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IN THE SUPREME COURT OF

THE STATE OF NEVADA

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada, *Appellant,* vs. HELLEN QUAN LOPEZ, *et al.*, *Respondents.*	)	Supreme Court No.: 69611 District Court No. 15-0C-00207

OPPOSITION TO THE STATE'S NOTICE RE: CONSOLIDATION OF THE ESA CASES FOR ORAL ARGUMENT AND EXPEDITION OF BRIEFING IN *DUNCAN*

Opposition of Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger (Appellants in *Duncan v. Nevada*)

Opposing State's Proposed Briefing Deadline

Amy M. Rose (SBN 12081)
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 S. Rancho Drive, Suite B-11
Las Vegas, Nevada 89106
Telephone: (702) 366-1536
rose@aclunv.org

Daniel Mach*
Heather L. Weaver*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW, Ste. 600
Washington, D.C. 20005
dmach@aclu.org
hweaver@aclu.org

Richard B. Katskee*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1901 L Street NW, Suite 400
Washington, DC 20036
katskee@au.org

Nitin Subhedar*
Samuel Jacob Edwards*
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
nsubhedar@cov.com
sedwards@cov.com

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Anupam Sharma*
COVINGTON & BURLING LLP
333 Twin Dolphin Dr., Suite 700
Redwood Shores, CA 94065
asharma@cov.com

Attorneys for Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger

*Admitted Pro Hac Vice in the Clark County District Court for Pending Case No: A-15-723703-C

OPPOSITION TO THE STATE'S NOTICE RE: CONSOLIDATION OF THE ESA CASES FOR ORAL ARGUMENT AND EXPEDITION OF BRIEFING IN *DUNCAN*

Amici curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger (hereafter, the "Duncan Appellants") are plaintiffs in *Duncan v. Nevada* (District Court Case Number A-15-723703-C). The Duncan Appellants have filed a notice of appeal from the district court's order granting the State's motion to dismiss, and are now waiting for their appeal to be docketed in this Court. The Duncan Appellants are not parties to this case, but the State's decision to file an inappropriate "Notice" filled with misleading statements and inaccurate representations has forced the Duncan Appellants to respond.

The State, in its determination to deny the Duncan Appellants their right to a full and fair appeal, will apparently stop at nothing to achieve its objectives. The State has made misrepresentations to this Court, has created artificial deadlines, has withheld key information in its dealings with the Court and with counsel, and has urged the Court to adopt a schedule for the Duncan Appellants' appeal that is *entirely at odds* with the schedule that it advanced when the State *itself* was the appellant in the *Lopez* case. State Treasurer Dan Schwartz—a licensed attorney—has even stated publicly that both he and the Attorney General have initiated *ex parte communications* with members of this Court relating to the *Lopez* and *Duncan* appeals.

The Duncan Appellants cannot allow this conduct by the State to go unaddressed, and the Court certainly should not reward it. The simple reality here is this: *first*, the Duncan Appellants have duly filed a notice of appeal in a case that raises important constitutional issues, and they should be given a full and fair opportunity for a proper appeal to this Court; and *second*, the State's June 14, 2016 request that the Court set the *Lopez* oral argument for the "last week of July" had no basis in any actual deadline, and was never approved by the Duncan Appellants as being appropriate for an appeal that they might subsequently elect to file. Under these circumstances, there is *no reason* why the *Duncan* appeal should now be given short shrift, by rushing through a draconian briefing schedule designed to accommodate a hearing date that the State arbitrarily suggested in the *Lopez* case.

The Duncan Appellants are mindful of this Court's stated preference to hear the *Lopez* and *Duncan* appeals on the same day, and they share in the desire to move the appeal process along expeditiously. In order to facilitate these goals while also ensuring that their appeal is not compromised, the Duncan Appellants propose a highly expedited briefing schedule that is even *more aggressive* than the schedule that the State requested as appellant in the *Lopez* case. Specifically:

- Opening brief due 21 calendar days after the date on which the Court sets the briefing schedule;
- Answering brief due 21 calendar days after the date on which the opening brief is filed; and

- Reply brief due 21 calendar days after the date on which the answering brief is filed.

Although this schedule will require a slight postponement of the July 29, 2016 hearing, that minor delay will have absolutely no impact on the State's ability to meet the next quarterly funding deadline—which does not arrive until the fall, presumably around October 8, 2016 (i.e., one full quarter after the previously-announced July 8, 2016 funding deadline).

Given this lack of any actual prejudice to the State or its interests, it is hard to fathom any legitimate reason why the State would be so insistent on depriving the Duncan Appellants of a minimally reasonable briefing period. Nevertheless, the Duncan Appellants deserve to have their appeal properly presented and heard, and the Court undoubtedly has an interest in reaching its decision only after a thorough consideration of all salient issues. For these reasons, the Duncan Appellants respectfully request that their proposed briefing schedule be adopted, and the State's unreasonable schedule be rejected.

A. The State's Recitation of the History of Its Discussions with Counsel for the Duncan Appellants is Misleading at Best

The State's Notice provides a wildly inaccurate and misleading summary of the discussions that took place between counsel regarding the briefing and oral argument schedule for any appeal in the *Duncan* case. In truth, as detailed below, counsel for the Duncan Appellants ("Duncan Counsel") tried *repeatedly* to engage

with the State in good faith, hoping to find a schedule that balanced and addressed all of the competing concerns of the Court, the *Lopez* parties, and the *Duncan* parties. Yet, time and again, the State abandoned those discussions, withheld material information, and acted in less than good faith.

On May 20, 2016, the State filed a motion with this Court asking for oral argument in the Lopez case to be set for June 6 or June 7, 2016. In that submission, the State noted that its lead counsel—Paul Clement—would be out of the country from June 23, 2016 to July 11, 2016. Nevertheless, on May 25, the Court set oral argument in *Lopez* for July 8—a date falling in the middle of Mr. Clement's unavailability. The Court's order also indicated that, if the Duncan Appellants were to ultimately file an appeal, the Court would prefer to hear the *Duncan* and *Lopez* oral arguments on the same day.

Approximately one week later, on May 31, Solicitor General, Lawrence Van Dyke called counsel for Appellants, Amy Rose, and asked whether the Duncan Appellants were going to file an appeal. Rose Decl. ¶ 3. At the time, 17 days remained in the statutory period for the Duncan Appellants to file their appeal, and Ms. Rose explained that her clients were still evaluating whether, and what, to appeal. *Id.* Mr. Van Dyke and Ms. Rose discussed that the court recently indicated it would like to hear any oral argument in the *Duncan* appeal on the same day as the *Lopez* appeal, currently scheduled for July 8; the two agreed that a July

8 oral argument left very little briefing time for any appeal in the *Duncan* case, even if the notice of appeal were filed immediately. *Id.* Mr. Van Dyke next suggested that the State would be open to submitting a joint request to continue the July 8 oral argument—but *only if the Duncan Appellants filed their notice of appeal soon*. *Id.* Mr. Van Dyke did not explain why his offer to agree to a continuance was conditioned on the Duncan Appellants filing their notice quickly. *Id* ¶ 3. Mr. Van Dyke also did not reveal that the State planned to seek postponement of the oral argument regardless of whether or when the Duncan Appellants filed their notice of appeal, so that Mr. Clement would be able to attend. *Id.*

On June 1, Mr. Van Dyke spoke to Tod Story, Executive Director for the ACLU of Nevada. Story Decl. ¶ 3. Mr. Van Dyke again stated his condition that the State would not support a request to move the July 8 oral argument *unless* the Duncan Appellants filed their notice of appeal several weeks earlier than the statutory deadline allows. *Id.* Again, Mr. Van Dyke failed to explain why an early filing of the appeal was necessary, and concealed the State's intention of seeking a continuance regardless due to Mr. Clement's unavailability. *Id.*

On June 8, Ms. Rose spoke to Mr. Van Dyke about possible oral argument dates were the Duncan Appellants to appeal. *Id.* ¶ *5.* During this call, Mr. Van Dyke proposed—for the first time—that a consolidated oral argument could be

held at the end of July. *Id.* Although Ms. Rose agreed to discuss these dates with her co-counsel, she also expressed concern to Mr. Van Dyke that holding oral argument the end of July still presented an extremely short briefing schedule. *Id.*

On June 10, Ms. Rose spoke with Mr. Van Dyke, and once again expressed her concern that—were the Duncan Appellants to decide to appeal—a late July oral argument left very little time for briefing. *Id.* ¶ 6. Mr. Van Dyke stated his concern that his clients would not agree to push oral argument much later than the final week in July, and he expressed his belief that the Nevada Supreme Court does not hear any oral arguments in August. *Id.* The call ended with Mr. Van Dyke promising to draft a joint request for the Duncan Appellants to consider—one in which the State would explain that it no longer expects a decision from the Court by July 8 and accordingly would not be trying to disburse ESA funds in August. *Id.* While Ms. Rose agreed to review the draft, at no time did she represent that the Duncan Appellants agreed to a late July oral argument. *Id.*

Mr. Van Dyke never sent Ms. Rose the draft joint motion. Instead, on Monday June 13, Mr. Van Dyke informed Ms. Rose via email that the State was going to file its motion the next day—with or without input from the Duncan Appellants. *Id.* ¶ 7. Ms. Rose explained that she had been expecting to receive a draft joint motion and offered to talk further, but the State elected to proceed by unilaterally filing its motion without the Duncan Appellants. *Id.*

In the "Notice" that it filed with the Court, the State continues the artifice that it first presented to counsel for the Duncan Appellants —i.e., that it was willing to move for a continuance of the July 8 argument, and actually did so, *for the benefit of the Duncan Appellants*. Thus, citing the dialogue between Mr. Van Dyke and Ms. Rose described above, the State claims that it "tried persistently to arrange a fair briefing schedule," and that its "interest was to honor this Court's preference to hear the two ESA cases together, while ensuring the parties ample time to brief these issues." Notice at 2; *see also* 2016-06-14 Unopposed Motion to Reset Oral Argument for the Last Week of July at 3 (arguing that "resetting the *Lopez* argument would make it more likely that *Duncan* could be briefed in time to be argued with *Lopez*"). Nothing, of course, could be further from the truth.

The State clearly had no intention of working with the Duncan Appellants, as evidenced by the fact that the State (a) created a false urgency and inexplicably tried to rush the Duncan Appellants to file their appeal several weeks before it was otherwise due,[1] (b) failed to provide the promised joint request setting forth a schedule for the Duncan Appellants to consider, and (c) proceeded to file its request for a continuance unilaterally, suggesting a late July date that the Duncan

[1] The State argues in its "Notice" that the Duncan Appellants "refused even to inform Nevada about *whether* they planned to appeal." Mr. Van Dyke asked about the Duncan Appellants' appeal plans at a time when they were still digesting the district court's order, evaluating their options, and assessing various appeal strategies.

Appellants never approved. The real reason for the State's request for a continuance of the July 8 hearing, of course, was Mr. Clement's vacation. *See* 2016-06-14 Unopposed Motion to Reset Oral Argument for the Last Week of July; *see also* 2016-05-20 Unopposed Motion for Expedited Oral Argument and Decision, footnote 3; Part B, *infra.*

On June 17, the Duncan Appellants timely filed their notice of appeal. On June 20, Mr. Joseph Tartakovsky from the State Solicitor General's Office left a message for Ms. Rose to discuss scheduling matters related to this appeal. Subhedar Decl. ¶ 3. Mr. Nitin Subhedar, co-counsel for the Duncan Appellants, returned his call the next morning. *Id.* ¶ 4-6. During their conversation, Mr. Subhedar explained to Mr. Tartakovsky the Duncan Appellants' concerns about a July 29 oral argument, namely that—even if the shortened briefing schedule similar to that the State proposed in the *Lopez* case were followed—briefing would not be completed until after July 29. *Id.* Mr. Subhedar indicated that the Duncan Appellants were leaning toward a schedule in which 21 days are allowed for each of the opening brief, the answering brief, and the reply brief, starting from the date of the scheduling order. *Id.* ¶ 5.

Mr. Tartakovsky asked whether the Duncan Appellants would agree to the schedule Mr. Van Dyke proposed several weeks ago, under which the opening brief would be due on July 1. *Id.* Noting that this is a mere 10 days away, Mr.

Subhedar indicated that the Duncan Appellants would need more time. *Id.* Mr. Tartakovsky then asked whether the Duncan Appellants are taking the position that they will not agree to any briefing schedule that would enable a July 29 oral argument for their appeal. *Id.* Mr. Subhedar responded that while it seems difficult to subdivide the time remaining in a way that provides all parties with adequate time for briefing, *the Duncan Appellants were certainly willing to entertain any proposal the State would like to make. Id.*

Mr. Tartakovsky indicated that he would discuss the scheduling issues with his colleagues and then get back to Mr. Subhedar. *Id.* ¶ 7. A few hours later, while counsel for the Duncan Appellants were still waiting for a return call, the State instead rushed off and filed its "Notice"—another unilateral submission made in the *Lopez* case, urging the Court to adopt a briefing schedule that binds the Duncan Appellants before the *Duncan* appeal has even been docketed.

B. The State's Attempt to Initiate Inappropriate Ex-parte Communications with Members of this Court

Apparently, the State has not been content with its repeated efforts to file papers in the *Lopez* appeal seeking to fix oral argument dates and briefing schedules for the *Duncan* appeal—including at times prior to the docketing, or even the *filing*, of the *Duncan* appeal itself. It was recently revealed that the State has at least attempted to initiate *ex parte* communications with Justices of the Nevada Supreme Court regarding the schedule of the *Duncan* appeal. On June 17,

State Treasurer Dan Schwartz—who is also an attorney, and a party to this case—appeared on the talk show "Ralston Live." *See* Ralston Live: June 17, 2016 Episode (KNPB Public Broadcasting for Northern Nevada 2016), available at http://watch.knpb.org/video/2365786636/ (last accessed Jun. 22, 2016). The following is an excerpted transcript of Mr. Schwartz's appearance, starting at 11:58:

> **Jon Ralston:** Now the latest development is that the AG's hired gun, the former solicitor general, he's going on a European trip, he's going out of the country like Dan Schwartz does all of the time and he can't make it so they have to push the thing back? Are you upset about this, that it's getting pushed back?
>
> . . .
>
> **Dan Schwartz**: The real truth of the matter is there was an original date of July 8th and, our lead attorney was not available but then the ACLU would have filed an appeal to their decision, to Judge Johnson's ruling. And what is interesting to me is that the last day for briefs was, is July 21st, and the Supreme Court I really thought they would have set arguments in mid-August, they came back and they set it a week later for July 29. So July 29 will be the big day, all argument, all briefs will be in, all arguments will be heard, and I know that we, that the Attorney General Laxalt and I, both had informal conversations with the Justices, and they are very much aware that this is an important issue, that we have thousands of Nevada families that are waiting on their ruling, and they've obviously—and as I say I'm quite pleased about it—have decided to hold a hearing quickly, and I suspect will get a ruling pretty quickly after that.
>
> **Jon Ralston:** I hate to ask this question but you brought it up yourself, the AG and the State Treasurer have had ex parte communications with the Justices of the Supreme Court? You're a lawyer you know what I'm talking about here, you're not supposed to have those conversations, are you?
>
> **Dan Schwartz**: The answer is we don't have ex-parte communications with the justices, but in passing, uh, I, we …

Jon Ralston: What's the difference, informal discussion vs. ex parte discussion?

Dan Schwartz: Well there's no, uh, there's no questions that we, uh, that I, as I said I can't speak for the Attorney General I'll just say myself you know, I've gone up to the Justices and I said, um, I'm not representing me in the hearing, in the, in the uh cases, but I've said that people in this State are, we're, we're holding over we have now 6,000, 6,300 applications, um

...

Dan Schwartz: We're very much concerned about the hearings. And the Justices, they've not discussed any legal issues they've just said we're aware that you've got, that there are a lot of people in this State who, you know, are waiting on a ruling and we're, we're sensitive to that.

Jon Ralston: So you don't think those are ex parte communications because no substantive legal issues were discussed?

Dan Schwartz: That would be my-

Jon Ralston: You're just saying get this thing done because they're waiting to hear, they need to-

Dan Schwartz: I wouldn't talk that way to a Justice. I would say, I just said, from our, from the Treasurer's office, we're holding a lot of applications, we sure would appreciate a ruling. To me that's not substantive ex parte communications.

Jon Ralston: And you're saying you don't know if the AG did that, you didn't mean to say it, you misspoke-

Dan Schwartz: I did misspoke, yeah, misspeak.

Jon Ralston: Because I'm sure Adam Laxalt is watching us saying I'm going to kill Dan Schwartz-

Dan Schwartz: Right, he may-

Jon Ralston: Don't you think?

...

...

Jon Ralston: I guess what I'm wondering is, what do you think a reasonable timeline is now, are we going to be waiting till September? You think this is going to happen in August? What do you think?

Dan Schwartz: Well again, as a result of my very casual discussions-

Jon Ralston: [smiling] Not ex parte-

Dan Schwartz: [smiling] Not ex parte discussions, uh, the Justices indicated to me that they were very sensitive to the issues, they were very sensitive to-

Jon Ralston: They will get it done quickly

Dan Schwartz: They will get it done quickly.

Id. (emphasis added).

Needless to say, this interview raises serious questions about the conduct of Dan Schwartz and the Attorney General's office.[2] Notably, this interview aired on June 17, 2016—the same date on which the Duncan Appellants filed their notice of appeal. That means that, at the time of the interview, the briefing in the *Lopez* appeal was complete— but the *Duncan* appeal had either not been filed, or it had been filed but not yet docketed. Yet, Mr. Schwartz confidently represented that "the last day for briefs was, is July 21st, and the Supreme Court I really thought they would have set arguments in mid-August . . ." http://watch.knpb.org/video/2365786636/ at 12:55. This July 21 date has not appeared in any order from this Court, nor was it mentioned in the State's request to postpone the July 8 oral argument (or in any other filing by the State). Instead,

[2] The Attorney General has since denied that he has "had any conversation with any justice about the ESA case or any other pending matters before the Nevada Supreme Court." Jon Ralston, Twitter, https://twitter.com/RalstonReports/status/743983600798830592. The Duncan Appellants, however, intend to investigate further whether anyone in the Attorney General's or Solicitor General's office, or any other State official, had improper *ex parte* communications with members of this Court.

the only place July 21 had been mentioned is in the potential schedule proposed by the State.

Mr. Schwartz's comments at least raise the question of whether he and/or an employee of the Attorney General's office initiated *ex parte* discussions about the *Duncan* case with one or more Justices of the Supreme Court—and at a time before the *Duncan* case was even filed and/or docketed. Obviously, any such communication by Mr. Schwartz or members of the Attorney General's office is prohibited by the Nevada Rules of Professional Conduct, and would serve to undermine the very foundations of our legal system.

Despite whatever Mr. Schwartz or anyone else from the State may have represented to Justices of this Court during any such discussions, the Duncan Appellants never agreed that a July 29 oral argument was appropriate for their appeal—or that July 21 as the "last day for briefs," to use Mr. Schwartz's phrase, is appropriate either. Instead, the Duncan Appellants should be provided adequate time to complete their briefing, and they certainly should not be prejudiced by any efforts by the State to engage in inaccurate and prohibited communications with members of this Court behind closed doors.

C. The Duncan Appellants' Proposed Briefing Schedule Allows a Full Hearing on the Merits Without Prejudicing the State

The Duncan Appellants agree with the State that a speedy resolution of this case is appropriate and that expedited briefing is therefore warranted. And they

have no objection to the Court's hearing oral arguments for both appeals together, per the Court's previously stated preference.[3] But the date currently set for the *Lopez* oral argument simply does not provide reasonable time for the parties in *this* case to prepare briefs that thoroughly address the serious constitutional questions implicated by the district court's order. This is especially true given that the district court dismissed Appellants' claims under Sections 2 and 10 of Article 11 of the Nevada Constitution—the latter of which is not presented in *Lopez*, and the former of which is not the primary focus of the *Lopez* appeal.

Thus, whether or not the Court proceeds with hearing oral argument for both appeals together, Appellants respectfully request that the Court set a briefing schedule and argument date in this case that provides both parties adequate time to prepare and file their briefs. Specifically, Appellants suggest the following expedited schedule, which is substantially shorter than the usual timeline but will still allow a full and fair opportunity for briefing:

- Opening brief due 21 calendar days after the date on which the Court grants this Motion.
- Answering brief due 21 calendar days after the date on which the opening brief is filed.
- Reply brief due 21 calendar days after the date on which the answering brief is filed.

[3] If the Court no longer desires to hear both cases together, Appellants also have no objection to proceeding separately, on a reasonable schedule.

Nevada Rule of Appellate Procedure 31 provides an appellant 120 days to file and serve an opening brief after an appeal has been docketed in this Court and 30 days each for the respondent's answering brief and the appellant's reply. Nev. R. App. Pro. 31(a)(1)(A)-(C). Thus, the schedule proposed here cuts appellants' time for the opening brief to nearly one-sixth of the normal period, while reducing the overall briefing schedule from the standard 180 days to just 63 days.

Further, as discussed below, the Duncan Appellants' proposed schedule would not unfairly prejudice the State; with the final brief due in mid to late August, the Court will have nearly two months before the next ESA funding deadline. In contrast, any reduction in the briefing schedule would significantly prejudice the Duncan Appellants' right to a full and fair hearing.

1. The State Will Not be Harmed by Moving the July 29 Hearing Date Until Late August or Early September

The State's recent filings hide from the Court a critical fact: now that the State necessarily will not receive a decision by July 8, there is no reason why an oral argument in July is necessary. Moving the date for oral argument to August or even early September will not prejudice the State in the least. In its motion for an expedited oral argument in the *Lopez* case, the State represented that:

> The first quarterly payment for the coming school year is scheduled for August 1, 2016. Therefore, in order to make that payment, the Treasurer will need a ruling from this Court lifting the preliminary injunction no later than July 8, 2016.

The Court, however, originally set the *oral argument date* for July 8, and the State subsequently asked that the argument be postponed all the way to July 29. At this point, therefore, the State will not be able to make the August 1 payment under any scenario. Presumably, the next scheduled quarterly payment is set for approximately November 1, 2016. *See* Nevada Treasurer, "Nevada's Education Savings Account Program: FAQ," http://www.nevadatreasurer.gov/uploadedFiles/nevadatreasurergov/content/SchoolChoice/NVESA_FAQ.pdf ("Disbursements are scheduled quarterly: February, May, August and November.").

Indeed, the lack of urgency for a July 29 hearing date is confirmed by the State's own words. First, on the June 17 Ralston Live program during which State Treasurer Dan Schwartz exposed his *ex parte* communication attempts, Mr. Schwartz stated the following when discussing the State's recent request to move back the oral argument date:

> **Dan Schwartz**: The real truth of the matter is there was an original date of July 8th and, our lead attorney was not available but then the ACLU would have filed an appeal to their decision, to Judge Johnson's ruling. And what is interesting to me is that the last day for briefs was, is July 21st, and the Supreme Court I really thought they would have set arguments in mid-August, they came back and they set it a week later for July 29 . . .

This means that when the State asked this Court to move the *Lopez* oral argument to accommodate Mr. Clement's vacation plans, it believed that it would have no

choice but to accept a hearing date in mid-August – yet, it decided to make the request anyway. Therefore, the State cannot now pull an about-face and pretend that a mid-August hearing date would adversely affect the State's schedule. And indeed, on the June 21 call between the Duncan Appellants' counsel and the State, the State confirmed that the next funding deadline will be in the fall. Subhedar Decl. at ¶ 9.

Under the Duncan Appellants' proposed schedule, both cases could be fully briefed by mid- to late August—a full two months before the November 1 funding—giving the Court more than enough time to consider and rule on both appeals. Therefore, adoption of the schedule proposed by the Duncan Appellants, including a relatively modest postponement of the hearing date, poses no threat to the State's plans to fund the voucher program for the fall.

2. The Duncan Appellants' Proposed Briefing Schedule Cuts the Default Schedule by Nearly Two-Thirds; Anything More Would Hinder the Parties' Ability to Fully Brief these Complex and Weighty Issues

The Court should reject the State's proposed punitive briefing schedule, because it would unfairly undermine the Court's ability to decide the appeal correctly by depriving both sides of the time necessary to prepare thorough briefs. The Nevada Rules of Appellate Procedure state that "[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order." Nev. R. App. Pro. 31(a)(1)(A). In order for this right to have any meaning, the

aggrieved party must be given a full and fair opportunity to articulate the grounds on which the lower court's order is incorrect—including being permitted adequate time to prepare briefs that present all relevant facts, law, and policy considerations.

Here, the district court's 45-page decision errs in numerous respects—including in its use of an improper standard for a motion to dismiss, its incorrect conclusions and analysis on standing, and its misapprehension of fundamental principles enshrined in the Nevada Constitution. These are complex and weighty issues, and it will necessarily take Appellants a significant amount of time to research the applicable precedent and prepare a brief that thoroughly explicates all the infirmities in the district court's order. The proposed schedule already drastically reduces the time for Appellants' opening brief—from 120 days to a mere 21. Any further reduction would significantly impair Appellants' ability to address these issues comprehensively.

3. The State's Motion Exaggerates the Time Available Under Its Own Proposed Briefing Schedule, and the Duncan Appellants' Proposed Schedule In Fact Is Significantly Shorter Than the Schedule the State Proposed For Itself in the *Lopez* Case

The State's "Notice" suggests that its proposed briefing schedule is adequate, but it does so by using misleading metrics—comparing the date on which briefing *begins* in the *Duncan* case, to a date after briefing was already *completed* in the *Lopez* case. Indeed, when comparing briefing schedule to

briefing schedule, the State asked for and received a briefing schedule significantly *longer* than what the Duncan Appellants are asking for now.

In the State's "Notice," the State claims that "[t]he timeframe that this would require is similar to that already followed in the Lopez matter" because "[i]n *Lopez*, the Court, by order dated May 25, set argument for July 8." But in *Lopez,* the State filed its notice of appeal in January and *had already spent several months briefing its issues* before the Court set oral arguments. In contrast, the *Duncan* appeal has not even been docketed as of the date the State used as a comparison. In short, the comparison is apples to oranges, and it highly distorts the relatively timelines between the two cases.

When one looks to the proper comparison—the briefing schedules in both cases—there is a stark contrast between what the State seeks to impose on the Duncan Appellants, and what the State asked for itself in *Lopez.* Assuming the Court sets a briefing schedule in the *Duncan* appeal today, June 22, 2016, the following chart demonstrates the differences between the proposed briefing schedules:

	The State's proposal in *Lopez*	What the State received in *Lopez*	Duncan Appellants' Proposal	The State's proposal in this case
Opening Brief (days from notice of appeal)	49	49	26	18
Opening Brief (days from Court Order,)[4]	21	21	21	13
Answering Brief	21	21	21	13
Reply Brief	14[5]	35	21	7

In *Lopez*, the State's opening brief was due 49 days after it filed its notice of appeal—whereas the Duncan Appellants' brief, under their proposal, would be due approximately 26 days after it filed its notice of appeal. In *Lopez*, the Respondents' answering brief was due 21 days after the opening brief, and the State's reply was due 35 days after that; under the Duncan Appellants' proposal, these periods would be 21 days each.[6]

When the State believed that time was of the essence—as it did in its own appeal of the preliminary injunction entered by the district court in Lopez—it

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[5] The State asked for 10 court days, which translates to 14 calendar days.

[6] The State initially asked for an earlier date to file its reply, but it later filed for an extension.

proposed a briefing schedule that would last *126 days* from the date of its notice of appeal, in order to fairly and fully present its argument. Now, however, when the Duncan Appellants propose a much shorter 89-day briefing cycle, the State insists on trying to force an even shorter briefing period—while at the same time having no qualms about asking for more time to accommodate the vacation plans of its outside counsel. This is simply unfair and untenable.

The Duncan Appellants believe that their proposed schedule strikes an appropriate balance between the need to ensure that the parties have enough time to brief the complex constitutional issues that will be before the Court, and the Court's desire to hear oral argument in the *Lopez* and *Duncan* appeals on the same day. And given that this proposed schedule is much shorter than that which the State proposed for its own appeal, the Duncan Appellants respectfully urge adoption of their schedule.

CONCLUSION

Appellants—and all Nevadans—deserve to have a decision from this Court that rests on full and fair briefing on all pertinent issues, particularly when there are important constitutional principles at stake. For the foregoing reasons, the Duncan Appellants respectfully request that if this Court chooses to consolidate the *Duncan* appeal with the *Lopez* appeal for oral argument, the Court order that: The opening brief shall be due on 21 calendar days after the Court grants this order, that the

answering brief be due 21 calendar days after the opening brief is filed, and that the reply brief be due 21 calendar days after the answering brief, with oral argument heard as soon as practical after the briefing has been completed.

DATED on this 22nd day of June, 2016.

/s/ Amy M. Rose
Amy M. Rose (SBN 12081)
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 S. Rancho Drive, Suite B-11
Las Vegas, Nevada 89106
Telephone: (702) 366-1536
rose@aclunv.org

/s/ Daniel Mach
Daniel Mach*
Heather L. Weaver*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW, Ste. 600
Washington, D.C. 20005
dmach@aclu.org
hweaver@aclu.org

/s/ Richard B. Katskee
Richard B. Katskee*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1901 L Street NW, Suite 400
Washington, DC 20036
katskee@au.org

/s/ Nitin Subhedar
Nitin Subhedar*
Samuel Jacob Edwards*
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
nsubhedar@cov.com
sedwards@cov.com

*Admitted Pro Hac Vice in the Clark County District Court for Pending Case No A-15-723703-C

/s/ Anupam Sharma
Anupam Sharma*
COVINGTON & BURLING LLP
333 Twin Dolphin Dr., Suite 700
Redwood Shores, CA 94065
asharma@cov.com

CERTIFICATE OF SERVICE

I hereby certify and affirm that this **Opposition To The State's Notice Re: Consolidation Of The ESA Cases For Oral Argument And Expedition Of Briefing in *Duncan*** was filed electronically with the Nevada Supreme Court on June 22, 2016, and electronically served on the following parties:

Wolf Rifkin Shapiro Shulman & Rabkin, LLP

Don Springmeyer	dspringmeyer@wrslawyers.com
Justin C. Jones	jjones@wrslawyers.com
Bradley Schrager	bschrager@wrslawyers.com

Attorneys for Respondents

Attorney General of State of Nevada

Adam Paul Laxalt	
Lawrence VanDyke	lvandyke@ag.nv.gov
Joseph Tartakovsky	jtartakovsky@ag.nv.gov
Ketan D. Bhirud	kbhirud@ag.nv.gov

Attorneys for Appellant

Kolesar and Leatham

Matthew T. Dushoff	mdushoff@klnevada.com
Lisa J. Zastrow	lzastrow@klnevada.com

I further certify and affirm that I caused this document to be deposited via USPS first class mail, the following parties:

Munger Tolles & Olson, LLP
Tamerlin J. Godley
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Attorneys for Respondents

Education Law Center
David G. Sciarra
60 Park Place, Suite 300
Newark, New Jersey 07102
Attorneys for Respondents

Bancroft PLLC
Paul Clement
500 New Jersey Ave. NW
Seventh Floor
Washington DC 20001
Attorneys for Appellant

Institute for Justice
Timothy D. Keller
398 South Mill Ave. Ste. 301
Tempe, AZ 85281

By /s/ Amy M. Rose
Amy M. Rose (SBN 12081)
AMERICAN CIVIL LIBERTIES
UNION OF NEVADA
601 S. Rancho Drive, Suite B-11
Las Vegas, Nevada 89106
Telephone: (702) 366-1536
rose@aclunv.org

DECLARATIONS

IN THE SUPREME COURT OF

THE STATE OF NEVADA

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada, *Appellant,* vs. HELLEN QUAN LOPEZ, *et al.*, *Respondents*	)	Supreme Court No.: 69611 District Court No. 15-0C-00207

DECLARATION OF AMY M. ROSE IN SUPPORT OF OPPOSITION TO THE STATE'S NOTICE RE: CONSOLIDATION OF THE ESA CASES FOR ORAL ARGUMENT AND EXPEDITION OF BRIEFING IN *DUNCAN*

Opposition of Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger (Plaintiffs in *Duncan v. Nevada*)
Opposing State's Proposed Briefing Deadline

Amy M. Rose (SBN 12081)
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 S. Rancho Drive, Suite B-11
Las Vegas, Nevada 89106
Telephone: (702) 366-1536
rose@aclunv.org

Daniel Mach*
Heather L. Weaver*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW, Ste. 600
Washington, D.C. 20005
dmach@aclu.org
hweaver@aclu.org

Richard B. Katskee*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1901 L Street NW, Suite 400
Washington, DC 20036
katskee@au.org

Nitin Subhedar*
Samuel Jacob Edwards*
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
nsubhedar@cov.com
sedwards@cov.com

Anupam Sharma*
COVINGTON & BURLING LLP
333 Twin Dolphin Dr., Suite 700
Redwood Shores, CA 94065
asharma@cov.com

Attorneys for Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger

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DECLARATION OF AMY M. ROSE IN SUPPORT OF OPPOSITION TO THE STATE'S NOTICE RE: CONSOLIDATION OF THE ESA CASES FOR ORAL ARGUMENT AND EXPEDITION OF BRIEFING IN *DUNCAN*

Amy M. Rose, declares as follows:

1. I am over 18 years old and legally competent to make this declaration.

2. I am the Legal Director for the ACLU of Nevada and counsel for Amici Curiae in the above-captioned matter, and counsel for Plaintiffs in the not yet docketed appeal in *Duncan v. Nevada*. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, I could and would testify competently to the matters set forth in this declaration.

3. On May 31, Solicitor General, Lawrence Van Dyke called me inquiring whether the Duncan Plaintiffs were going to file an appeal. I explained that the Plaintiffs were still evaluating the decision as to whether (and what) to appeal. Mr. Van Dyke and I discussed that the court recently indicated it would like to hear any oral argument in the *Duncan* appeal on the same day as the *Lopez* appeal, currently scheduled for July 8. Mr. Van Dyke and I agreed that this July 8 oral argument date left very little briefing time for the *Duncan* case. Mr. Van Dyke suggested to me that the state would be open to submitting a joint request to move the currently scheduled oral argument date, but only if the Duncan Plaintiffs filed their appeal soon.

4. Mr. Van Dyke made no mention that the State wished to move the hearing because of Mr. Clement's vacation schedule.
5. On June 8, I spoke with Mr. Van Dyke again about scheduling and he suggested substantive dates for oral argument and briefing, including oral argument at the end of July. I agreed to take these dates back to my co-counsel. During this conversation I also expressed concern to Mr. Van Dyke that holding oral argument the end of July still presented an extremely short briefing schedule.
6. On June 10, after discussion with my co-counsel, I again spoke again with Mr. Van Dyke about the potential of moving the oral argument date should the Duncan Plaintiffs file and the Nevada Supreme Court combine their case with the *Lopez* case. After I suggested setting a later oral argument date to allow for sufficient briefing, Mr. Van Dyke represented to me that he was concerned his clients would not agree to push oral argument much further than that last week in July. He also expressed his belief that the Nevada Supreme Court does not hear oral arguments in August. Mr. Van Dyke represented that he would draft a joint request for the Duncan Plaintiff's review, explaining that the State no longer expected a decision from this Court in July and thus was no longer planning on the possibility of disbursing ESA funds for August.

7. On Monday June 13, Mr. Van Dyke informed me via email that the State was going to file its motion to move the hearing date the next day with or without input from the Duncan Plaintiffs. I explained via email that I had been expecting to receive a draft joint motion, and offered to talk further, but the State still chose to file its motion without the Duncan Plaintiffs.

Dated: June 22, 2016

____/s/ Amy M. Rose_____
Amy M. Rose

IN THE SUPREME COURT OF

THE STATE OF NEVADA

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada, *Appellant,* vs. HELLEN QUAN LOPEZ, *et al.*, *Respondents*	)	Supreme Court No.: 69611 District Court No. 15-0C-00207

DECLARATION OF TOD STORY IN SUPPORT OF OPPOSITION TO THE STATE'S NOTICE RE: CONSOLIDATION OF THE ESA CASES FOR ORAL ARGUMENT AND EXPEDITION OF BRIEFING IN *DUNCAN*

Opposition of Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger (Plaintiffs in *Duncan v. Nevada*)
Opposing State's Proposed Briefing Deadline

Amy M. Rose (SBN 12081)
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 S. Rancho Drive, Suite B-11
Las Vegas, Nevada 89106
Telephone: (702) 366-1536
rose@aclunv.org

Daniel Mach*
Heather L. Weaver*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW, Ste. 600
Washington, D.C. 20005
dmach@aclu.org
hweaver@aclu.org

Richard B. Katskee*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1901 L Street NW, Suite 400
Washington, DC 20036
katskee@au.org

Nitin Subhedar*
Samuel Jacob Edwards*
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
nsubhedar@cov.com
sedwards@cov.com

Anupam Sharma*
COVINGTON & BURLING LLP
333 Twin Dolphin Dr., Suite 700
Redwood Shores, CA 94065
asharma@cov.com

Attorneys for Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger

*Admitted Pro Hac Vice in the Clark County District Court for Pending Case No: A-15-723703-C

DECLARATION OF TOD STORY IN SUPPORT OF OPPOSITION TO THE STATE'S NOTICE RE: CONSOLIDATION OF THE ESA CASES FOR ORAL ARGUMENT AND EXPEDITION OF BRIEFING IN *DUNCAN*

Tod Story, declares as follows:

1. I am over 18 years old and legally competent to make this declaration.
2. I am the Executive Director for the ACLU of Nevada, which is counsel for Amici Curiae in the above-captioned matter, and counsel for appellants in the not yet docketed appeal in *Duncan v. Nevada.* I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, I could and would testify competently to the matters set forth in this declaration.
3. On June 1, Mr. Van Dyke and I spoke regarding possibly rescheduling oral argument should the Duncan Plaintiffs appeal. Mr. Van Dyke made clear to me that the State would not support a request to move the oral argument date unless the Duncan Plaintiffs filed an appeal weeks earlier than the statutory deadline requires.

Dated: June 22, 2016

_____/s/ Tod Story_____
Tod Story

IN THE SUPREME COURT OF

THE STATE OF NEVADA

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada, *Appellant,*	)	Supreme Court No.: 69611
vs.	)	District Court No. 15-0C-00207
HELLEN QUAN LOPEZ, *et al.*, *Respondents*	)	

DECLARATION OF NITIN SUBHEDAR IN SUPPORT OF OPPOSITION TO THE STATE'S NOTICE RE: CONSOLIDATION OF THE ESA CASES FOR ORAL ARGUMENT AND EXPEDITION OF BRIEFING IN *DUNCAN*

Opposition of Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger (Plaintiffs in *Duncan v. Nevada*)
Opposing State's Proposed Briefing Deadline

Amy M. Rose (SBN 12081)
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 S. Rancho Drive, Suite B-11
Las Vegas, Nevada 89106
Telephone: (702) 366-1536
rose@aclunv.org

Daniel Mach*
Heather L. Weaver*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW, Ste. 600
Washington, D.C. 20005
dmach@aclu.org
hweaver@aclu.org

Richard B. Katskee*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1901 L Street NW, Suite 400
Washington, DC 20036
katskee@au.org

Nitin Subhedar*
Samuel Jacob Edwards*
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111-5356
nsubhedar@cov.com
sedwards@cov.com

Anupam Sharma*
COVINGTON & BURLING LLP
333 Twin Dolphin Dr., Suite 700
Redwood Shores, CA 94065
asharma@cov.com

Attorneys for Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger

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DECLARATION OF NITIN SUBHEDAR IN SUPPORT OF OPPOSITION TO THE STATE'S NOTICE RE: CONSOLIDATION OF THE ESA CASES FOR ORAL ARGUMENT AND EXPEDITION OF BRIEFING IN *DUNCAN*

Nitin Subhedar, declares as follows:

1. I am over 18 years old and legally competent to make this declaration.

2. I am a partner at Covington & Burling LLP in San Francisco, CA. I am admitted to practice pro hac vice in Clark County District Court for Pending Case No: A-15-723703-C. In that case, I am counsel for Ruby Duncan et al., who are Amici Curiae in the above-captioned matter and are Appellants in the not yet docketed appeal in *Duncan v. Nevada*. I have personal knowledge of the facts set forth in this Declaration, and, if called as a witness, I could and would testify competently to the matters set forth in this Declaration.

3. On June 20, 2016, Deputy Solicitor General Joseph Tartakovsky left a message for Amy Rose, my co-counsel in this case, stating that Solicitor General Lawrence VanDyke was out of town, but he (Mr. Tartakovsky) wanted to speak about scheduling for the *Duncan* Appellants appeal.

4. On June 21, 2016, I spoke with Mr. Tartakovsky regarding briefing and oral argument schedules in an appeal in the *Duncan* case. I explained to Mr. Tartakovsky that the Duncan Appellants are of the view that a fair and

appropriate briefing schedule would be one in which 21 days are sequentially allowed for each of the opening brief, the answering brief, and the reply brief, starting from the date of the scheduling order. I noted that this is a very expedited schedule, and that it is actually faster than the one the State requested in the *Lopez* case – in which the opening brief was due 21 days after the scheduling order, the answering brief was due 21 days later, and the reply brief (after a motion by the State seeking additional time) ended up being due 35 days later. Mr. Tartakovsky and I discussed the fact that the proposed schedule totals 63 days, and that the briefing would not be completed until after July 29.

5. Mr. Tartakovsky asked if the Duncan Appellants would agree to a schedule proposed several weeks ago by his colleague, under which the opening brief would be due on July 1. I pointed out that this was only ten days away, and that the Duncan Appellants would need more time than that for their opening brief.

6. Mr. Tartakovsky asked if the Duncan Appellants were of the view that there is no acceptable briefing schedule that could result in having the *Duncan* appeal heard on July 29. I explained that there were only 38 days remaining until July 29, and that it seems difficult to figure out a way to divide up these days such that both parties will have sufficient time for their briefs. I also

added, however, that if the State wants to try to come up with a proposed solution for this, the Duncan Appellants were certainly willing to take a look at it and discuss it with the State.

7. Mr. Tartakovsky told me that the State would be willing to discuss the schedule proposed by the Duncan Appellants, and that he would consult with his colleagues and then get back to me as soon as possible.

8. Relying upon Mr. Tartakovsky's statement that he would get back to me, the Duncan Appellants did not proceed with filing their proposed schedule with the Court – as they did not want to file something while discussions between the parties were ongoing and remained open. A few hours later, however, I received an electronic filing notification indicating that the State had filed its "Notice" in this case – with no advance warning to me or anybody else representing the Duncan Appellants.

9. During my call with Mr. Tartakovsky, I asked if there is another funding deadline – like the July 8, 2016 funding deadline about which the State had previously informed the Court – coming up. He told me that the next such deadline will be sometime later in the fall, because the State's funding system is set up on a quarterly basis.

Dated: June 22, 2016

/s/ Nitin Subhedar
Nitin Subhedar