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²³128 Nev. A.O. 50, 289 P.3d 1194, 1197 (2012).

²⁴65 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.”²⁵

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.²⁶

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

27
28 ²⁶*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 (9th Cir. 1997); *Eaves*
Bd. Of Clark Cnty Comm’rs, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980).

1
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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 _____
15 James E. Wilson Jr.
16 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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Judicial Assistant

“EXHIBIT ONE (1)”

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

Exhibit to:
Docketing Statement
Civil Appeals

“EXHIBIT ONE (1)”

REC'D & FILED

2015 SEP -9 PM 2:01

SUSAN MERRIWETHER
CLERK

BY [Signature]
DEPUTY

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 12 *(Additional counsel appear on signature page)*

8 **FIRST JUDICIAL DISTRICT COURT**
 9 **IN AND FOR CARSON CITY, NEVADA**

11 HELLEN QUAN LOPEZ, individually and on
 12 behalf of her minor child, C.Q.; MICHELLE
 13 GORELOW, individually and on behalf of her
 14 minor children, A.G. AND H.G.; ELECTRA
 15 SKRYZDLEWSKI, individually and on behalf
 16 of her minor child, L.M.; JENNIFER CARR,
 17 individually and on behalf of her minor
 18 children, W.C., A.C., and E.C.; LINDA
 19 JOHNSON, individually and on behalf of their
 20 minor child, K.J.; SARAH and BRIAN
 21 SOLOMON, individually and on behalf of
 22 their minor children, D.S. and K.S.,

18 Plaintiffs,

19 vs.

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

22 Defendant.

Case No.: 150C002071B

Dept. No: II

COMPLAINT

23 Plaintiffs, parents of children attending Nevada public schools, allege as follows:
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 25
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1 **I. INTRODUCTION**

2 1. In the last biennium session, the Nevada Legislature established the most expansive
3 voucher program ever instituted in the United States. The new statute, Senate Bill 302, directs the
4 State Treasurer to deposit funds appropriated by the Legislature for the operation of the Nevada
5 public schools into private accounts to pay for private school tuition, online classes, home-based
6 curriculums and related expenses, tutoring, transportation to and from private schools, and other
7 private expenses. The Education Article of the Nevada Constitution expressly prohibits the use of
8 public school funds for anything other than the operation of Nevada's public schools. The
9 voucher statute plainly violates this and other provisions of the Nevada Constitution and will have
10 serious deleterious effects on Nevada and its children.

11 2. Under the voucher statute, every child in any private school (including on-line
12 programs), and every child taught at home, will be entitled to receive over \$5,000 a year in state
13 public school funds after attending 100 days in a public school (part time or full time) once in their
14 academic career. This requirement is easily met. Simply enrolling a student in 100 days of public
15 kindergarten at the outset of their education will entitle them to collect over \$5,000 a year for the
16 rest of their K-12 education. Under the regulations proposed by the State Treasurer, students
17 already in private school or educated at home can also readily qualify by taking a single public
18 school class for 100 days.

19 3. There are currently just over 20,000 students enrolled in private schools in Nevada.
20 The yearly cost to Nevada's public schools of subsidizing their private school education under the
21 voucher statute would be over \$102 million. This hefty sum does not include payments for
22 students who are educated at home or on-line because the Nevada Department of Education does
23 not track how many children in Nevada are so educated. It also does not include any child
24 attending public school who decides to leave their school and attend a private school with a
25 voucher subsidy. The voucher statute will thus drain Nevada's public schools of the funds
26 provided by the Legislature essential for their operation and divert those funds to private use in
27 violation of the Nevada Constitution.

1 4. The voucher statute will also provide a windfall to those who can already afford to
2 send their children to private school. The ~\$5,000 voucher subsidy is not enough to cover the full
3 tuition at all but a handful of existing private schools in Nevada. Only those families with the
4 means to make up the significant difference will be able to use the voucher subsidy. Diverting
5 precious Nevada taxpayer revenues to subsidize private school education for families that can
6 already afford it is not only inappropriate but is also an unconstitutional use of tax dollars. In
7 addition, very few of Nevada’s private schools are in the urban core of Nevada’s two largest cities,
8 accessible to students in those neighborhoods. The voucher statute will consign Nevada’s most
9 vulnerable and at-risk children to public schools that will have even less funding—isolated by
10 socioeconomic status, disability and academic need.

11 5. The voucher statute further violates the Legislature’s constitutional obligation to
12 establish and maintain a “uniform system” of public schools. Private schools attended by students
13 receiving a voucher subsidy do not have to meet the same requirements as public schools. For
14 example, students do not have to take the same tests or show mastery of the same rigorous
15 standards. Nor do teachers in these schools have to be certified. The voucher statute will also
16 encourage subpar private institutions to spring up to take advantage of the State Treasurer’s yearly
17 deposits of over \$5,000 per child, without any real concern for educating students, to the detriment
18 of the students and families involved.

19 6. Likewise, the voucher statute does not require private schools receiving voucher
20 subsidies to be open to all students as are the public schools. They can refuse admission based on
21 religious beliefs, ability to pay, and academic performance. The drafters of the Nevada
22 Constitution understood the importance of establishing a “uniform system” of “common” or
23 public schools sufficiently funded to prepare all Nevada children to become engaged, productive
24 and contributing citizens; schools that all Nevadan children can attend regardless of beliefs, wealth
25 or ability. SB 302’s diversion of public school funds to private schools and other entities not open
26 to all, with virtually no accountability to the taxpayers, does not maintain—indeed, undermines—
27 the uniform system of public schools mandated by the Nevada Constitution.

28

1 11. Plaintiff Electra Skryzdlewski is a resident of Las Vegas, Nevada, whose daughter,
2 L.M., is a sixth-grader in Clark County School District in the Gifted and Talented Education
3 (GATE) program. Through the hard work of her teachers and parents, L.M. has done quite well in
4 school. However, her schools have struggled to keep class sizes small and to serve all students
5 with limited resources. Electra is a Nevada taxpayer whose tax dollars support the public schools.
6 She has a direct stake in making sure the public schools have the funds to provide an outstanding,
7 high-quality education for every student and that those funds are not used for children enrolled in
8 private schools.

9 12. Plaintiff Jennifer Carr is a resident of Las Vegas, Nevada. Her minor children,
10 W.C., A.C., and E.C., all attend public magnet and charter schools in Clark County. A.C., who is
11 in third grade, has received occupational and speech therapy services in his public school pursuant
12 to his IEP. Although the school does provide occupational and speech therapy, these services
13 have been limited. As a result, A.C. now attends private occupational therapy. Jennifer is also a
14 Nevada taxpayer whose tax dollars support the public schools. She has a direct stake in
15 preventing the transfer of funds from the public schools into private hands.

16 13. Plaintiff Linda Johnson resides in Las Vegas, Nevada. Her daughter, K.J., attends
17 high school in Clark County. K.J. is an honors student who takes advanced placement courses and
18 participates on the student council. K.J. has had great teachers in her Clark County schools, but
19 her school has struggled to serve its students while receiving limited funding. Her school had to
20 eliminate block scheduling because of the expense, and K.J.'s course offerings are not as broad as
21 they otherwise would be as a result. Linda is also a Nevada taxpayer whose tax dollars support the
22 public schools. She has a direct stake in preventing the use of public school funding for private
23 schools that are not accountable to the public and do not have to serve English language learners,
24 students in need of special education services, or low-income families.

25 14. Plaintiffs Sarah and Brian Solomon are residents of Reno, Nevada, whose children,
26 D.S. and K.S., have attended Washoe County public schools since kindergarten and are now in
27 third grade and second grade, respectively. Sarah and Brian believe that parents should have the
28 choice to send their children to private schools, but object to the use of funds appropriated

1 specifically for public schools to subsidize private education. Sarah and Brian are also taxpayers
2 who have a direct stake in preventing the diversion of taxpayer funds to private schools.

3 15. Defendant Dan Schwartz is named herein in his official capacity as the duly elected
4 Treasurer of Nevada. Dan Schwartz, acting in his official capacity as State Treasurer, is charged
5 under Senate Bill 302 with the enforcement and/or administration of the unconstitutional voucher
6 program. The State Treasurer has offices in Carson City and Las Vegas, Nevada.

7 III. JURISDICTION AND VENUE

8 16. This Court has subject matter jurisdiction pursuant to Article VI of the Nevada
9 Constitution, which vests the judicial power of the State herein.

10 17. This Court has personal jurisdiction over Defendant pursuant to Nev. Rev. Stat.
11 (“NRS”) 14.065 because Defendant is a resident of the state of Nevada.

12 18. Venue is proper in this Court, pursuant to NRS 13.020. The present cause of action
13 arises in Carson City, and Defendant is a public officer whose office is required to be kept in
14 Carson City pursuant to NRS 226.030. Plaintiffs are students who attend Nevada public schools
15 and their parents are Nevada residents and taxpayers. Plaintiffs have a direct and immediate
16 interest in the diversion of tax dollars from the operation and support of the public schools under
17 the voucher statute and will suffer harm if the voucher statute is not enjoined from
18 implementation.

19 IV. FACTS

20 A. The Voucher Statute

21 19. On May 29, 2015, the Legislature enacted Senate Bill 302 (“SB 302”), which
22 authorizes the State Treasurer to transfer funding appropriated by the Legislature for the operation
23 of Nevada public schools from those schools into private “education savings accounts” (“ESAs”)
24 to pay for a wide variety of non-public education services. SB 302 was signed into law by the
25 Governor on June 2, 2015.

26 20. SB 302 imposes only one requirement for eligibility: enrollment in a public school
27 for 100 consecutive school days. Children can satisfy the 100 day public school enrollment
28 requirement once at any point in their academic career in order to obtain the funding every year

1 through the end of their K-12 education. Under the regulations implementing SB 302 proposed by
2 the State Treasurer, the 100 day requirement can be met by full or part time enrollment. These
3 proposed regulations would therefore allow the requirement to be met by enrollment in public
4 school kindergarten at the outset of a child's education; by a single public school class taken by a
5 child enrolled in private school now; or by attendance in 2014-15, the school year prior to
6 enactment of the statute.

7 21. When an ESA is established, SB 302 requires the State Treasurer to deposit into
8 each ESA an amount equal to 90 percent of the statewide average basic support per public school
9 pupil, or \$5,139 per pupil for the 2015-16 school year. For children with disabilities and children
10 in a household with an income of less than 185 percent of the Federal poverty level, the State
11 Treasurer must transfer 100 percent of the statewide average basic support per public school pupil,
12 or \$5,710 per pupil for 2015-16. SB 302 § 8(2).

13 22. The basic support per pupil funding is provided to school districts each year
14 through the Nevada Plan, the Legislature's funding formula. The basic support per pupil funding
15 consists of local revenue and state aid appropriated by the Legislature for the maintenance and
16 support of Nevada's uniform system of public schools. It is guaranteed by the Legislature and is
17 the primary funding appropriated to school districts to fund the operation of the public schools,
18 kindergarten through grade 12, from year-to-year.

19 23. SB 302 requires the State Treasurer to transfer funds into ESAs from the basic
20 support per pupil funding appropriated by the Legislature for the operation of the school district in
21 which the eligible child was previously enrolled. Specifically, the statute directs the State
22 Treasurer to deduct "all the funds deposited in education savings accounts established on behalf of
23 children who reside in the county" from the school district's "apportionment" of the legislatively
24 appropriated funding "computed on a yearly basis." SB 302 § 16.1. As the Legislative Counsel's
25 Digest on SB 302 explains, "the amount of the [ESA] must be deducted from the total
26 apportionment to the resident school district of the child on whose behalf the grant is made."

27 24. SB 302 directs the State Treasurer to divert the school district's apportionment of
28 appropriated funding, on a per pupil basis, from the State Distributive School Account ("DSA") to

1 ESAs established by the State Treasurer. SB 302 § 15.9. The DSA is comprised primarily of
2 money derived from interest on the State Permanent School Fund pursuant to Article XI, Section 3
3 of the Nevada Constitution and the appropriations of state and local revenue made by the
4 Legislature for the operation of Nevada’s public schools pursuant to Article XI, Section 6 of the
5 Nevada Constitution. NRS 387.030.

6 25. SB 302 does not impose any cap on the amount of public school funding that can
7 be transferred from the DSA and Nevada public school districts to ESAs in any school year, nor
8 does the statute impose any limit on the number of children who can receive per pupil payments to
9 an ESA. The statute also authorizes the State Treasurer to establish an ESA for all children who
10 satisfy the 100 day public school enrollment requirement without any limit on household income
11 and without regard to financial or academic need.

12 26. SB 302 authorizes the public school funds deposited by the State Treasurer into an
13 ESA to be used to pay for a wide variety of private education expenses. The statute allows
14 payments to any “participating entity”, which is defined as:

- 15 (a) A private school licensed pursuant to chapter 394 of NRS or exempt from such
16 licensing pursuant to NRS 394.211;
- 17 (b) An eligible institution—defined by SB 302§ 3.5 as:
- 18 ■ A university, state college or community college within the Nevada
19 System of Higher Education; or
 - 20 ■ Any other college or university that:
 - 21 • Was originally established in, and is organized under the laws of,
22 this State;
 - 23 • Is exempt from taxation pursuant to 26 U.S.C. § 501(c)(3); and
 - 24 • Is accredited by a regional accrediting agency recognized by the
25 United States Department of Education.
- 26 (c) A program of distance education that is not operated by a public school or the
27 Department;
- 28 (d) A tutor or tutoring facility that is accredited by a state, regional or national
accrediting organization; or
- (e) The parent of a child.

SB 302 § 11.1.

1 27. Further, SB 302 authorizes the public school funding deposited into an ESA to pay
2 for any of the following private education services and expenditures:

- 3 (a) Tuition and fees at a school that is a participating entity in which the child is
4 enrolled;
- 5 (b) Textbooks required for a child who enrolls in a school that is a participating
6 entity;
- 7 (c) Tutoring or other teaching services provided by a tutor or tutoring facility that
8 is a participating entity;
- 9 (d) Tuition and fees for a program of distance education that is a participating
10 entity;
- 11 (e) Fees for any national norm-referenced achievement examination, advanced
12 placement or similar examination or standardized examination required for
13 admission to a college or university;
- 14 (f) If the child is a pupil with a disability, as that term is defined in NRS 388.440,
15 fees for any special instruction or special services provided to the child;
- 16 (g) Tuition and fees at an eligible institution that is a participating entity;
- 17 (h) Textbooks required for the child at an eligible institution that is a participating
18 entity or to receive instruction from any other participating entity;
- 19 (i) Fees for the management of the education savings account, as described in
20 section 10 of this act [which provides that the Treasurer may deduct up to 3
21 percent of the ESA's amount for management];
- 22 (j) Transportation required for the child to travel to and from a participating entity
23 or any combination of participating entities up to but not to exceed \$750 per
24 school year; or
- 25 (k) Purchasing a curriculum or any supplemental materials required to administer
26 the curriculum.

27 SB 302 § 9.1.

28 28. SB 302 thus explicitly permits public school funding deposited into an ESA to pay
for private school tuition, tutoring, online schooling, home-based education curriculum and other
related expenses, and private school and home-based education transportation. SB 302 also allows
payments from ESAs for the SAT, AP and other commercial fee-based tests, as well as private
tutoring services for those tests, services not generally paid for by public dollars for public school
students.

1 29. SB 302 provides little check on the expenditure of public school funds deposited
2 into ESAs for private expenditures. SB 302 only requires the State Treasurer to verify
3 expenditures to “participating entities” through random audits of ESAs.

4 30. SB 302 authorizes the payment of public school funds deposited into ESAs to be
5 used for private schools and entities that are not open to all students, as are the Nevada public
6 schools. Private schools that accept payments of public school funds from an ESA can refuse to
7 admit and serve all students and can restrict admission on the basis of religious beliefs, ability to
8 pay, and academic ability.

9 31. SB 302 does not require “participating entities” accepting payment of public school
10 funds from ESAs to meet the same educational standards and performance benchmarks required
11 by the Legislature for public schools. Private schools can operate in Nevada whether they are
12 licensed by the state or not; approximately half of the private schools in the state are not licensed
13 by the state. Public school funding from ESAs can be used at non-licensed schools. SB 302
14 § 11(1)(a). Private schools and other participating entities are also not required to use a
15 curriculum based on state-adopted curriculum content standards. The only requirement for
16 participating entities is that they administer a norm-referenced achievement assessment in
17 mathematics and English/language arts each year. SB 302 § 12(1)(a).

18 32. In addition to diverting public school funding from the operation of the public
19 schools, the voucher statute will increase financial uncertainty and instability for public schools.
20 School funding is based on “average daily enrollment” taken on a quarterly basis. When a student
21 qualifies for an ESA, the district’s quarterly enrollment will be recalculated and its funding from
22 the state will be reduced accordingly on a quarterly basis. As the State Treasurer establishes
23 additional ESAs throughout the year, the districts will experience a reduction in their DSA funding
24 levels from quarter to quarter, necessitating budgetary adjustments, including cuts to teachers,
25 support staff, programs and other expenditures during the school year.

26 33. The State Treasurer has already begun to pre-register children for ESAs. The
27 Treasurer will begin accepting formal applications for the ESAs in January 2016. The State
28

1 Treasurer has also announced that he will begin depositing public school funds into ESAs in April
2 2016.

3 **B. The Voucher Statute Violates the Education Article of the Nevada Constitution**

4 34. The Nevada Constitution places a high priority on the value of public education, as
5 memorialized in the Education Article. Nev. Const. Art. XI. As one of the drafters stated in the
6 1864 Constitutional debate, “[t]ime will not permit, nor is it necessary that I should recapitulate
7 the arguments which have already been urged to show that among the first and the highest duties
8 of the State, is the duty of educating the rising generation.” OFFICIAL REPORT OF THE DEBATES
9 AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 587-88, 591-
10 93 (1864) (hereinafter, “DEBATES AND PROCEEDINGS”).

11 35. Consistent with this duty, the Nevada Constitution mandates that the Legislature:
12 (1) make appropriations, as a first priority in the biennium budget, to be used only for the
13 maintenance and support of the public schools; (2) appropriate funds that, when combined with
14 available local revenue, it deems sufficient for the operation of the public schools; and (3) provide
15 for a “uniform system” of public schools throughout the state. The voucher statute violates each
16 of these Constitutional mandates.

17 **1. The Voucher Statute Diverts Funds Appropriated For the Operation of**
18 **the Public Schools to Private Uses**

19 36. Article XI of the Nevada Constitution contains specific directives to the Legislature
20 for funding the operation of Nevada’s uniform system of public schools. First, Article XI directs
21 that all proceeds derived from federal land grants and property bequeathed to the state for
22 educational purposes be deposited into the State Permanent School Fund and that these funds
23 “must not be transferred to other funds for other uses.” NEV. CONST. art. XI, § 3. In addition, the
24 interest earned on the State Permanent School Fund “must be apportioned by the legislature
25 among the several counties for educational purposes.” *Id.*

26 37. Article XI also requires the Legislature to “provide for the[] support and
27 maintenance [of the common schools] by direct legislative appropriation from the general fund.”
28 NEV. CONST. art. XI, § 6.1. Further, the funds appropriated by the Legislature for the support and

1 maintenance of the public schools must be used to “fund the operation of the public schools.”

2 NEV. CONST. art. XI, § 6.2.

3 38. The framers of the Nevada Constitution repeatedly expressed their intent that funds
4 appropriated by the Legislature pursuant to Article XI, §§6.1 and 6.2 be used only for the support
5 and maintenance of public, not private, education institutions. Delegates to the 1864
6 Constitutional Convention explained that Article XI makes reference “only to public schools, and
7 to the appropriation of the public funds. . . so that it has a direct reference to the public schools,
8 and clearly cannot refer to anything else.” DEBATES AND PROCEEDINGS at 568. Further, the
9 delegates stated clearly that funds appropriated pursuant to Article XI were for “the support of
10 good common schools . . . the support and encouragement of public instruction.” *Id.* at 594.

11 39. The Legislature has also codified its obligation under Article XI, §§ 6.1 and 6.2 to
12 appropriate funding to be used only for the operation of the public schools. NRS 387.045. This
13 statute explicitly provides that “[n]o portion of the public school funds or of the money specially
14 appropriated for the purpose of public schools shall be devoted to any other object or purpose.”

15 40. The voucher statute purports to exempt ESAs from the requirement, as codified in
16 NRS 387.045, that funds appropriated by the Legislature for the operation of the public schools
17 cannot be used for any other purpose. SB 302 § 15.9. However, NRS 387.045 is a statutory
18 codification of the mandate in Article XI, §§ 6.1 and 6.2 restricting the use of Legislative
19 appropriations for the maintenance and support of the public schools to fund the operation of those
20 schools. The Legislature cannot exempt itself from this constitutional mandate by statute and,
21 therefore, SB 302’s exemption from that mandate is null and void.

22 41. The express language of Article XI, §§ 6.1 and 6.2, and the implementing statute,
23 make plain that the Legislature’s appropriations for the maintenance and support of Nevada’s
24 uniform system of public schools must be used to fund the operation of the public schools, and the
25 public schools alone.

26 42. SB 302, by transferring public school funding to ESAs, diverts appropriations made
27 by the Legislature for the maintenance and support of public schools to pay for private schools and
28

1 a wide variety of other private education expenses, in contravention of the express language,
2 meaning and intent of Article XI, §§ 6.1 and 6.2 of the Nevada Constitution.

3 **2. The Voucher Statute Reduces the Appropriations Deemed Sufficient by**
4 **the Legislature for the Operation of the Public Schools**

5 43. The Education Article of the Nevada Constitution requires the Legislature to enact
6 “one or more appropriations” for the next biennium that the Legislature “deems to be sufficient,
7 when combined with the local money reasonably available for this purpose, to fund the operation
8 of the public schools in the State for kindergarten through grade 12.” NEV. CONST. art. XI, § 6.2.
9 Because the provision for public education has the highest priority in the Nevada Constitution, the
10 Education Article mandates that the Legislature appropriate the funds it deems sufficient to
11 operate the public schools first “before any other appropriation.” *Id.*

12 44. Studies commissioned by the Legislature in 2006 and 2012 recommended that
13 funding for Nevada’s public schools be substantially increased above current levels, especially for
14 the state’s growing population of low income students, English language learners, and students
15 with special needs. The level of public school funding currently provided by the Legislature
16 through the Nevada plan formula is far below most other states and among the lowest in the
17 nation.

18 45. SB 302, by transferring the basic support per pupil guaranteed for the operation of
19 the public schools to ESAs, and by directing the State Treasurer to deduct those transfers from the
20 DSA and school district budgets, reduces the Legislature’s appropriations for the maintenance and
21 support of Nevada’s uniform system of public schools below the level deemed sufficient by the
22 Legislature for the operation of those public schools, in contravention of the express language,
23 plain meaning and intent of Article XI, § 6.2 of the Nevada Constitution.

24 **3. The Voucher Statute Diverts Funding Appropriated to Maintain the**
25 **Uniform System of Public Schools to Fund Private, Non-Uniform**
26 **Schools and Education Services**

27 46. Article XI of the Nevada Constitution mandates that the Legislature “provide for a
28 uniform system of common schools” across the state. NEV. CONST. art. XI, § 2. To ensure the
public schools operate uniformly, Article XI further authorizes the Legislature to “pass such laws

1 as will tend to secure a general attendance of the children in each school district upon said public
2 schools”; to establish and maintain a public school “in each school district” open to all, NEV.
3 CONST. art. XI, § 2; and to “provide for a superintendent of public instruction” to supervise the
4 uniform public school system. NEV. CONST. art. XI, § 1.

5 47. The Legislature is obligated under Article XI to establish and maintain a system of
6 public schools that provides uniform, high quality education to children across the state and that
7 benefits all Nevadans by preparing those children for citizenship and to be productive participants
8 in Nevada’s economy.

9 48. In recent years, the Legislature has exercised its constitutional obligation to
10 maintain Nevada’s system of public education by establishing uniform, rigorous education and
11 accountability standards that all public schools must meet to give every child the opportunity to
12 achieve and graduate from high school prepared for college and career and ready for active
13 citizenship. These uniform education and accountability standards include, but are not limited to:
14 curriculum content standards, assessments, teacher qualifications, and class size limits. All public
15 schools must adhere to these uniform standards.

16 49. SB 302 diverts legislative appropriations for the maintenance and support of
17 Nevada’s uniform system of public schools to pay for private schools and a wide variety of other
18 private education services. SB 302 does not require the private schools, online schools and other
19 entities that receive payment from public school funds deposited to an ESA to adhere to any of the
20 education and accountability standards established by the Legislature and applicable to public
21 schools.

22 50. In addition to uniform education standards, the Legislature has also mandated non-
23 discrimination in the public schools. Nevada public schools must serve all children regardless of
24 need and be open to all without regard to characteristics such as race, disability, income level, or
25 academic ability.

26 51. SB 302 does not require the private schools, online schools and other entities
27 receiving public school funds through an ESA to be free and open to all children; to admit and
28 serve all children without regard to race, religion, sex, disability, sexual orientation and gender

1 identity or expression; or to admit children with special educational needs, including English
2 language learners, at-risk children, homeless children and children with disabilities requiring
3 special education services.

4 52. Thus, SB 302 transfers public school funding to private schools that are not free
5 and open to all students. These schools can refuse to serve students who do not meet selective
6 admission requirements; who have disabilities, are academically at-risk, or need to learn English;
7 or who are low income and cannot afford to pay the full cost of private school tuition, books, fees,
8 transportation and other expenses. Conversely, SB 302 will increase the concentration in the
9 public schools of students who are low income, English language learners, immigrants, homeless,
10 transient, and otherwise at-risk and in need of additional educational programs, services and
11 interventions. SB 302 will also increase the concentration in the public schools of students with
12 disabilities in need of special education services. At the same time, SB 302 reduces the funding
13 available to provide the teachers, staff and programs needed to give those students the opportunity
14 to meet Nevada's uniform, rigorous standards.

15 53. Because SB 302 allows for the funding of private schools, online schools and other
16 participating entities not required to meet any of the uniform education and accountability
17 standards or the non-discrimination and open access requirements established by the Legislature
18 for Nevada's public schools, it results in the use of public school funding to support private
19 schools separate from the uniform system of public schools, in contravention to Article XI, § 2 of
20 the Constitution.

21 **FIRST CAUSE OF ACTION**

22 (Violation of Article XI, Sections 3 and 6 of the Nevada
23 Constitution – Prohibiting Diversion of Public School Funds)

24 54. The allegations in the preceding paragraphs are realleged and incorporated herein
25 by reference.

26 55. Article XI, Section 3 of the Nevada Constitution provides that proceeds derived
27 from federal land grants, which were given to Nevada "for the support of common schools,"
28 Nevada Enabling Act, ch. 36 § 7, 13 Stat. 30, 32 (1864), and property bequeathed to the state for
educational purposes, must be deposited into the State Permanent School Fund for the operation of

1 the public schools, and “must not be transferred to other funds for other uses.” NEV. CONST. art.
2 XI, § 3.

3 56. Likewise, the Nevada Constitution requires the Legislature to “provide for the[]
4 support and maintenance [of the common schools] by direct legislative appropriation from the
5 general fund.” NEV. CONST. art. XI, § 6.1.

6 57. The Nevada Constitution mandates that the “direct legislative appropriation from
7 the general fund” be used only to “fund the operation of the public schools.” NEV. CONST. art. XI,
8 §§ 6.1 and 6.2.

9 58. SB 302 violates Article XI, Sections 3 and 6 of the Nevada Constitution because it
10 diverts legislative appropriations for the support and maintenance of Nevada public schools to pay
11 for private schools and a wide variety of other private educational services.

12 **SECOND CAUSE OF ACTION**

13 (Violation of Article XI, Section 6 of the Nevada Constitution –
14 Reducing the Funds Deemed Sufficient to Operate the Public Schools)

15 59. The allegations in the preceding paragraphs are realleged and incorporated herein
16 by reference.

17 60. The Nevada Constitution provides that “[d]uring a regular session of the
18 Legislature, before any other appropriation is enacted to fund a portion of the state budget for the
19 next ensuing biennium, the Legislature shall enact one or more appropriations to provide the
20 money the Legislature deems to be sufficient, when combined with the local money reasonably
21 available for this purpose, to fund the operation of the public schools in the State for kindergarten
22 through grade 12 for the next ensuing biennium for the population reasonably estimated for that
23 biennium.” NEV. CONST. art. XI, § 6.2.

24 61. SB 302 violates Article XI, Section 6 of the Nevada Constitution because it
25 reduces, without limitation, the appropriations for the maintenance and support of the public
26 schools below the level deemed sufficient by the Legislature to fund the operation of those
27 schools.
28

THIRD CAUSE OF ACTION

(Violation of Article XI, Section 2 of the Nevada Constitution –
Mandating a Uniform System of Common Schools)

62. The allegations in the preceding paragraphs are realleged and incorporated herein
by reference.

63. Article XI, § 2 of the Nevada Constitution provides that the “legislature shall
provide for a uniform system of common schools.” NEV. CONST. art. XI, § 2.

64. Pursuant to this constitutional obligation, the Legislature has established uniform
education and accountability standards that govern all public schools across the state, and has
established uniform standards requiring all public schools to be open, free, and serve all children,
without regard to race, gender, disability or sexual orientation, and to provide education services
to all students, including ELLs, at-risk and homeless children, and children with disabilities in
need of special education.

65. SB 302 violates Article XI, § 2 of the Nevada Constitution because it authorizes the
State Treasurer to divert legislative appropriations for the maintenance and support of Nevada
public schools to pay for private schools and other private entities that are not governed by the
legislatively established, uniform education and accountability standards applicable to Nevada
public schools, and that are not free, or open or required to serve all Nevada children, thereby
funding non-uniform private schools and other private education services.

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4. For such other and further relief as this Court deems just and proper.

DATED: September 9, 2015

WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

By: 
Don Springmeyer

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JUSTIN C. JONES (Nevada Bar No. 8519)
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Attorneys for Plaintiffs

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

DAN SCHWARTZ, in his official capacity as
Treasurer of the State of Nevada,
Appellant,
v.
HELLEN QUAN LOPEZ, et al.,
Respondents.

No. 69611

Electronically Filed
Jan 21 2016 09:00 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District First Department 2
County Carson City Judge Hon. James E. Wilson Jr.
District Ct. Case No. 15-OC-00207-1B

2. Attorney filing this docketing statement:

Attorney Lawrence VanDyke Telephone 775-684-1100
Firm Office of the Attorney General
Address 100 N. Carson St.
Carson City, Nevada 89701

Client(s) DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Don Springmeyer Telephone 702-341-5200
Firm Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
Address 3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

Client(s) All respondents

Attorney See separate sheet Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input checked="" type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- Child Custody
- Venue
- Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Hairr et al. v. First Judicial District et al., No. 69580 (Petition for a Writ of Mandamus, filed Jan. 15, 2016, challenging district court order denying petitioners' motion to intervene as defendants in this action below).

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Duncan, et al. v. State of Nevada ex rel. Office of the State Treasurer of Nevada, et al., No. A-15-723703-C (8th Jud. Dist., Dep't XX) (no disposition; motion to dismiss pending; motion for preliminary injunction pending).

Norman, et al., v. State of Nevada, et al., No. A-15-729344 (8th Jud. Dist., Dep't XXV) (no disposition; case stayed by stipulation of parties).

8. Nature of the action. Briefly describe the nature of the action and the result below:

Plaintiffs brought a constitutional challenge to Nevada's new Education Savings Account ("ESA") program, alleging that the ESA program violates Article XI, Sections 2, 3, and 6, of the Nevada Constitution. They subsequently moved the District Court for a preliminary injunction, which the District Court granted. Specifically, the District Court rejected Plaintiffs' Section 2 and 3 claims, but concluded that Plaintiffs had shown a likelihood of success and irreparable harm on their Section 6 claim. The Treasurer appeals the District Court order issuing the injunction.

The ESA program authorizes parents and children to receive funds, deposited into individual accounts, that can be used for a variety of educational purposes. More than 4,000 students have already applied to participate in the program. Thousands of parents who were relying on those funds are now anxiously planning for the coming school, which starts in seven months. Many parents have been expecting ESA funds by February 2016.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the Plaintiffs are entitled to a preliminary injunction enjoining the Treasurer from implementing SB 302 based on Article XI, Section 6, of the Nevada Constitution.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A

Yes

No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

Reversal of well-settled Nevada precedent (identify the case(s))

An issue arising under the United States and/or Nevada Constitutions

A substantial issue of first impression

An issue of public policy

An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case is presumptively retained for the Supreme Court to "hear and decide" because it raises "as a principal issue a question of first impression involving the ... Nevada constitution" and because the case raises "as a principal issue a question of statewide public importance." Nev. R. App. P. 17(a)(13)-(14). This case presents the question whether S.B. 302, creating Nevada's new ESA program, violates Article 11, Section 6, of the Nevada Constitution.

Additionally, this case is of tremendous and urgent public importance to Nevada families and the State. Over 4,000 students have already applied to participate in the ESA program. The Treasurer in October announced that approved ESAs would start being funded in early February. Thousands of Nevada families acted in reliance on that expectation.

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from January 11, 2016

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served January 11, 2016

Was service by:

Delivery

Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

NRCP 50(b) Date of filing _____

NRCP 52(b) Date of filing _____

NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See *AA Primo Builders v. Washington*, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

Delivery

Mail

19. Date notice of appeal filed January 15, 2016

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

Nev. R. App. P. 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input checked="" type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |
-

(b) Explain how each authority provides a basis for appeal from the judgment or order:

Rule 3A(b)(3) authorizes a party in a civil action to appeal a judgment or order "granting or refusing to grant an injunction." The rule authorizes this appeal because the order appealed is an order granting a preliminary injunction.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada; HELLEN QUAN LOPEZ, indiv. & on behalf of her minor child, C.Q.; MICHELLE GORELOW, indiv. & on behalf of her minor children, A.G. & H.G.; ELECTRA SKRYZDLEWSKI, indiv. & on behalf of her minor child, L.M.; JENNIFER CARR, indiv. & on behalf of her minor children, W.C., A.C., AND E.C.; LINDA JOHNSON, indiv. & on behalf of her minor child, K.J.; SARAH and BRIAN SOLOMON, indiv. and on behalf of their minor children, D.S. and K.S.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

All Plaintiffs - Claim 1: Violation of Article XI, Sections 3 and 6, of the Nevada Constitution (On Jan. 11, 2016, dist. ct. found § 3 claims "lack merit."). Claim 2: Violation of Article XI, Section 6, of the Nevada Constitution (On same date, dist. ct. found that Plaintiffs showed a "reasonable likelihood of success on the merits."). Claim 3: Violation of Article XI, Section 2, of the Nevada Constitution (On same date, dist. ct. found § 2 claim is unlikely to "succe[ed] on the merits.").

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

Yes

No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

Yes

No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

Yes

No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

The order is independently appealable under NRAP 3A(b).

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

DAN SCHWARTZ, in his off. capacity
Name of appellant

Lawrence VanDyke
Name of counsel of record

January 20, 2016
Date

/s/ Lawrence VanDyke
Signature of counsel of record

Carson City, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 20th day of January, 2016, I served a copy of this completed docketing statement upon all counsel of record:

By personally serving it upon him/her; or

By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

DON SPRINGMEYER, JUSTIN C. JONES, BRADLEY S. SCHRAGER, 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, EDUCATION LAW CENTER, 60 Park Place, Suite 300, Newark, NJ 07102.

Dated this 20 day of January, 2016

/s/ Janice Riherd
Signature