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

AMICI CURIAE BRIEF

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

In Support of Respondents and Affirmance

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF THE AMICI CURIAE

Amici curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger are citizens of Nevada, who are also Plaintiffs in a separate case challenging Nevada's Education Savings Account Program (the "Program" or "Voucher Program") under the Nevada State Constitution. *See Duncan et al. v. State of Nevada ex rel. Office of State Treasurer of Nevada and Nevada Department of Education et al.*, No. A-15-723703-C (filed Aug. 27, 2015).

The *Duncan* Plaintiffs are community leaders and taxpayers; one of them is also a special-education teacher in the Clark County School District and the father of a student attending public school in Nevada. The *Duncan* Plaintiffs object to the Voucher Program because it will divert millions of dollars in public-education funds to private schools, the majority of which are religious—thereby violating Article XI, Sections 2 and 10, of the Nevada Constitution. The *Duncan* Plaintiffs accordingly seek to enjoin the Voucher Program permanently.

The *Duncan* Plaintiffs submit this brief for two reasons: *first*, to highlight the Voucher Program's numerous constitutional defects, in addition to the constitutional violation that led to the injunction in this case; and *second*, to apprise this Court of the fully briefed preliminary-injunction motion pending in the *Duncan* case, so that the Court's resolution of this appeal can take into account the procedural posture of that motion.

In accordance with Nevada Rule of Appellate Procedure 29(a), the *Duncan* Plaintiffs have received written consent from the parties to file this amici curiae brief.

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici are all individuals and thus have no parent corporations and no publicly held company owns 10% or more of its stock. The following law firms have appeared and/or are expected to appear in this court:

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I. STATEMENT OF FACTS AND PROCEDURE

Senate Bill 302 ("S.B. 302") was signed into law on June 2, 2015, establishing the Voucher Program and authorizing the use of public-education funds to pay for certain educational expenses, including private-school tuition. S.B. 302 was scheduled to take effect on January 1, 2016, and the State initially announced that funds would be disbursed into the ESA accounts in April 2016.

In September 2015, the *Lopez* Plaintiffs filed their complaint against the Treasurer of the State of Nevada, alleging that the Voucher Program violates Sections 2, 3, and 6 of Article XI of the Nevada Constitution. Respondents moved for a preliminary injunction, arguing that they were likely to prevail on all of their claims. On January 11, 2016, the district court issued an order preliminarily enjoining further implementation of the Voucher Program, on the ground that the plaintiffs were likely to prevail on their Section 6 challenge.[1] Shortly thereafter, the State Treasurer filed a notice of appeal.

Separately, on August 27, 2015, the *Duncan* Plaintiffs filed their complaint in Clark County District Court challenging the Voucher Program under Sections 2 and 10 of Article XI of the Nevada Constitution. On October 20, 2015, the State announced that it had moved up the disbursement date for Voucher Program funds

[1] The district court ruled that Plaintiffs were unlikely to succeed on their challenges under Sections 2 and 3.

from April to February 2016. As a result, on November 25, 2015, the *Duncan* Plaintiffs filed a motion for preliminary injunction to preserve the status quo, arguing that they are likely to succeed on both of their constitutional challenges.[2] The *Duncan* Plaintiffs were subsequently granted very limited discovery in support of their motion. The preliminary-injunction motion was fully briefed as of January 8, 2016, though Plaintiffs continued to seek additional, targeted discovery for further support for their claims.

Before the district court could act upon the preliminary-injunction motion in *Duncan*, the district court in *Lopez* preliminarily enjoined the Voucher Program. The *Duncan* court held a status conference in early February 2016, in connection with which Plaintiffs provided detailed submissions describing the discovery needed before the court could rule on the case on the merits. At a March 2016 status conference, however, the *Duncan* court raised the possibility that it might rule upon the pending preliminary-injunction motion. Plaintiffs raised the question of whether the court—by doing so and potentially seeking to enjoin a program that was *already preliminarily enjoined*—would effectively be issuing an advisory opinion. The *Duncan* court asked for briefing on that question.

In their responsive submission, the *Duncan* Plaintiffs noted that courts do not issue opinions on what they would do if the circumstances were different, nor

[2] On October 19, 2015, the state Defendants filed a motion to dismiss all claims.

do they rule upon issues that rest on some event that may or may not ever occur. Because the Voucher Program had already been enjoined by the district court in *Lopez*, any ruling on the motion for preliminary injunction in *Duncan* would have no real world effect. In short, if the motion were granted, the court would be ordering the State not to do something that it was already prohibited from doing; if the motion were denied, the State would remain prohibited from implementing the Voucher Program. The *Duncan* Plaintiffs pointed out that the purpose of a preliminary injunction is to maintain the status quo, but the status quo is already being maintained as a result of the preliminary injunction in *Lopez*. Accordingly, the *Duncan* Plaintiffs argued that the district court should hold their motion for preliminary injunction in abeyance for as long as the preliminary injunction in *Lopez* remains in effect.[3]

As of this filing, the *Duncan* Plaintiffs' preliminary-injunction motion—based on Sections 10 and 2—remains pending, and the district court has not indicated whether it intends to rule upon the motion or hold it in abeyance. This appeal, meanwhile, centers on the *Lopez* court's entry of a preliminary injunction under Section 6, with the *Lopez* Plaintiffs also arguing, in the alternative, that this Court can affirm that preliminary injunction under Section 2.

[3] The *Duncan* Plaintiffs also suggested that as long as the preliminary injunction from *Lopez* remains on appeal, the parties in Duncan should be permitted to take reasonable and relevant discovery in order to develop a full factual record.

II. SUMMARY OF ARGUMENT

Nevada's Voucher Program will divert to private, religious institutions millions of dollars in taxpayer funds that have been appropriated for the operation of the public schools. As the court below recognized, the Program violates Article XI, Sections 6.1 and 6.2, which require the legislature to appropriate money to fund public schools, and prohibit the State from using these dollars for *any other purpose*—educational or otherwise. Thus, while parents have the right to send their children to private schools if they so choose, Section 6 prohibits the diversion of taxpayer funds, once earmarked for public education, to pay for that private schooling. The *Duncan* Plaintiffs therefore agree that the Voucher Program violates Section 6, for the reasons articulated by the district court below and set forth by Respondents in their brief. The district court correctly entered a preliminary injunction to halt the Voucher Program and maintain the status quo pending a determination on the merits, and this Court should affirm.

But Nevada's Voucher Program also suffers from other constitutional infirmities, of which this Court should be aware as it considers this appeal. First, as presented in the *Duncan* case, the Voucher Program violates Article XI, Section 10, of the Nevada Constitution by impermissibly using taxpayer money to support religious instruction at private, religious schools—schools that not only teach religion and require religious observance but also, in many instances, discriminate in admissions and employment on the basis of religion. Second, as Respondents

argue in the alternative in this appeal, the Voucher Program violates Article XI, Section 2, of the Nevada Constitution, because the Program directs the expenditure of taxpayer dollars—diverted from the public schools—to pay for education through a non-uniform system of private schools.

The *Duncan* Plaintiffs have a pending preliminary-injunction motion based on Sections 2 and 10, which seeks to maintain the status quo and prevent implementation of the program until a decision on its constitutionality can be reached on the merits. Should this Court for any reason reverse or vacate the *Lopez* court's grant of a preliminary injunction (which it should not do), the State would be able to resume implementation of the Voucher Program immediately. This, in turn, could simultaneously cause irreparable harm to the *Duncan* Plaintiffs and prejudice the district court's ability to rule upon the pending preliminary-injunction motion before the State alters the status quo. The *Duncan* plaintiffs respectfully request that this Court be mindful of the posture of the *Duncan* case as it decides this appeal.

III. ARGUMENT

A. Nevada's Voucher Program is Unconstitutional

1. The Voucher Program violates Article XI, Section 10, of the Nevada Constitution, which prohibits spending public funds for religious purposes

Article XI, Section 10, provides that "[n]o public funds of any kind or character whatever, State, County, or Municipal, shall be used for sectarian

purpose." It thus provides critical protections for the religious liberty of all Nevadans by ensuring that (i) taxpayers do not have their tax dollars diverted to fund religious education and religious institutions that are contrary to tenets of their faith or their personal beliefs, and (ii) public officials do not play favorites among churches or denominations by distributing state funds to religious groups. The Voucher Program violates this strict prohibition by directing taxpayer funds to private, religious schools, where the public funds can and will be used for religious instruction and other religious purposes with no meaningful restrictions.

The voucher funds at issue in this case are public funds that are to be drawn from the Distributive School Account of the State General Fund, and then deposited into state-controlled, limited-purpose voucher accounts to pay for the schooling of voucher students. S.B. 302 § 16. These public funds will, in turn, flow to private, religious schools. Proof of this can be found in Section 5 of the Voucher Program law, which specifically invites participation by all schools that are exempt from licensing under NRS § 394.211—including, by reference, all "[e]lementary and secondary educational institutions operated by churches, religious organizations, and faith-based ministries." NRS § 394.211(1)(d). Of the 48 schools that have applied to participate in the Voucher Program as of January 2016, 27 are exempt religious schools; and of the 110 eligible private schools in Nevada, 63 are religious. Moreover, several parents who have intervened as defendants in the

Duncan case have specifically affirmed under oath that they plan to send their students to religious schools using voucher funds if the program is not enjoined.

Although the State contends in *Duncan* that voucher funds are stripped of their public nature once they are deposited into voucher accounts, S.B. 302 makes clear that this is simply not true. Briefly holding the public funds in the limited-purpose, highly-regulated, state-sponsored voucher accounts does not alter their public nature. Additionally, under S.B. 302:

- Participants in the Voucher Program are not free to use program funds however they see fit. S.B. 302 § 9.1.

- The money in voucher accounts may be spent for only a narrow set of statutorily authorized purposes—e.g., tuition at private schools, including private religious schools. S.B. 302 § 9.1.

- The voucher accounts will be managed by firms chosen by the State, not by parents. S.B. 302 § 10.1.

- The State will randomly audit voucher accounts each year using a certified or licensed public accountant of the State's choosing. S.B. 302 § 10.2.

- The State Treasurer is empowered to freeze or dissolve any account if program funds are "misused." S.B. 302 § 10.3.

- If there is any money left in a voucher account at the end of the year, it will be carried forward to the next school year and does not become the parents' property. S.B. 302 § 8.6(a).

All of these factors point to the same conclusion: funds in the voucher accounts remain State property and remain public funds. The funds therefore retain their public character even as they flow to private religious schools. Hence, as the

Duncan Plaintiffs have argued and will prove in their case, the State should not be permitted to circumvent the strong religious-liberty protections of Article XI, Section 10, by playing a shell game with taxpayer dollars.

Additionally, once these public funds are in the hands of private religious schools, there is no question that they will be used for religious purposes. For while there are many limitations on how *parents* may spend state funds, the Voucher Program gives private religious schools free rein to spend the funds however they wish. Indeed, S.B. 302 specifically provides that "nothing" in the act "shall be deemed to limit the independence or autonomy of a participating school or to make the actions of a participating school the actions of the State Government." S.B. 302 § 14.

Accordingly, there is nothing in the statute requiring religious schools to segregate and restrict to secular uses the taxpayer dollars that they receive. On the contrary, religious schools may use the public funds for explicitly religious purposes—including for things entirely unrelated to classroom instruction, such as buying Bibles for a sponsoring church, renovating the school chapel, or underwriting a church mission. To take just one example, at Lamb of God Lutheran School,[4] the educational program entails "[r]eligion classes [that] offer daily Christian lessons, weekly memorization of a scripture verse or selections

[4] All schools mentioned in the brief have applied to the voucher program.

from Luther's Small Catechism, and a weekly chapel service in the church's sanctuary. In addition, once per year, each class presents a chapel service based on scripture." *Christian Education*, LAMB OF GOD LUTHERAN SCHOOL, http://tinyurl.com/o6q2gx7. Under S.B. 302, this school could use public funds to pay for any or all of these activities.

Additionally, religious schools that receive public funds through the Voucher Program will be permitted to discriminate in admissions and employment based on the faith of students or their parents, and may also employ religious criteria to discriminate on other grounds such as sexual orientation and gender identity. For example, the Mountain View Christian School, which has applied to receive voucher funds, requires that all teachers be "born-again" Christians in order to be hired; it also requires applicants to answer religious interview questions including, "Please describe how you came to know Jesus Christ as your personal savior?" and "How is the Christian School a distinctively different educational experience than a secular private school and/or a public school?" *Teacher Employment Application*, MOUNTAIN VIEW CHRISTIAN ACADEMY, http://tinyurl.com/o634mac.

In *State v. Hallock*, 16 Nev. 373 (1882), this Court explicitly held that Article XI, Section 10, forbids state expenditures of precisely the sort at issue here. In that case, the legislature had allocated state funds to support the religiously

affiliated Nevada Orphan Asylum, but the State Controller refused to disburse the funds on the ground that doing so would violate Section 10. The Court agreed with the State Controller, explaining:

> That the legislature, under the constitution, could not have appropriated moneys for sectarian purposes, is too plain for argument; and it is equally plain that state funds should not, and can not, be used for such purposes in any case . . . .

Id. at 377. Like the program invalidated in *Hallock*, the Voucher Program here will take money from the public treasury and give it to private religious institutions, with no limitations on how the money is spent. And therefore, just as in *Hallock*, the Voucher Program plainly violates Nevada's Constitution.

2. The Voucher Program violates Article XI, Section 2, which requires the legislature to create a uniform, secular school system that is open to general attendance

The Voucher Program also violates Article XI, Section 2, and the district court erred in holding that Respondents were unlikely to prevail upon this claim. Accordingly, in affirming the district court's grant of a preliminary injunction, this Court need not limit its ruling to Respondents' Section 6 claim; instead, the Court may alternatively uphold the preliminary injunction on the ground that the Voucher Program also runs afoul of Section 2.

Section 2 provides that "[t]he legislature shall provide for a uniform system of common schools . . . and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the

public school fund during such neglect or infraction;" it also provides that "the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools." Nevada's Voucher Program violates this "Uniformity Clause" by (i) funding non-uniform instruction, (ii) funding religious schools that discriminate in admissions and employment, and (iii) impoverishing—and thereby undermining—the public-school system.

First, the Voucher Program violates the uniformity requirement because participating private schools are not bound by the same instructional requirements as public schools. On the contrary, S.B. 302 explicitly provides that the Voucher Program in no way "shall be deemed to limit the independence or autonomy of a participating entity." S.B. 302 § 14. Thus, taxpayer-funded private schools may use curricula, instruction, and educational standards that diverge dramatically from those of public schools. And indeed, *religious* schools participating in the program may provide religious instruction that, as a matter of federal and state constitutional law, public schools do not and cannot offer.

For example, the International Christian Academy explains that Bible study is part of the "daily classroom schedule, each morning classes begin with prayer from the approved Bible [and] each teacher prays with their [sic] class and individual students as needed." *See, e.g.*, *Registration Packet*, INTERNATIONAL CHRISTIAN ACADEMY 12, http://tinyurl.com/ojahukp. The school similarly points

out that "each teacher will lead their [sic] students to a knowledge of our Lord Jesus Christ, as their personal savior to be born again, sometime during the school year." *See id.* Many schools that have applied to the Voucher program, including Word of Life Christian Academy and Calvary Christian Learning Academy, teach religious curricula such as A Beka. http://tinyurl.com/jzzlnxq; http://tinyurl.com/o22vvjc. The A Beka World History Book for Grade 7, for example, includes such topics as "Creation," "Fall of man,"' "Ten Commandments," and the "Gospel of Christ." http://tinyurl.com/jfkm755.

Although the Voucher Program requires that participating students take state standardized tests, there are *no consequences* for participating schools whose students perform poorly on these examinations. S.B. 302 § 12. And because these schools are exempt from many regulatory requirements under NRS § 394.211, they can continue to do what they please—all the while using public money.

Second, because the Voucher Program does nothing to prevent participating schools from discriminating in admissions or employment, taxpayer dollars will undeniably go to schools that engage in discriminatory practices. Under S.B. 302, participating private schools need not comply with the constitutional requirement that public schools open their doors to the public at large, nor does the statute reserve public funding to only those schools that agree not to discriminate. Thus, state-funded discrimination will be directed at students and employees on a variety

of grounds—including religion, sexual orientation, gender identity, health condition, disability, and other grounds.

For example, the International Christian Academy (which has applied to participate in the Voucher Program) reserves the right, "within its sole discretion, to refuse admission of an applicant or to discontinue enrollment of a student if the atmosphere or conduct within a particular home or the activities of the student are counter to or are in opposition to the Biblical lifestyle the school teaches. This includes, but is not necessarily limited to, participating in, supporting or condoning sexual immorality, homosexual activity, [or] bisexual activity . . . ." *Registration Packet*, INTERNATIONAL CHRISTIAN ACADEMY 12-13, http://tinyurl.com/ojahukp. In other words, it will exclude or expel students who are gay, or who have a parent or sibling who is gay. Thus, the Voucher Program puts the State in the business of financing discrimination in education, and it does so by diverting public-education dollars that are supposed to support schools that are open and available to all on equal terms.

Finally, the Voucher Program violates Section 2 by materially undermining the system of public schools and public instruction that the State is constitutionally required to provide. In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court struck down a far less expansive voucher program because it violated the Florida Constitution's Uniformity Clause "by devoting the state's

resources to the education of children within our state through means other than a system of free public schools." *Id.* at 407. The Florida court found that "[t]he systematic diversion of public funds to private schools on either a small or a large scale is incompatible with" the State Constitution's mandate to fund a uniform system of public schools. *Id.* at 409. In the same way, Nevada's Voucher Program seeks to undermine this state's constitutional obligation to provide public education through a uniform system of public schools by instead expending public-education dollars on non-uniform private schools.

Furthermore, because there is *no limit* on the number of vouchers available under Nevada's Voucher Program (as there was in Florida), there is likewise no limit on the amount of the State's educational funds that may be siphoned away from public schools and deposited into the coffers of private schools. In that regard, Nevada's Voucher Program is extraordinary and unprecedented in scope, dramatically outpacing other voucher programs across the nation. The State's public schools stand to lose a correspondingly enormous amount of funding, threatening their ability to fulfill the State's responsibility to provide a common and generally available education to all Nevada children.

Accordingly, the Voucher Program not only violates Article XI, Section 6, of the Nevada Constitution, as the *Lopez* court found that Respondents are likely to prove, but it also violates Sections 10 and 2 of Article XI. The Court should uphold

the preliminary injunction and permit a final resolution on the merits in both the *Lopez* and *Duncan* cases.

B. If this Court Reverses or Vacates the Preliminary Injunction, That Decision Will Affect Proceedings in the *Duncan* Litigation

As noted above, the parties in the *Duncan* case have completed briefing on a pending motion for preliminary injunction based on Article XI, Sections 2 and 10. The *Duncan* Plaintiffs filed that motion in order to preserve the status quo, by preliminarily enjoining the State from taking any steps to implement the Voucher Program that would cause irreparable harm.

This risk of irreparable harm was at least temporarily averted, however, when the *Lopez* court entered its preliminary injunction. But if this Court were now to vacate or reverse the lower court's ruling, the State would be free to resume implementation of the Voucher Program immediately—thus causing the irreparable harm that the *Duncan* Plaintiffs sought to avoid by filing their motion in the first place. The *Duncan* Plaintiffs accordingly request that this Court—if it decides to vacate or reverse the preliminary injunction entered by the lower court—be mindful of the preliminary-injunction motion pending in the *Duncan* case. Otherwise, the district court in *Duncan* might be prejudiced in its ability to rule upon that motion before the State takes steps to alter the status quo.

IV. CONCLUSION

The *Duncan* Plaintiffs urge the Court to affirm the preliminary injunction entered in this case.

DATED on this 5th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this Brief of Amici Curiae Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger was filed electronically with the Nevada Supreme Court on April 5, 2016, and electronically served on the following parties:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 3675 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: April 5, 2016.

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