



CLERK OF THE COURT

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19 **DISTRICT COURT**
20 **CLARK COUNTY, NEVADA**

21 RUBY DUNCAN, an individual; RABBI MEL
22 HECHT, an individual; HOWARD WATTS III,
23 an individual; LEORA OLIVAS, an individual;
24 ADAM BERGER, an Individual,

25 Plaintiff(s),

26 vs.

27 STATE OF NEVADA, ex rel. the Office of the
28 State Treasurer of Nevada and the Nevada
Department of Education; DAN SCHWARTZ,
Nevada State Treasurer, in his official capacity;
STEVE CANAVERO, Interim Superintendent of
Public Instruction, in his official capacity,

Defendant(s).

Case No. A-15-723703-C
Dept. No. XX

**MOTION FOR PERMISSION TO FILE SUR-
REPLY**

23 The State respectfully moves this Court to permit it to file a Sur-Reply in response to Plaintiffs'
24 Reply in Support of Request to Enter Proposed filed on December 9, 2016. On December 1, 2016,
25 Plaintiffs requested a proposed order for a declaratory judgment and permanent injunction. The State
26 opposed the request that same day and provided an alternative proposed order for this Court's
27 consideration. On December 9, 2016, Plaintiffs filed a Reply raising new issues and making new
28 arguments. Specifically, in their Reply Plaintiffs referenced for the first time an order issued on

1 November 18 in the *Lopez* litigation in the First Judicial District and argued that this Court should issue
2 a “similar” order. The State’s sur-reply is necessary to address these new issues and arguments, which
3 Plaintiffs could have raised in their initial request, but chose to raise in a reply. Rather than move to
4 strike this new argument, Nevada, in the interests of fair and speedy disposition, seeks to address it by
5 way of a sur-reply. A brief sur-reply is preferable to a motion to strike given that motions to strike are
6 disfavored. *Germaine Music v. Universal Songs of Polygram*, 275 F. Supp. 2d 1288, 1300 (D. Nev.
7 2003); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F. Supp. 2d 1262, 1271 (D. Nev.
8 2008). The State is not seeking to deprive Plaintiffs of the opportunity to make argument; the State
9 simply requests a brief opportunity to respond. The proposed Sur-Reply is attached as **Exhibit A**.

10 **NOTICE OF MOTION**

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

12 PLEASE TAKE NOTICE that the foregoing motion will be heard before the above-captioned
13 Court [in chambers] / [on January 18, 2017, at 8:30 a.m./~~p.m.~~].

14 ADAM PAUL LAXALT
15 Attorney General

16 By: /s/ Joseph Tartakovsky
17 Joseph Tartakovsky (Nev. Bar No. 13796C)
18 Deputy Solicitor General
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by
3 using the electronic filing system on December 14, 2016.

4 The following participants in this case are registered electronic filing systems users and will be
5 served electronically:

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EXHIBIT A

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STEVE CANAVERO, Interim Superintendent of
21 Public Instruction, in his official capacity,

22 Defendant(s).

Case No. A-15-723703-C
Dept. No. XX

**SUR-REPLY TO PLAINTIFFS' REPLY IN
SUPPORT OF REQUEST TO ENTER
PROPOSED**

23
24 Plaintiffs urge this Court to adopt "similar" language to the First Judicial District's order dated
25 November 18, 2016.¹ Events in the *Lopez* suit illustrate the wisdom of what the State has already asked
26 this Court to do: to enter an order that carefully follows the Nevada Supreme Court's own language, in
27 order to prevent the possibility that Plaintiffs (or others) may improperly read language that differs

28 ¹ The First Judicial District's order is attached to Plaintiff's Reply as the only attachment.

1 from the Supreme Court’s as reaching farther than the Nevada Supreme Court did. That is what has
2 happened in the *Lopez* case. The First Judicial District entered a final injunction with language drafted
3 by the *Lopez* Plaintiffs that departs from the Supreme Court’s language. Once the differently worded
4 and far broader injunction was entered by the First Judicial District, the *Lopez* Plaintiffs threatened
5 contempt proceedings against the Treasurer for purportedly violating the district court’s injunction,
6 relying specifically on the disparity in language between the Nevada Supreme Court’s decision and the
7 *Lopez* order. Nevada has challenged that order and anticipates a revision of it, either by the First
8 Judicial District or the Nevada Supreme Court. The proper course for this Court, to faithfully
9 implement the Nevada Supreme Court’s instruction and avoid needless confusion and litigation over
10 the scope of any differences between this Court’s language and the Nevada Supreme Court’s, is to hew
11 as closely as possible to the actual language that the Nevada Supreme Court itself used.

12 Ultimately, as their Reply makes clear, Plaintiffs’ real problem is with the Nevada Supreme
13 Court’s language. That language made the injunction conditional on new funding. Plaintiffs dislike this
14 and instead request that this Court issue a unconditional, absolute injunction. But that is not what the
15 Nevada Supreme Court ordered. Plaintiffs implicitly admit this by acknowledging that the Supreme
16 Court “specifically ordered that this Court enjoin *Section 16* of SB 302.” (Emphasis added.) The
17 Supreme Court said no more, and, even with regard to Section 16, the Court only ordered that Section
18 16 be enjoined “absent appropriation therefor consistent with this opinion.” Reply at 1 (quoting
19 opinion). Certainly it did not say, as Plaintiffs write, that the *entire* “program” was invalid. Plaintiffs’
20 absolute injunction would plainly require this Court to go further than the Supreme Court. In fact, their
21 remarkable position is that if “in the future” the Legislature “were to amend SB 302,” then this Court’s
22 order could be reconsidered. This seems an attempt to lure the Court into prospectively impeding
23 legislative action. It also misunderstands how the ESA program works. Appropriation was not part of
24 SB 302; it was part of SB 515. And SB 515 will not be “amended”; a new appropriation will be
25 enacted.

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1 Nevada respectfully asks this Court to adopt the language proposed in its opposition to
2 Plaintiffs' request.

3 ADAM PAUL LAXALT
4 Attorney General

5 By: /s/ Joseph Tartakovsky
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