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FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, NEVADA

HELLEN QUAN LOPEZ, individually and on behalf of her minor child, C.Q.; MICHELLE GORELOW, individually and on behalf of her minor children, A.G. and H.G.; ELECTRA SKRYZDLEWSKI, individually and on behalf of her minor child, L.M.; JENNIFER CARR, individually and on behalf of her minor children, W.C., A.C., and E.C.; LINDA JOHNSON, individually and on behalf of her minor child, K.J.; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S.,

Plaintiffs,

vs.

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

Defendant.

Case No. 150C002071B

Dept. No.: II

REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT; MOTION FOR RECONSIDERATION; MOTION FOR A STAY; NRCP 59(e), 60; FJDCR 15(10)

Plaintiffs' opposition is a veritable disquisition on severability, which is most remarkable because in over a year of concentrated litigation about SB 302, across multiple cases and courts, Plaintiffs' latest brief is the *first* time the subject has ever been raised. It was never raised in the parties' briefing before this Court on Plaintiffs' motion for a preliminary injunction. This Court

never addressed it in any of its orders. It was never raised in the *Duncan* proceedings or orders either. It was never raised in the Nevada Supreme Court briefing of either this case or the *Duncan* case, oral argument of those cases, or the Nevada Supreme Court's decision. Nor was it raised by Plaintiffs when they provided a proposed permanent injunction order to this Court. Yet now, Plaintiffs would have this Court believe that, notwithstanding that this novel subject has never been so much as broached by any litigant or court involved in this case, and notwithstanding that the Nevada Supreme Court took care to specifically enjoin *only* one of SB 302's sections—and even then only conditionally, *i.e.*, "absent appropriation therefore consistent with this opinion"—that *obviously* what the Nevada Supreme Court really meant to do was to *unconditionally* invalidate the entirety of SB 302. That argument is implausible on its face. It also relies on an erroneous depiction of severability.

Severability questions arise when a provision of law is invalidated and the issue then becomes whether that problematic part can be cut to preserve the rest in good working order. But the Nevada Supreme Court did not invalidate any part of SB 302—it "enjoined" the use, by the ESA program, of SB 515 money in the Distributive School Account. The decision says this repeatedly.[1] Invalidation and injunction are wholly different remedies and the word choice was deliberate: the Nevada Supreme Court did not hold that SB 302 could *never* be funded; it held that SB 302 was not properly funded *at present*, and until that problem is resolved, ESA grants cannot be made.

The funding problem could be fixed immediately, were the Legislature and Governor to decide to do so. It could take at least two forms, set out here simply as examples to illustrate the fallacy of Plaintiffs' argument. First, the Legislature could pass a new and independent appropriation that would place into the DSA a specific amount just for ESAs, over and above what the Legislature already deposited for public K-12 education. Second, the Legislature could amend

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[1] *Schwartz v. Lopez*, 132 Nev. Adv. Op. 73, 382 P.3d 886, 902–03 (2016) ("the use of any money appropriated in SB 515 for K–12 public education to instead fund the education savings accounts ... must be *permanently enjoined*"); *id.* ("In *Schwartz v. Lopez*...we remand the case to the district court to enter a final declaratory judgment and *permanent injunction* enjoining enforcement of Section 16 of SB 302 consistent with this opinion") (emphases added).

SB 302 to provide for a new stream of funding, outside the DSA, and make the appropriation for it. In these obvious ways, SB 302 can be given legal effect in a manner wholly consistent with *Lopez*.

In the meantime, however, Plaintiffs ask this Court to find that when the Nevada Supreme Court said "Section 16," it really meant *all* of SB 302. In this view, Section 16 was apparently just shorthand for Section 16 *plus* some forty other sections of the law. If the Nevada Supreme Court intended that, why did it specify a particular section? Furthermore, if the Nevada Supreme Court had in fact intended to invalidate, forever, Section 16 (let alone all of SB 302), the Supreme Court would have been under a *duty* to consider severability.[2] The very fact that the Court did not undertake this analysis only proves the conditional and fact-dependent nature of the remedy imposed: a conditional injunction, not an absolute invalidation. Plaintiffs, moreover, think it significant that SB 302 lacks a severability clause. But Nevada, like other states, has a general severability provision. NRS 0.020 instructs courts to read the omission of a severability clause to say nothing of legislative intent, since NRS 0.020 expresses the Legislature's intent, in every instance, to demand that a court sever unconstitutional provisions if at all possible. The practice of the Legislative Counsel Bureau, which drafts bills for codification in the NRS, is *not* to include a severability clause—so it is no surprise that such a clause does not appear in SB 302.

Finally, even if the Nevada Supreme Court had intended to *strike* Section 16, Plaintiffs' severability analysis still fails. The severability doctrine applies when a court strikes the entirety of a law and must then consider whether a portion is salvageable. But a court can choose to target a specific provision for invalidation while leaving the rest alone—which is precisely what the Nevada Supreme Court did by expressly enjoining "enforcement of Section 16 of SB 302 *absent appropriation therefor consistent with this opinion.*" (Emphasis added.) If we assume arguendo that the Nevada Supreme Court invalidated the funding mechanism set out in Section 16, there is no reason for that narrow remedy to call into question the constitutionality of the *entire* law, especially when the Nevada Supreme Court clearly anticipated that, in the event that there was an

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[2] *Sierra Pac. Power v. State Dep't of Tax.*, 130 Nev. Adv. Op. 93, 338 P.3d 1244, 1247 (2014) ("The severability doctrine *obligates* the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional provisions") (quotation marks omitted) (emphasis added).

"appropriation ... consistent with this opinion," the remainder of SB 302 would still be given effect. Therefore, even if Section 16 was "invalidated" rather than "enjoined," the Nevada Supreme Court's decision must be understood to have already *done* the work of severing—while leaving the remainder of the law standing.[3]

Dated: December 15, 2016

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[3] As explained in the Motion to Alter or Amend, Plaintiffs' December 5, 2016 letter is the first time the Treasurer became aware of Plaintiffs' extraordinarily broad reading of this Court's permanent injunction order. The Treasurer in good faith promptly asked this Court to amend the order to prevent such a misreading, or, if this Court agrees with Plaintiffs, to grant a stay to allow the Nevada Supreme Court to address this disagreement over how its decision should be read. In their opposition, Plaintiffs for the first time raised their novel (and incorrect) argument that the Nevada Supreme Court's decision cannot be read according to its plain terms because of background severability principles. The Treasurer has again, in good faith, promptly responded. Nonetheless, Plaintiffs have informed counsel for the Treasurer that they have *ex parte* sought an application for an order to show cause from this Court. Discussion of "contempt" is plainly premature until the meaning of the order supposedly violated is clarified. Moreover, this Court's rules make clear that *ex parte* orders are "disfavored and counsel are encouraged to move with notice whenever possible." FJDCR 18. It is unclear why an *ex parte* order to show cause in this case is either necessary or appropriate.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the personal information of any person.

DATED: December 15, 2016.

LAWRENCE VANDYKE
Solicitor General
Counsel for Defendant Dan Schwartz

CERTIFICATE OF SERVICE

I, Sandra L. Geyer, hereby certify that I am an employee with the Office of the Nevada Attorney General, and that on the 15th day of December, 2016, I placed a true and correct copy of **REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT; MOTION FOR RECONSIDERATION; MOTION FOR A STAY; NRCP 59(e), 60; FJDCR 15(10)**, in the U.S. Mail in Carson City, Nevada, postage prepaid to the following addresses:

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