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DISTRICT COURT

CLARK COUNTY, NEVADA

ZAVIA NORMAN, individually and on behalf of her minor children, RHEALYN NORMAN, LAILA NORMAN, and CAILYN NORMAN; and GLYNIS GALLEGOS, individually and on behalf of herminor child, D'MEIRE GALLEGOS,

Plaintiffs,

vs.

STATE OF NEVADA; DAN SCHWARTZ, in his official capacity as TREASURER OF THE STATE OF NEVADA; and DOES 1 through 10, inclusive, ,

Defendants.

Case No. A-15-729344-C
Dept. No. XXV

MOTION TO DISMISS AND MOTION TO DISQUALIFY

Date of Hearing: 02/09/16
Time of Hearing: 9:00 AM

Defendants, State of Nevada and Dan Schwartz, by and through counsel, ADAM PAUL LAXALT, Attorney General of the State of Nevada; Lawrence VanDyke, Solicitor General; Joseph Tartakovsky, Deputy Solicitor General; and Ketan Bhirud, Head of Complex Litigation, hereby submit

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their Motion to Dismiss and Motion to Disqualify. These motions are based on the following points and authorities and the papers and pleadings on file herein.

DATED this 7th day of January, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Lawrence VanDyke
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Joseph Tartakovsky
Deputy Solicitor General
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NOTICE OF MOTION

TO: **ALL PARTIES AND THEIR COUNSEL OF RECORD**

PLEASE TAKE NOTICE that Defendant's Motion to Dismiss and Motion to Disqualify will be heard in the above-entitled action on the 09 day of February, 2016, at 9:00A.m., in Department XXV, of the Eighth Judicial District Court, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89101.

DATED this 7th day of January, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Lawrence VanDyke
Lawrence VanDyke
Solicitor General
Joseph Tartakovsky
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INTRODUCTION

Plaintiffs are two Clark County mothers whose children seek to participate in Nevada's new Education Saving Account program ("ESA"), enacted in June 2015 as Senate Bill 302. Plaintiffs ask this Court to declare (1) that SB 302 is constitutional and (2) that "no legal reason prevents the State or its Treasurer from funding Plaintiffs' ESAs."[1]

This case should be dismissed under Rule 12(b)(1) as Plaintiffs lack standing. They have not been injured by the State of Nevada or Treasurer Dan Schwartz (collectively, the "State") and are not adverse to the State in any substantive sense. The State wholeheartedly agrees with Plaintiffs that Nevada's ESAs are constitutional and that their constitutionality should be settled as soon as possible. Indeed, that is why the Office of the Attorney General has been working non-stop defending against two constitutional challenges brought against Nevada's ESA law.[2] The important issues that Plaintiffs ask this Court to decide are hotly disputed—just not by the parties in *this* case. Those issues have been extensively briefed and argued in two preexisting challenges by many different parties and amici with clear and unquestionable adversity. Both courts that are hearing those challenges appear to be on the verge of issuing decisions. Plaintiffs are asking the Court to usurp the authority of those courts by participating in an attempted collusive lawsuit and issuing a hasty, uncontested decision. Plaintiffs lack standing and their suit should be dismissed.

Alternatively, if Plaintiffs' suit is not dismissed, Plaintiffs' counsel must be disqualified as it suffers from ethical conflicts of interest originating in the first two ESA suits. Before being engaged to bring this suit, Hutchison & Steffen (hereinafter, "Hutchison") acted as local counsel with the Institute for Justice in both ESA cases, representing parents similarly situated to Plaintiffs here, as Intervenor-Defendants. As local counsel, Hutchison was subject to a joint defense and confidentiality agreement entered into between its co-counsel and the Nevada Attorney General's Office (the "Joint Defense and Confidentiality Agreement"), the office that represents the State in all of these ESA suits.[3] Relying on

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[1] Compl. at 11. Plaintiffs only actually allege that their children *applied* for ESAs, not that they have been approved for ESAs. *Id.* at ¶ 18 (Plaintiff Norman), ¶ 27 (Plaintiff Gallegos).

[2] *See Duncan v. State*, No. A-15-723703-C (Nev. 8th J.D.); *Lopez v. Schwartz*, No. 15-OC-00207-1B (Nev. 1st J.D.).

[3] Joint Defense and Confidentiality Agreement, attached hereto as Exhibit B.

the duty of confidentiality created by that agreement, the Nevada Attorney General's Office shared confidential litigation information and strategy with the Institute for Justice and their then-local counsel, Hutchison. Now Hutchison has turned around and sued the very party with whom it still shares a joint-defense obligation relating to those lawsuits.[4] Worse, Hutchison has brought this suit without regard to how it might prejudice its former clients, the intervening parents in the other two ESA suits, suits in which a decision is shortly expected. Allowing the instant litigation to proceed under these circumstances, especially absent any material adversity between the parties in this case, would seriously undermine the integrity of and the public's confidence in our judicial system.

BACKGROUND

Nevada, as part of a series of sweeping education reforms, bestowed parents with real choice in how to best educate their children. SB 302 works by letting parents enter into agreements with the Treasurer to open ESA "accounts" for their children.[5] Subject to a few requirements, any Nevada school-age child may participate in the program.[6] Into each ESA account the Treasurer deposits a sum of money for educational purposes,[7] generally in the amount the children would get if enrolled in public school.[8] For 2015-16, the amounts will be a pro rata portion of between $5,139 and $5,710.[9] SB 302 took effect in July to let the State adopt implementing regulations; the law became fully effective on January 1, 2016.[10]

This suit is the third to concern SB 302. The first, *Duncan v. State*, No. A-15-723703-C, was filed in Las Vegas in August 2015. The second, *Lopez v. Schwartz*, No. 15-OC-00207-1B was filed in Carson City in September 2015. The plaintiffs in both cases attack SB 302's constitutionality and have moved for preliminary injunctions seeking to enjoin the implementation of SB 302. The State has moved for dismissal in both cases. The motions have been carefully briefed and argued.

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[4] See Exhibit B at Section 6 (explaining that unless terminated by written agreement, the Joint Defense and Confidentiality Agreement does not expire until the earlier of a "final non-appealable judgment disposing of the Lawsuits; or settlement by all parties to the Lawsuits").

[5] SB 302 §§ 7.1, 7.2.

[6] *Id.* at §§ 7.1, 12.1.

[7] *Id.* at §§ 7.1(b), 8.1.

[8] *Id.* at § 8.2.

[9] SB 515 §1.

[10] *Id.* at § 17.

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Hutchison, counsel for Plaintiffs in this case, has been involved in both of the earlier suits. First, Hutchison was local counsel for the parent intervenors in *Duncan* from August until December.[11] During this period, its co-counsel, the Institute for Justice, entered into the Joint Defense and Confidentiality Agreement with the State—whom Plaintiffs have sued here.[12] As a result of that agreement, counsel for the State shared confidential information and strategy related to their defense of those suits with counsel for the parent intervenors. Since August or September, Hutchison has also represented an amicus curiae institution, the Foundation for Excellence in Education, in support of the State in both the *Duncan* and *Lopez* lawsuits. Sometime after Hutchison began representing the Foundation for Excellence in Education it withdrew from representing the parent intervenors in the *Duncan* and *Lopez* cases. (But it still represents amicus Foundation for Excellence in Education both suits.) Hutchison has never sought permission from the State to use the confidential information it obtained during its earlier representation of the parent intervenors in the *Duncan* and *Lopez* cases in a lawsuit against the State here. Nor, to the State's knowledge, has Hutchison sought or obtained a conflict waiver from its former clients—the parent intervenors in *Duncan* and *Lopez*—to bring a separate ESA lawsuit that could injure and undermine its former clients' interests in the *Duncan* and *Lopez* litigation.

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ARGUMENT

I. Plaintiffs Lack Standing as Hutchison Has Attempted to Bring a Collusive Lawsuit Where There Is No Adversity Between the Parties.

Standing, the "legal right to set judicial machinery in motion," is a jurisdictional requirement.[13] The Nevada Supreme Court has a "long history of requiring an actual justiciable controversy as a predicate to judicial relief," including in cases for declaratory relief and where constitutional matters arise. [14] The courts will *only* resolve real disputes, "not merely the prospect of a future problem … that may not occur as anticipated, or indeed may not occur at all."[15]

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[11] During this same period, Hutchison also served as local counsel to the same parents in their attempt to intervene in the *Lopez* case.

[12] Exhibit B.

[13] *Heller v. Legislature of State*, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004).

[14] *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel,* 122 Nev. 385, 393, 135 P.3d 220, 225-26 (2006) *abrogated by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (citations omitted).

[15] *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988) (internal quotation marks omitted); *Laxalt v. Cannon*, 80 Nev. 588, 591, 397 P.2d 466, 467 (1964) ("[I]mplicit in

Plaintiffs' supposed "injury" in this case is that the Office of Treasurer Dan Schwartz "refus[es]" to "provide assurances that the Plaintiffs' ESAs will be funded in February 2016, the time by which the State is scheduled to fund the Plaintiffs' ESAs."[16] Plaintiffs claim this leaves them in a state of "uncertainty and insecurity."[17] But Plaintiffs lack standing because there is no substantive adversity: both Plaintiffs and the State seek the exact same result—a declaration of the law's constitutionality and the speedy implementation of SB 302, including the funding of qualifying accounts by this February.

Nevada's judicial system, like all American courts, depends on the presence of adverse parties. Nevada's Rules of Civil Procedure are suffused with references to "adverse" parties because courts resolve disputes.[18] They do not write advisory opinions or issue rulings to confirm parties' preferences. Only in the adversarial crucible do parties reliably canvass law, develop evidence, and refine and test both. And only with the benefit of honest opposition before it can a court decide a case with the confidence that it received a fair, transparent, robust presentation. This doctrine has been best articulated in litigation-heavy states like California, where a tribunal said:

> Courts do not decide abstract questions of law. An indispensable element to jurisdiction is that there be an actual controversy between parties who have an adversarial interest in the outcome of the litigation…. When questions are presented in good faith in the regular course of honest litigation, and are necessary to the determination of the case, we shall not hesitate to decide them; but it is no part of our duty to investigate and decide questions not regularly arising in the due course of litigation, for the gratification of the curiosity of counsel, or to serve some ulterior purpose of parties….[19]

Friendly suits pose a great danger to courts, namely, that of collusive actions, which, as *Black's Law Dictionary* explains, are those "between two parties who have no actual controversy, being merely for the purpose of determining a legal question or receiving a precedent that might prove favorable in

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the concept of jurisdiction is the power to make a binding determination of the case or controversy…. Traditionally a court will not render an advisory opinion….").

[16] Compl. at ¶ ¶ 37, 42.

[17] *Id.*; *see also id*. at ¶ 22 (Plaintiff Norman), ¶ 29 (Plaintiff Gallegos); *id.* at ¶ 38.

[18] *See, e.g.,* Rule 8(b) (general rules of pleading), Rule 12(b) (defenses and objections), Rules 27 and 32 (depositions), Rule 56 (summary judgment), Rule 59 (new trials), and Rule 65 (injunctions).

[19] *Connerly v. Schwarzenegger*, 146 Cal. App. 4th 739, 746 (2007) (citations and internal quotation marks omitted); *see also Golden Gate Bridge and Highway Dist. v. Felt*, 214 Cal. 308, 316 (1931) ("It is, of course, the prevailing doctrine in our judicial system that an action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law, is collusive and will not be entertained.").

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related litigation."[20] As the U.S. Supreme Court explained in 1892, in such cases judges risk being "misled into doing grievous wrong to the public" by ruling on constitutional questions on the basis of "agreed and general statements, and without the fullest disclosure of all material facts."[21] In 2013, that Court reiterated that "concrete adverseness" alone "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"[22] and dispels concerns about standing that arise where the "principal parties agree."[23] For this reason, courts, not parties, are most zealous to ensure bona fide controversies. In a California case, *City of Santa Monica v. Stewart*, for instance, one government entity sued another in "arguably collusive" fashion to knock out a law.[24] To let a law's validity be determined in a suit where "both parties and their attorneys" agree on the answer, the court said, "makes a mockery" of the decisional process.[25]

Plaintiffs claim that, without funding by February, they will be forced to withdraw their children from the private school at which they excel and return to the public schools where they "suffered and sank academically."[26] But Treasurer Schwartz has every intention of funding qualifying parents' ESA accounts by February. His office has publically said so repeatedly. The Treasurer shares Plaintiffs' regret over the uncertainty occasioned by lawsuits against SB 302 and he continues vigorously to seek those lawsuits' dismissal. The individual who, on the Treasurer's behalf, supposedly refused to provide Plaintiffs with "assurances" about February funding was Grant Hewitt, the Treasurer's Chief of Staff. Mr. Hewitt, in the affidavit attached to this motion, affirms that he attempted only to convey that the law's legal status was pending in two courts—and naturally that no assurances could be given by him as to future judicial dispositions—but that until ordered otherwise the Treasurer was eagerly implementing the program.[27] The Treasurer's position—that the law is constitutional and that no legal reason prevents the State, or him, from funding ESAs—is restated in Mr. Hewitt's affidavit.[28]

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[20] Black's Law Dictionary 34 (10th ed. 2014).
[21] *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 346 (1892).
[22] *United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).
[23] *Id.* at 2688.
[24] *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 68 n.14 & 69 (2005).
[25] *Id.* at 69.
[26] Compl. at ¶ 22 (Plaintiff Norman), ¶ 29 (Plaintiff Gallegos), ¶ 38.
[27] Hewitt Decl., attached as Exhibit A, at ¶ 7.
[28] Hewitt Decl. at ¶ 8

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Stranger yet, contrary to Plaintiffs' claim,[29] the ESA law does not actually "schedule" funding of accounts by February. The February date was *selected* by the Treasurer, at his initiative, to better serve parents and implement SB 302 even more rapidly than the original April funding date. Both Plaintiffs claim to have "relied on" the February 2016 funding date in enrolling their children in private school. They did so, they claim, in the summer of 2015.[30] Yet the Treasurer's discretionary acceleration was only announced in *October* 2015.[31] Plaintiffs' claims simply don't hold up.

In sum, the Treasurer does not refuse, in any degree, to provide the funds or assurance that Plaintiffs are entitled to by February 2016. To the contrary, he shares their belief in SB 302's constitutionality. His office's supposed refusal to "assure" Plaintiffs was simply a responsible recognition of the fact that the ESA law is embroiled in two suits—a fact well known to Hutchison as it represented the plaintiffs in both those suits. No injury to Plaintiffs is traceable to conduct by the Treasurer or the State. As a result, this suit cannot proceed but in a collusive manner. A decision on the merits would lead this Court to issue an advisory opinion in a suit with effectively one party.

Moreover, this suit is unnecessary for Plaintiffs to receive the timely answers they desire as to SB 302's constitutionality. As noted, motions to dismiss and motions for preliminary injunction addressing all of the legal issues raised by Plaintiffs have been fully briefed and argued in two other suits, and decisions in those suits are expected imminently. Unlike in this case, the judges in those suits have had the benefit of adverse parties (and intervenors and amici) and full and careful briefing of the same important constitutional issues raised here by Plaintiffs. This ill-advised attempt at a friendly lawsuit can only distract and divide the State's efforts in defending the constitutionality of SB 302. Indeed, these Plaintiffs are more likely to be prejudiced by the continuance of this suit than by its dismissal.

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[29] Compl. at ¶ 42.
[30] Compl. at ¶ 18 (Plaintiff Norman), ¶ 27 (Plaintiff Gallegos), ¶ 38.
[31] Hewitt Decl. at ¶ 4.

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II. If This Matter Is Not Dismissed, Hutchison Should Be Disqualified As It Labors Under Disqualifying Conflicts of Interest.

A. Hutchison Previously Represented the Parent Intervenors in the *Duncan* and *Lopez* Lawsuits and Its Actions in This Lawsuit Are Adverse to Those Former Clients.

This court has broad discretion in attorney disqualification matters.[32] Nevada Rule of Professional Conduct 1.9(a) provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." The Nevada Supreme Court has explained that a party moving to disqualify an attorney under this rule must establish: (1) that there was an attorney-client relationship with the lawyer, (2) that the former matter and the current matter are substantially related, and (3) that the current representation is adverse to the party seeking disqualification.[33] Although a party who is not a client of the attorney sought for disqualification generally lacks standing to move to disqualify based on an alleged conflict of interest, there are exceptions to this rule.[34] For instance, a non-client movant has standing to seek disqualification if there is a serious ethical violation and disqualification is necessary to preserve the integrity of the court's judgments and to maintain public confidence in the integrity of the bar.[35]

Here, Hutchison indisputably had an attorney-client relationship with the parent intervenors in both the *Duncan* and *Lopez* cases. Those parent intervenors' legal interests are parallel to the State's—indeed, so much so that these parties' counsel entered into a joint-defense and confidentiality agreement. Given that this matter involves legal questions identical to those in the *Duncan* and *Lopez* cases, with the Treasurer a Defendant in all three, it is also indisputable that these matters are substantially related. Additionally, Hutchison's representation of the Plaintiffs in this lawsuit, while not substantively adverse to his former clients, is nonetheless adverse precisely because every dispute raised here has already been raised in the *Duncan* or *Lopez* cases, both of which have been pending for

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[32] *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 47, 152 P.3d 737, 738 (2007).
[33] *Id.* at 50, 152 P.3d at 741.
[34] *Sanders v. Lab. Corp. of Am.*, No. 2:10-CV-01231-JCM-GWF, 2011 WL 4834452, at *3 (D. Nev. Oct. 12, 2011).
[35] *Id.*

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at least three months and have been fully briefed. The instant lawsuit can only complicate those cases and delay their resolution, while also providing for the possibility of inconsistent court rulings (if this case is permitted to proceed). Moreover, this lawsuit can only distract and divide the State's (and parent intervenors') efforts to defend Nevada's ESA in the *Duncan* and *Lopez* suits—indeed, it has already done so. Finally, as this ethical conflict involves Nevada's sitting Lieutenant Governor, allowing this suit to proceed with current counsel would especially undermine public confidence in the integrity of the bar.

B. Hutchison Seeks to Unfairly Use Confidential Information Relating to the State That It Obtained Through the Joint Defense and Confidentiality Agreement in the *Duncan* and *Lopez* Matters.

As was explained above, the State entered into a Joint Defense and Confidentiality Agreement with the Institute for Justice relating to the *Duncan* and *Lopez* matters.[36] Relying on the duty of confidentiality created by that agreement, the State provided confidential information to counsel for the parent intervenors that it would not have otherwise provided, including litigation strategy. Now, Hutchison has sued the State and is able to use information, unfairly obtained, against the State, if this lawsuit proceeds. In fact, Hutchison has already done so. When it reached out to the Treasurer's office asking whether ESAs would be funded by February, Hutchison violated its ongoing joint-defense duties by fishing for a statement to fabricate a supposed basis for suit between Hutchison's new, undisclosed clients and the State. Hutchison never sought permission from the State (or its former clients) to bring this suit or to use the confidential information it obtained during its earlier representation of the parent intervenors in the *Duncan* and *Lopez* cases. Hutchison should not be allowed to benefit from its violation of the Joint Defense and Confidentiality Agreement. Here again, allowing this lawsuit to proceed under this cloud of impropriety involving Nevada's sitting Lieutenant Governor could only do serious damage to the public's perception of our judicial system and the integrity of the bar.

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[36] *See* Exhibit B. The Agreement provides that it "shall [not] be asserted by any Party or Counsel as grounds for a motion to disqualify any other Party's Counsel or Counsel's legal department from current or future representation *of such other Party*," but the parties only thereby waived the right to argue disqualification of the parties to the Agreement. The Agreement does *not* prevent the State from moving to disqualify counsel from representing entirely new individuals, in a separate lawsuit, against the State in a case otherwise virtually identical to the *Duncan* and *Lopez* cases.

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CONCLUSION

For the foregoing reasons, the State's motion to dismiss should be granted. Alternatively, Hutchison should be disqualified from representing the Plaintiffs in this matter.

DATED this 7th day of January, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Lawrence VanDyke
Lawrence VanDyke
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Joseph Tartakovsky
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EXHIBIT A

EXHIBIT A

DECL
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Joseph Tartakovsky (Nev. Bar No. 13796C)
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** Motion for admission pro hac vice pending*

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DISTRICT COURT

CLARK COUNTY, NEVADA

ZAVIA NORMAN, individually and on behalf of her minor children, RHEALYN NORMAN, LAILA NORMAN, and CAILYN NORMAN; and GLYNIS GALLEGOS, individually and on behalf of herminor child, D'MEIRE GALLEGOS, Plaintiffs, vs. STATE OF NEVADA; DAN SCHWARTZ, in his official capacity as TREASURER OF THE STATE OF NEVADA; and DOES 1 through 10, inclusive, , Defendants.	Case No. A-15-729344-C Dept. No. XXV **DECLARATION OF GRANT HEWITT**

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. . .

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DECLARATION OF GRANT HEWITT

1. I, Grant Hewitt, present this Declaration in the Nevada District Court for Clark County in support of Defendants' Motion to Dismiss Plaintiffs' Complaint in the above-referenced matter. I have personal knowledge of, and am competent to testify, regarding the matters stated below.

2. I am currently employed as the Chief of Staff to Nevada Treasurer Dan Schwartz and have been so employed at all times relevant to this dispute.

3. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge and belief.

4. I have been involved in directing the substantive decisions taken by this Office to implement SB 302. I am familiar with all aspects of the ESA law's implementation since its passage.

5. Originally the Office of the Treasurer planned to fund the first ESA accounts in April 2016. For a variety of reasons, most of them designed to better assist parents, this Office moved that date forward to February 2016. This was announced to the public in a public hearing on October 20, 2015 and simultaneously by a press release posted online.

6. I am not aware of any law that requires this Office to fund qualifying ESA accounts in February 2016. On the contrary, this accelerated date was, in my view, only enabled by our strenuous efforts on behalf of applicant parents.

7. Nevertheless, this Office has every intention of meeting that February deadline. We are eager to do. We have not deviated from our announcement on October 20, 2015.

8. On December 21, 2015, I received a call from an individual who announced himself as an attorney from the law firm of Hutchison & Steffen. I knew that this firm had been co-counsel with the Institute for Justice and therefore subject to a joint defense agreement with my attorneys at the Office of the Attorney General. I was not aware of his purpose in calling but I understood from him that he represented parents who had applied for ESAs. In a brief conversation, he asked for assurances that qualifying ESA accounts would be funded in February 2016. In my effort to answer responsibly, I indicated that the ESA law's

constitutionality had been called into question in two lawsuits, and that there were two pending preliminary-injunction motions against the law that had yet to have hearings. I also indicated that unless an injunction was granted we would fund ESAs in February as announced on October 20, 2015. I had no intention of suggesting to him that I saw any impediment to funding in February beyond an adverse judicial decision. I do not believe that I suggested anything to the contrary on the phone.

9. The Office of the Treasurer continues to believe that SB 302 is constitutional and intends to see through SB 302's implementation, including by funding ESA accounts, until ordered otherwise.

Executed in Carson City, Nevada on January 7, 2016.

Grant Hewitt

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EXHIBIT B

EXHIBIT B

JOINT DEFENSE AGREEMENT

PARTIES

This Agreement is entered into effective September 24, 2015, by the Nevada Attorney General's Office ("AGO") and the Institute for Justice ("IJ") (collectively, "Counsel"), who are counsel for defendants and intervenors ("Parties") involved in actions pending in Nevada state court, captioned *Ruby Duncan et al. v. Nevada*, A-15-723703-C, and *Lopez et al. v. Schwartz*, 15-OC-00207-1B, both involving challenges to Nevada's Education Savings Account program (the "Lawsuits").

A. Counsel believe that the Lawsuits raise legal and factual issues common to the Parties and thus they share mutual interests in pursuing certain common or joint claims, defenses, settlements, negotiations, or strategies concerning the Lawsuits.

B. Counsel have concluded that, in order to further the rendering of professional legal services by Counsel to their respective clients, promote the efficient use of resources, minimize the cost of representation, facilitate fact gathering and legal analysis, and to advance the pursuit of their separate but common interests, it is advisable and necessary to cooperate and assist each other in litigating or resolving certain claims raised in the Lawsuits. To this end, the Parties and their Counsel may elect to (among other things) communicate to one another matters which may be of a confidential nature, assert common or joint defenses or claims on some issues and exchange strategies, legal theories, and information which may be useful in assisting the preparation of the Parties' respective Counsel with respect to the Lawsuits.

C. In pursuit of their coordinated and cooperative litigation of the Lawsuits, Counsel intend by this Agreement to preserve to the fullest extent permitted by law the protection against disclosure protected under the work product doctrine, the attorney-client privilege, the joint defense doctrine, the joint litigant privilege, the legal or professional privilege or any other applicable rules of law (collectively, the "Rules of Non-Disclosure"). It is Counsel's mutual intention that any disclosure of attorney-client privileged information or attorney work-product to the other will not waive those privileges.

D. To that end, one of the purposes of this Agreement is to memorialize Counsel's past practice and agreement that its clients' interests are aligned in the Lawsuits. Counsel's past practice has been to share legal research, documents and drafts of documents, to confer and coordinate legal strategy, and to keep each other apprised of upcoming events in the case, in order to further our clients' mutual goals in the litigation. Counsel's past practice also has been to keep all information provided by the other strictly confidential.

NOW, THEREFORE, in consideration of the mutual agreements made here and other good and valuable consideration, and in order to pursue the separate, but common, interests of the Parties, Counsel agree as follows:

AGREEMENT

1. No Waiver of Rules of Non-Disclosure

In executing this Agreement, the Parties and their Counsel have not waived, and will not waive, any Rules of Non-Disclosure as to any communications or as to any work-product.

2. Confidential and Privileged Communications

"Confidential Material" shall mean all work product, information or communications, including without limitation drafts of documents, that are received or prepared by the Parties or their Counsel that is shared among the Parties and their Counsel in furtherance of the Parties' common interests, or in furtherance of their cooperative legal representation, that in any way relate to the Lawsuits and shall be protected from disclosure to any third-party under the Rules of Non-Disclosure. "Confidential Material" further includes any information that a Party or its Counsel derives from Confidential Material that the Party or its Counsel has received from another Party or its Counsel and shall also be protected from disclosure to any third-party under the Rules of Non-Disclosure. It shall be assumed all information exchanged between Counsel is confidential unless otherwise clearly indicated.

Any Confidential Material shall not be disclosed to any person other than:

(a) The Parties;
(b) The Parties' Counsel and the members, associates and employees of the Parties' Counsel's legal departments;
(c) In-house/outside attorneys, paralegals and employees who usually provide advice or support to the Parties' Counsel;
(d) Agents, experts or consultants retained or employed in good faith to assist a Party in the Party's litigation efforts concerning the Lawsuits, provided however, that each such agent, expert or consultant has, prior to the disclosure, been provided with a copy of this Agreement and has agreed in writing to abide by, and comply with, its terms and conditions as part of the engagement; and
(e) Those individuals or entities to whom disclosure is required by statute, regulation, court, or administrative order.

Any Party that is or may be required to disclose Confidential Material under Section 2(e) shall promptly notify the other Parties of the potential for disclosure of Confidential Material, and shall make reasonable efforts to make disclosure of the Confidential Material (consistent with the law and with any applicable court or administrative order) only after the other Parties have been notified and have had a reasonable opportunity to object or consent to such disclosure.

If any third-party requests or demands by subpoena or otherwise any Confidential Material received from a Party, its Counsel, or jointly obtained by the Parties or their Counsel, that Party's Counsel will immediately notify the other Party's Counsel of such request or demand. Each Counsel will take all steps necessary to permit the assertion of all applicable rights and privileges with respect to the Confidential Material, including without limitation, filing appropriate objections or motions in the appropriate forums, and shall cooperate fully with the other Counsel in any proceeding related to disclosure of the Confidential Material.

Nothing in this Agreement shall be deemed or construed to restrict any Party or Counsel from disclosing any information that was obtained or developed independently of this Agreement.

Counsel understand that the purpose of this Agreement is to support a joint litigation effort by facilitating the sharing of information among the Parties, while preserving to the maximum extent possible all privileges and protections applicable to such information. Counsel recognize however, that under some circumstances, information known to one of the Parties and its Counsel may not be shared with any other Party to this Agreement.

Counsel acknowledge that a violation of this Agreement will cause irreparable harm to the non-breaching Party for which there is no adequate remedy at law. Thus, Counsel further

acknowledge that immediate, temporary or permanent injunctive relief is an appropriate and necessary remedy for a violation of this Agreement, including without limitation, injunctive relief prohibiting any Party or Counsel (or any third-party to whom Confidential Material has been disclosed) from using, disclosing or communicating Confidential Material.

3. No Attorney-Client or Other Fiduciary Relationship Created

Nothing in this Agreement is intended to create any attorney-client or other agency or fiduciary relationship between any Party and any Counsel for another Party. Neither the existence of this Agreement, nor its terms, nor information obtained here, shall be asserted by any Party or Counsel as grounds for a motion to disqualify any other Party's Counsel or Counsel's legal department from current or future representation of such other Party. Furthermore, each Counsel represents and warrants to each and every other Counsel that the Party it represents—following full disclosure and consultation—has knowingly and intelligently waived any conflict of interest or other objection which might arise from the sharing of information pursuant to this Agreement. Accordingly, it is agreed that, if any Party takes a position in the Lawsuits, or testifies in the Lawsuits, and that position or testimony is adverse to any other Party, then the other Party and its Counsel shall be permitted to fully examine or cross-examine the Party with respect to any and all matters—even if knowledge of those matters was obtained or developed pursuant to this Agreement.

4. [Intentionally Omitted]

Section 4 is intentionally omitted.

5. Claims Not Waived

Nothing in this Agreement shall be construed as a waiver of any claim or claims any Party may have against any other Party or Parties to this Agreement. Each Party reserves the right to enforce its rights and claims against any other Party or non-party, even if the enforcement of such rights or claims involves matters that bear a substantial relationship to the joint litigation activities proscribed under this Agreement.

6. Term and Termination

This Agreement applies to past and future exchanges or disclosure of Confidential Material among the Parties and their Counsel.

This Agreement may be terminated at any time by written agreement of both sets of Counsel.

This Agreement shall otherwise expire upon:

a. Final non-appealable judgments disposing of the Lawsuits; or

b. Settlement by all parties to the Lawsuits.

In the event of a termination under this section, Counsel shall either return all tangible Confidential Material and copies thereof to the Party that originally provided it, or shall destroy all such tangible Confidential Material. If the recipient Counsel of tangible Confidential Material elects to destroy all originals and copies, it shall certify in writing to the producing Party that it has done so. However, Counsel is not required to return or destroy its own work product that may reflect knowledge of, or make reference to, Confidential Material disclosed by another Party. Such work product shall be subject to all of the other conditions and restrictions of this Agreement, which shall survive the termination of this Agreement.

7. Duration of Confidentiality Provisions

The confidentiality provisions and covenants of this Agreement shall survive the termination of this Agreement and shall remain in full force and effect without regard to whether the Lawsuits are terminated by final non-appealable judgment, settlement or otherwise and without regard as to whether any individual Party terminated its involvement in this Agreement or the Lawsuits by final non-appealable judgments disposing of the Lawsuits, settlement or otherwise. Any and all information shared between Counsel and the Parties pursuant to this Agreement shall remain fully protected from disclosure by this Agreement. Documents and attorney work-product shared by one set of Counsel do not become the property of the other Counsel or its client. In the event that any client withdraws from these Lawsuits, any and all information shared pursuant to this Agreement shall remain fully protected from disclosure by this Agreement. Moreover, in the event that any client withdraws from these Lawsuits, documents and attorney work-product shall be returned to their respective owner.

8. Non-Interference with the Right of the Parties and Their Counsel to Independently and Zealously Represent a Party's Interests

Although this Agreement contemplates and recognizes the benefits of cooperation among the Parties or their Counsel on matters of common interest, nothing in this Agreement shall limit or interfere with the right or ability of any Party or their Counsel to take reasonable and necessary measures to conduct their own independent litigation of the Lawsuits, including making appropriate motions, conducting separate and independent investigations or inquiries, or taking action for the benefit of the Party, except as provided in Section 4 above. Similarly, nothing in this Agreement shall obligate any Party or Counsel to participate in meetings of the Parties or Counsel, to disclose confidential or other information to the other Parties or their Counsel or to take any particular action with respect to the litigation of the Lawsuits.

Nothing in this Agreement shall be construed to alter the separate and independent representation of the respective clients in these Lawsuits. All Counsel understand and acknowledge that they represent their clients independently, that they have a duty to act solely in their respective clients' best interests, and that this Agreement does not create an attorney-client relationship between one Counsel's client and the other Counsel's client. Furthermore, nothing in this Agreement shall be construed to require the disclosure of any information or documents, privileged or otherwise, that either Counsel, in its sole discretion, chooses not to disclose to the other.

We understand and acknowledge our clients' respective rights to conduct independent discovery, witness interviews, and any other investigate efforts.

9. No Admission of Wrongdoing or Liability

Nothing in this Agreement is intended to be, or shall be construed to be, an admission of liability of any Party or of the existence of facts upon which liability could be based.

10. Sovereign Immunity and State Liability

Nothing in this Agreement is intended, or shall be construed, to affect or alter the State's sovereign immunity or to render the State liable for the actions of other Counsel or its clients.

11. No Legal Relationship

Nothing in this Agreement is intended to constitute the Parties as joint venturers, partners, licensor and licensee, principal and agent, or in any other legal relationship, nor is any Party

given the power or authority to bind or obligate any other party except as expressly provided here.

12. Severability and Modifications

In the event that any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable, the same shall not affect any other provision of this Agreement, but this Agreement shall be construed as if such invalid, illegal or unenforceable provisions had never been contained in this Agreement.

13. Successors and Assignees

This Agreement shall be binding upon and inure to the benefit of the Parties hereto, their successors and assigns, including shareholders and any other persons who are beneficiaries or distributees in the event of any corporate liquidation or dissolution.

14. Delegation and Assignment

14.1. No Party may delegate any of its duties or obligations or assign any of its rights under this Agreement without the prior written consent of all Parties.

14.2. This Agreement and its covenants are made solely for the benefit of the Parties. Except as provided in Section 12, no other person shall be entitled to enforce this Agreement or to assert any rights under this Agreement without the prior written consent of all Parties.

15. Construction

In the event it becomes necessary to construe and interpret this Agreement for any reason, it shall be construed as being jointly prepared and drafted by all Parties.

16. Attorneys' Fees

In the event that any legal proceeding is commenced for the purpose of interpreting or enforcing any provision of this Agreement, the prevailing Party in such proceeding shall be entitled to recover, in addition to all other awards, judgments, and amounts, such Party's reasonable attorneys' fees and costs in such proceeding and, if applicable, any appeal, whether or not litigated to final judgment.

17. Confidentiality of this Agreement

No Party or Counsel shall reveal the existence, nature, or extent of this Agreement except: (a) with the written consent of the other Parties and Counsel; (b) to the extent necessary to counter efforts by third parties to obtain information that is rendered confidential or privileged by this Agreement; or (c) as required by court order or otherwise by law.

18. Governing Law

This Agreement shall be governed by, and interpreted in accordance with, the laws of the State of Nevada, without reference to conflict of law principles.

19. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one agreement, and may be effectively and validly executed and delivered by facsimile or other electronic transmission.

20. Entire Agreement

This Agreement contains the entire agreements and understandings between Counsel in connection with a joint litigation of the Lawsuits. This Agreement may not be changed, modified or terminated orally but only by a written instrument executed by all Counsel.

21. Miscellaneous

The captions appearing at the commencement of the sections of this Agreement are descriptive only and for convenience in reference to this Agreement and shall not define, limit or describe the scope or intent of this Agreement, nor in any way affect this Agreement.

Nevada Attorney General's Office

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