IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. THE NEVADA DEPARTMENT OF TAXATION; THE HONORABLE KATE MARSHALL, in her official capacity as TREASURER OF THE STATE OF NEVADA; and THE LEGISLATURE OF THE STATE OF NEVADA,

Petitioners,

vs.

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for CARSON CITY; and THE HONORABLE JAMES TODD RUSSELL, District Judge,

Respondents, and

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,

Real Party in Interest.

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Case No. 12 OC 00168 1B

PETITION FOR WRIT OF MANDAMUS

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PETITION AND RELIEF SOUGHT

Petitioners, the State of Nevada ex rel. the Department of Taxation and Kate Marshall in her official capacity as State Treasurer (collectively the State), by and through their counsel the Office of the Attorney General, and the Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau (LCB) under NRS 218F.720, hereby file this Petition for Writ of Mandamus with the Court pursuant to NRS 34.160 and NRAP 21.

The State respectfully asks the Court to issue a writ of mandamus directed to Respondents, the First Judicial District Court and the Honorable James Todd Russell, District Judge, ordering Respondents to grant the State's and the Legislature's motions to dismiss—or alternatively to grant summary judgment in favor of the State—on all causes of action and claims alleged in the complaint filed on June 6, 2012, by Real Party in Interest, the City of Fernley (Fernley), which is a municipal corporation located in Lyon County, Nevada. This original action for writ relief involves several critically important issues of constitutional and statutory law that are of statewide significance and need urgent clarification by this Court for the proper functioning of the State's consolidated tax system or C-Tax system, which the Legislature enacted to distribute statewide tax revenues to Nevada's local governmental entities under NRS 360.600-360.740.

In response to Fernley's complaint, the State filed a motion to dismiss (*PA1:15*), and the Legislature filed a joinder in that motion to dismiss (*PA1:33*), which the parties agreed by stipulation to treat as the Legislature's own motion to dismiss (*PA3:615-18*).[1] On October 15, 2012, the district court entered an order denying both motions to dismiss. (*PA6:1298-99.*) In its order, the district court apparently treated both motions to dismiss as motions for summary judgment, and the district court granted Fernley a continuance to complete discovery under the summary judgment rule—NRCP 56(f). Id.

The State respectfully asks the Court for writ relief to compel the district court to rule properly and dismiss all of Fernley's claims because the State's right to a dismissal is clear. All of Fernley's claims are barred as a matter of law, and Fernley is not entitled to any of the legal or equitable relief sought against the State in its complaint. As a result, the district court manifestly abused its discretion by granting Fernley a continuance under NRCP 56(f) to conduct discovery because discovery of additional facts will not change the result of this case but will just burden the State with time-consuming and costly discovery that is unnecessary, pointless and futile.

[1] Citations to "*PA*" are to volume and page numbers of Petitioners' Appendix.

STATEMENT OF THE ISSUES

I. Whether the district court was obligated to dismiss or grant summary judgment to the State because: (1) Fernley's claims for money damages are barred as a matter of law by the State's sovereign immunity; (2) Fernley's Fourteenth Amendment and separation-of-powers claims are barred as a matter of law by Fernley's lack of standing to bring such claims; (3) Fernley's claims are time-barred as a matter of law by the statute of limitations and laches; and (4) Fernley's claims are barred as a matter of law because they fail to state a claim for relief even if all of Fernley's allegations are true.

II. Whether the district court manifestly abused its discretion by granting Fernley a continuance under NRCP 56(f) to conduct discovery when discovery of additional facts is unnecessary in this case because all of Fernley's claims are barred as a matter of law.

STATEMENT OF THE CASE AND FACTS

I. Parties and claims.

On June 6, 2012, Fernley filed a complaint seeking money damages and declaratory and injunctive relief against the State of Nevada ex rel. the Department of Taxation and Kate Marshall in her official capacity as State Treasurer. (*PA1:1-14.*) In its complaint, Fernley challenged the constitutionality of Nevada's system of allocating certain statewide tax revenues which are deposited and consolidated

in the Local Government Tax Distribution Account and distributed to Nevada's local governmental entities under NRS 360.600-360.740. Id. The system is administered by the Department of Taxation and the State Treasurer, and it is commonly referred to as the consolidated tax system or the C-Tax system.

Because Fernley challenged the constitutional authority of the Legislature to enact the C-Tax system, the Legislature timely moved to intervene in the case pursuant to NRCP 24 and NRS 218F.720. On August 30, 2012, the district court entered an order granting the Legislature's motion to intervene. (*PA3:605-06.*)

In its complaint, Fernley raised federal constitutional claims and state constitutional claims. In its federal constitutional claims, Fernley alleged that the C-Tax system violates the Equal Protection Clause of the Fourteenth Amendment because the system results in Fernley receiving distributions that are substantially less than the amounts received by other comparably populated and similarly situated local governmental entities. (*PA1:5.*) Fernley also alleged that the C-Tax system violates the Due Process Clause of the Fourteenth Amendment because the system results in Fernley receiving distributions that are substantially less than the amounts received by other local governmental entities and the system provides no process by which Fernley can obtain a meaningful and effective adjustment of the tax distributions it receives under the system. (*PA1:8.*)

In its state constitutional claims, Fernley alleged that the C-Tax system violates the separation-of-powers provision of Article 3, §1 of the Nevada Constitution because the system is set up so that the Legislature's authority over the system is abdicated to and exercised by the executive branch which administers the system. (*PA1:6.*) Fernley also alleged that the C-Tax system violates Article 4, §20 of the Nevada Constitution because the system operates as an impermissible local or special law for the assessment and collection of taxes for state, county, and township purposes. (*PA1:6-7.*) In particular, Fernley alleged that the C-Tax system operates as an impermissible local or special law with respect to Fernley because it treats Fernley significantly differently for tax collection and distribution purposes from other local governmental entities. Id. Finally, Fernley alleged that the C-Tax system violates Article 4, §21 of the Nevada Constitution because the system operates in a non-general and non-uniform fashion by treating Fernley significantly differently from other local governmental entities. (*PA1:7-8.*)

Based on its constitutional claims, Fernley asked for a declaration that the C-Tax system is unconstitutional and the issuance of an injunction enjoining the State from making distributions under the system. (*PA1:10-11.*) Fernley also asked for money damages in an amount to be proven at trial. Id.

II. Overview of the C-Tax system.

Because Fernley's claims are directed at the validity of the C-Tax system, it is necessary to provide an overview of that system. In 1995, the Legislature created an interim committee to study Nevada's laws governing the distribution of certain statewide tax revenues to local governmental entities. Senate Concurrent Resolution No. 40, 1995 Nev. Stat., file no. 162, at 3034-36. The Legislature authorized the interim committee to study the issue because the Legislature found that the existing laws relating to the distribution of tax revenue were inadequate to meet the demands for new and expanded services placed on local governmental entities by Nevada's rapid population and economic growth. Id. Based on its study, the interim committee recommended consolidating six statewide tax revenue sources into a single account and establishing base amounts that would be distributed from the account to local governmental entities. LCB Bulletin No. 97-5 (Nev. LCB Research Library, Jan. 1997) (*PA1:79-88*). The interim committee also recommended establishing appropriate adjustments to the base amounts when public services provided by local governmental entities are taken over by other entities or are eliminated. Id. The interim committee also recommended establishing the number and type of public services that a new entity must provide in order to participate in the distribution of revenue from the account. Id.

In 1997, based on the results of the interim study, the Legislature enacted Senate Bill No. 254 (SB254), which created the C-Tax system codified in NRS 360.600-360.740. 1997 Nev. Stat., ch. 660, at 3278-3304. The Legislature's intent in enacting SB254 was to rectify problems with the prior formula of revenue distribution to local governments which did not follow the growth of population and the resulting greater demand for services. Legislative History of SB254, 69th Leg. (Nev. LCB Research Library 1997) (*PA1:90-212; PA2:213-94*). The prior formula no longer worked because "with moneys not going to the growth areas, it was very difficult for local governments to be able to provide the increased demands of service." (*PA2:218.*) Indeed, the prior formula "had no relationship to the service-level needs within the community." (*PA1:135.*)

Thus, the purpose of SB254 was to eliminate the prior formula of revenue distribution that did not relate to providing services. The new formula in SB254 was based on the necessity of local governments having "to provide a level of service for the population groups they support." (*PA1:187.*) The new formula in SB254 was proposed because "[i]n order for a local government to provide adequate service levels to its citizens, the funding levels must keep commensurate with the costs." (*PA2:217.*) The new formula in SB254 was intended to ensure that "service levels can match the demands of Nevada's citizens." (*PA2:218.*)

In addition, the new formula in SB254 was intended to decrease the competition among local governments for tax revenue. Under the prior formula, if a county had one city, the county and the city shared the revenue, but if a county had two cities, the cities shared the revenue and the county received none. (*PA2:218.*) While the prior formula encouraged cities to be formed in order to receive greater revenue for that locality, SB254 ensured that when a new city is formed, it is not "based upon how much money the new entity will be receiving but upon the service level needs of its citizens." (*PA2:218.*) Thus, SB254 was enacted based on "the idea of distributing governmental revenues to governments performing governmental functions." (*PA1:140.*)

Through the enactment of SB254, the Executive Director of the Department of Taxation was given the duty to administer the C-Tax system and carry out the distribution of the proceeds from the six statewide tax revenues deposited in the Local Government Tax Distribution Account (Account).[2] NRS 360.660. Under SB254, the proceeds from the following six statewide tax revenue sources are deposited in the Account: (1) the liquor tax—NRS 369.173; (2) the cigarette tax—

[2] In 1997, the Account was enacted as the Local Government Tax Distribution Fund in the State Treasury. 1997 Nev. Stat., ch. 660, § 8, at 3278. In 1999, it was changed to the Local Government Tax Distribution Account in the Intergovernmental Fund (NRS 353.254) in the State Treasury. 1999 Nev. Stat., ch. 8, § 10, at 10.

NRS 370.260; (3) the real property transfer tax—NRS 375.070; (4) the basic city-county relief tax—NRS 377.055; (5) the supplemental city-county relief tax—NRS 377.057; and (6) the basic governmental services tax—NRS 482.181.

The money in the Account is distributed to local governmental entities under a two-tier system. Under the first-tier, a certain portion from each revenue source is allocated to each county according to specific statutory formulas and credited to the county's subaccount. The first-tier revenues in the county's subaccount are then distributed to the county and the cities, towns, enterprise districts[3] and special districts[4] in the county that are eligible for a second-tier distribution.

To be eligible for a second-tier distribution, the entity must be an enterprise district, or it must be a county, city, town or special district that received "before July 1, 1998, any portion of the proceeds of a tax which is included in the Account." NRS 360.670. In addition, a county, city, town or special district is also eligible for a second-tier distribution if it was created after July 1, 1998, and it

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[3] Enterprise districts are local governmental entities which are not counties, cities or towns and which are determined to be enterprise districts by the Executive Director based on the criteria in NRS 360.620 and 360.710. Examples of enterprise districts include certain general improvement districts (GIDs) and certain water, sewer, sanitation and television districts.

[4] Special districts are local governmental entities which are not counties, cities, towns or enterprise districts. NRS 360.650. Examples of special districts include certain hospital, library, fire-protection and mosquito-abatement districts.

provides police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance and repair of roads; or (3) parks and recreation. NRS 360.740.

The second-tier distributions in each county have two components—base amounts calculated under NRS 360.680 and excess amounts calculated under NRS 360.690. The base amounts for the enterprise districts in the county are distributed before any base amounts are distributed to the county and the cities, towns and special districts in the county. NRS 360.680. If there is sufficient money remaining in the county's subaccount after the enterprise districts receive their base amounts, the county and the cities, towns and special districts in the county are entitled to receive their base amounts. NRS 360.690. However, if there is not sufficient money remaining in the county's subaccount to distribute the full base amounts to the county and the cities, towns and special districts in the county, their base amounts are prorated in proportionate percentages. Id.

After distribution of all base amounts, if there is any excess money remaining in the county's subaccount, the county and the cities, towns and special districts in the county are entitled to receive distributions of excess amounts, but the enterprise districts are not entitled to receive such distributions. NRS 360.690. If excess amounts are distributed, the particular amount received by each entity is calculated using statutory formulas that take into account changes in population or changes in

the assessed valuation of taxable property, or changes in both. Id. Because the statutory formulas used to calculate excess amounts involve varying factors, the excess amounts ultimately distributed to each entity are significantly impacted by the specific population and property tax conditions attributable to each entity.

III. Application of the C-Tax system to Fernley.

When the C-Tax system was enacted in 1997, Fernley was an unincorporated town that was eligible for a second-tier distribution. To facilitate Nevada's transition to the new C-Tax system, the Legislature included transitory provisions in sections 35-36 of SB254 which initially took precedence over NRS 360.600-360.740. 1997 Nev. Stat., ch. 660, §§35-36, at 3301-04. Under section 35 of SB254, Fernley's initial year of distribution was the fiscal year ending on June 30, 1999, and the base amount for Fernley's initial year of distribution was calculated using the formula in that section. Id. §35, at 3301-02. After SB254's transitory provisions expired, the base amount of Fernley's distribution has been calculated using the formula in NRS 360.680. Under that formula, Fernley's base amount for each fiscal year is equal to the amount allocated to Fernley for the preceding fiscal year, minus any excess amount allocated to Fernley under NRS 360.690, multiplied by 1 plus the percentage change in the Consumer Price Index (All Items) for the immediately preceding calendar year. NRS 360.680.

In 2001, Fernley incorporated as a city under NRS Chapter 266, Nevada's general law for municipal incorporation.[5] Unlike many other Nevada cities, Fernley does not provide police or fire-protection services. Instead, police services are provided by Lyon County, and fire-protection services are provided by the North Lyon County Fire Protection District.

When Fernley incorporated in 2001, it knew that its C-Tax distribution could be increased because of incorporation only if it provided police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance and repair of roads; or (3) parks and recreation. NRS 360.740. Because Fernley did not provide the requisite services, it also knew that after incorporation in 2001, its C-Tax distribution would continue to be calculated and adjusted using its original base amount under section 35-36 of SB254 and the statutory formulas in NRS 360.680 and 360.690, unless it began to provide the requisite services or assumed the functions of another local governmental entity. NRS 360.740; NRS 354.598747.

[5] The Nevada Constitution allows the Legislature to provide for the organization of cities through general laws for municipal incorporation. Nev. Const. art. 8, § 8; State ex rel. Williams v. Dist. Ct., 30 Nev. 225, 227-28 (1908). It also allows the Legislature to create cities through special acts. Nev. Const. art. 8, § 1; State ex rel. Rosenstock v. Swift, 11 Nev. 128, 142-45 (1876); W. Realty v. City of Reno, 63 Nev. 330, 350-51 (1946).

Fernley's C-Tax distribution can also be increased through cooperative agreements with the county or other cities, towns or special districts in the county. NRS 360.730. In such agreements, the parties may establish "an alternative formula for the distribution of the taxes included in the Account to the local governments or special districts which are parties to the agreement." Id. Based on the allegations in the complaint, it does not appear that Fernley has entered into any such cooperative agreements.

IV. Proceedings in the district court.

On August 3, 2012, the State filed a motion to dismiss Fernley's complaint (*PA1:15*), and the Legislature filed a motion to intervene. On August 16, 2012, the Legislature filed a joinder in the motion to dismiss. (*PA1:33.*) On August 20, 2012, Fernley filed an opposition to the State's motion to dismiss. (*PA2:295.*) In its opposition, Fernley argued that the State's motion to dismiss should be treated as a motion for summary judgment, and Fernley moved for a continuance to complete discovery under the summary judgment rule—NRCP 56(f). (*PA2:298-99.*) On August 27, 2012, the State filed a reply in support of its motion to dismiss. (*PA3:590.*)

On August 30, 2012, the district court granted the Legislature's motion to intervene (*PA3:605-06*), and on September 18, 2012, the district court approved a stipulation and order in which the parties agreed to treat the Legislature's joinder in

the motion to dismiss as the Legislature's own motion to dismiss (*PA3:615-17*). Pursuant to that stipulation and order, on September 28, 2012, Fernley filed an opposition to the Legislature's motion to dismiss. (*PA4:619.*) On October 8, 2012, the Legislature filed a reply in support of its motion to dismiss in which the Legislature argued, among other things, that the district court should reject Fernley's request for a continuance under NRCP 56(f) because it was not a procedurally appropriate response to the Legislature's motion to dismiss. (*PA6:1277-78.*) The Legislature also argued that there were no genuine issues of material fact in this case because all of Fernley's claims are barred as a matter of law. (*PA6:1277-78.*) Therefore, the Legislature contended that even if the district court treated the Legislature's motion to dismiss as a motion for summary judgment, the district court should not grant Fernley a continuance under NRCP 56(f) to conduct discovery because discovery of additional facts would not change the result of this case and would just burden the other parties with time-consuming and costly discovery that is pointless and futile. (*PA6:1277-78.*)

On October 15, 2012, the district court entered an order denying both motions to dismiss. (*PA6:1298-99.*) In its order, the district court treated both motions to dismiss as motions for summary judgment because in denying the motions, the district court granted Fernley a continuance to complete discovery under the summary judgment rule—NRCP 56(f). (*PA6:1298-99.*)

ARGUMENT

I. The remedy of mandamus is appropriate to compel the district court to rule properly and dismiss all of Fernley's claims because they are barred as a matter of law.

In the ordinary case, the Court will generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss or for summary judgment. Int'l Game Tech. v. Dist. Ct., 124 Nev. 193, 197 (2008); G.C. Wallace, Inc. v. Dist. Ct., 127 Nev. ___, 262 P.3d 1135, 1137 (2011). However, "[t]he remedy of mandamus is available to compel the district court to rule properly if, as a matter of law, a defendant is not liable for any of the relief sought." Moore v. Dist. Ct., 96 Nev. 415, 416 (1980). Thus, "[w]hen the right to a dismissal is clear, the extraordinary relief of mandamus is available to compel dismissal." State Dep't of Hwys. v. Dist. Ct., 95 Nev. 715, 718 (1979), *overruled in part on other grounds by* Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873 (1991).

As a general rule, the Court will consider writ petitions that challenge interlocutory district court orders denying motions to dismiss or for summary judgment "when either (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition."

Int'l Game Tech., 124 Nev. at 197-98; G.C. Wallace, 262 P.3d at 1137. The Court will also consider such writ petitions "when the case is at early stages of litigation and writ relief would promote policies of sound judicial administration." Otak Nev., LLC v. Dist. Ct., 127 Nev. ---, 260 P.3d 408, 410-11 (2011); Int'l Game Tech., 124 Nev. at 198; G.C. Wallace, 262 P.3d at 1137.

Under these standards, the Court has granted writ petitions when the district court was obligated to dismiss an action because the plaintiff's claims were barred by sovereign immunity as a matter of law. County of Washoe v. Dist. Ct., 98 Nev. 456, 457 (1982). The Court has also considered writ petitions when the issue was whether the plaintiff lacked standing to bring its claims as a matter of law. D.R. Horton, Inc. v. Dist. Ct., 125 Nev. 449, 453-54 (2009). The Court has also granted writ petitions when the district court was obligated to dismiss an action because the plaintiff's claims were time-barred by the statute of limitations as a matter of law. Ash Springs Dev. v. O'Donnell, 95 Nev. 846, 847 (1979).

In this case, the Court should consider the State's writ petition because the district court was obligated to dismiss all of Fernley's claims pursuant to clear authority for the following reasons: (1) Fernley's claims for money damages are barred as a matter of law by the State's sovereign immunity; (2) Fernley's Fourteenth Amendment and separation-of-powers claims are barred as a matter of law by Fernley's lack of standing to bring such claims; (3) Fernley's claims are

time-barred as a matter of law by the statute of limitations and laches; and (4) Fernley's claims are barred as a matter of law because they fail to state a claim for relief even if all of Fernley's allegations are true.

In addition, the Court should consider the State's writ petition because the constitutionality of the C-Tax system is an important and urgent issue of law that needs clarification and public policy would be best served by the Court's consideration of whether Fernley's constitutional challenges to the C-Tax system are barred as a matter of law and the C-Tax system is a valid exercise of the State's fiscal powers. On several prior occasions, the Court has considered writ petitions involving constitutional challenges to the State's exercise of its fiscal powers "where the circumstances reveal urgency or a strong necessity . . . [or] where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." Bus. Computer Rentals v. State Treasurer, 114 Nev. 63, 67 (1998); EICON v. State Bd. of Exam'rs, 117 Nev. 249, 253 (2001).

Because the C-Tax system directly affects the budget of almost every local government in Nevada, Fernley's constitutional challenges to the validity of the C-Tax system present important and urgent questions of law that implicate the fiscal policy of the entire state. During the 2011 session, the Legislature created an interim committee to study the C-Tax system. Assembly Bill No. 71, 2011 Nev.

Stat., ch. 384, at 2391-92. Based on the results of the interim committee's study, the Legislature will be considering legislation concerning the C-Tax system during the upcoming 2013 session. See BDR 32-247, Bill Draft Requests for the 2013 Legislative Session (Nev. LCB Legal Div. 2012). It will be essential to the Legislature's consideration of such C-Tax legislation to receive a conclusive determination from the Court regarding whether Fernley's claims are barred as a matter of law and the C-Tax system is a valid exercise of the State's fiscal powers. Indeed, whatever policy decisions the Legislature makes about the C-Tax system during the 2013 session are likely to be affected by the outcome of this writ petition. Therefore, because public policy would be best served by the Court's invocation of its original jurisdiction to resolve these important and urgent legal issues of statewide significance, the Court should consider the State's writ petition.

The Court also should consider the State's writ petition because this case is in the early stages of litigation and writ relief would promote policies of sound judicial economy and administration by preventing Fernley from compelling the State to engage in time-consuming and costly discovery that is unnecessary, pointless and futile. Based on its pleadings and filings, Fernley wants to pursue extensive discovery regarding numerous local government budgets which would require the participation of scores of local public officers and employees from every corner of Nevada. (*PA2:299-300; PA4:622-24.*) Before the State and these

already overburdened public officers and employees are compelled to engage in such time-consuming and costly discovery, the policies of sound judicial economy and administration militate in favor of considering the State's writ petition because all of Fernley's claims are barred as a matter of law, which makes discovery in this case unnecessary, pointless and futile.

Finally, the Court should consider the State's writ petition in order to correct the district court's manifest abuse of discretion in treating the motions to dismiss as motions for summary judgment and granting Fernley a continuance to complete discovery under the summary judgment rule. The Court may issue a writ of mandamus to correct a manifest abuse of discretion by the district court. Cote H. v. Dist. Ct., 124 Nev. 36, 39 (2008). A manifest abuse of discretion occurs when "the district court based its ruling on an erroneous view of the law." Washoe County Dist. Att'y v. Dist. Ct., 116 Nev. 629, 636 (2000).

In this case, the district court treated the motions to dismiss as motions for summary judgment based on an erroneous view of NRCP 12(b). That rule provides:

> If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, *matters outside the pleading are presented to and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

NRCP 12(b) (emphasis added).

Although the general rule under NRCP 12(b) is that the district court may not consider materials outside the pleadings when deciding a motion to dismiss, the general rule is not absolute, and the district court may consider materials outside the pleadings that are properly subject to judicial notice, such as matters of public record, without converting the motion to dismiss into a motion for summary judgment. See Breliant v. Preferred Equities Corp., 109 Nev. 842, 847 (1993); Lee v. Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001); Nevada v. Burford, 708 F. Supp. 289, 292 (D. Nev. 1989) ("this court may take judicial notice of facts outside the pleadings such as matters of public record, without converting [Defendant's] Motion to Dismiss to one for summary judgment.").

Because the State and the Legislature presented only public records with their motions to dismiss, the district court manifestly abused its discretion when it treated the motions to dismiss as motions for summary judgment. With the State's motion to dismiss, the State presented information concerning the C-Tax system obtained from the public records of the Department of Taxation. (*PA1:30.*) And with the Legislature's motion to dismiss, the Legislature presented public records that are part of the legislative history of SB254, which enacted the C-Tax system. (*PA1:79-88; PA1:90-212; PA2:213-94.*) See Fierle v. Perez, 125 Nev. 728, 737-38 n.6 (2009) ("courts generally may take judicial notice of legislative histories, which are public records."). Because the district court should have taken judicial

notice of the public records without converting the motions to dismiss into motions for summary judgment, the district court manifestly abused its discretion.

The district court also manifestly abused its discretion when it granted Fernley a continuance to complete discovery under the summary judgment rule. NRCP 56(f). Because all of Fernley's claims are barred as a matter of law, there are no genuine issues of material fact to warrant discovery under the summary judgment rule. Therefore, any discovery of additional facts will not change the result of this case but will simply burden the State with time-consuming and costly discovery that is unnecessary, pointless and futile.

The district court has the discretion to grant a continuance under NRCP 56(f) to conduct discovery only if such discovery would lead to the creation of genuine issues of material fact. Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118 (2005). However, when there are no genuine issues of material fact because all of the plaintiff's claims are barred as a matter of law, the district court must deny the plaintiff's request for a continuance under NRCP 56(f) because discovery of additional facts would not change the result of the case and would just burden the parties with time-consuming and costly discovery that is unnecessary, pointless and futile. See Nylund v. Carson City, 117 Nev. 913, 917 & n.10 (2001), *overruled in part on other grounds*, ASAP Storage v. Sparks, 123 Nev. 639 (2007);

J.E. Dunn Nw., Inc. v. Corus Constr. Venture, 127 Nev. ___, 249 P.3d 501, 508 n.7 (2011).

As will be discussed extensively below, there are no genuine issues of material fact in this case because all of Fernley's claims are barred as a matter of law by the State's sovereign immunity, by Fernley's lack of standing and by the statute of limitations and laches. Fernley's claims are also barred as a matter of law because they fail to state a claim for relief even if all of Fernley's allegations are true. Therefore, the district court manifestly abused its discretion by granting Fernley a continuance under NRCP 56(f) to conduct discovery because all of Fernley's claims are barred as a matter of law and discovery of additional facts will not change the result of this case.

Accordingly, the remedy of mandamus is appropriate to compel the district court to rule properly and dismiss all of Fernley's claims because the State's right to a dismissal is clear. All of Fernley's claims are barred as a matter of law, and Fernley is not entitled to any of the legal or equitable relief sought against the State in its complaint.

II. Standards of review governing motions to dismiss or for summary judgment.

The Court reviews a district court's decision granting or denying a motion to dismiss or for summary judgment de novo. Munda v. Summerlin Life & Health Ins., 127 Nev. ___, 267 P.3d 771, 774 (2011); Ozawa v. Vision Airlines, 125 Nev.

556, 560 (2009). The purpose of granting a dismissal or summary judgment "is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law." McDonald v. D.P. Alexander & Las Vegas Blvd., LLC, 121 Nev. 812, 815 (2005) (quoting Coray v. Hom, 80 Nev. 39, 40-41 (1964)).

A defendant is entitled to a dismissal or summary judgment when the claims against the defendant are barred as a matter of law by one or more affirmative defenses. Kellar v. Snowden, 87 Nev. 488, 491-92 (1971); Williams v. Cottonwood Cove Dev. Co., 96 Nev. 857, 860-61 (1980). An affirmative defense is a legal argument or assertion of fact that, if true, prohibits prosecution of the claims against the defendant even if all allegations in the complaint are true. Douglas Disposal v. Wee Haul, 123 Nev. 552, 557-58 (2007); Clark County Sch. Dist. v. Richardson Constr., 123 Nev. 382, 392-93 (2007). Such affirmative defenses include sovereign immunity and the statute of limitations and laches. NRCP 8(c); Webb v. Clark County Sch. Dist., 125 Nev. 611, 618-20 (2009); Boulder City v. Boulder Excavating, 124 Nev. 749, 754-55 (2008); Kellar, 87 Nev. at 491-92.

A defendant is also entitled to a dismissal or summary judgment when the plaintiff lacks standing to bring its constitutional claims against the defendant. Doe v. Bryan, 102 Nev. 523, 524-26 (1986). When the plaintiff lacks standing, the

plaintiff does not have the legal right to set judicial machinery in motion, and the plaintiff is barred as a matter of law from prosecuting its constitutional claims. Heller v. Legislature, 120 Nev. 456, 460-62 (2004).

Finally, a defendant is also entitled to a dismissal when the allegations in the complaint, even if true, are insufficient to establish the elements of a claim for relief as a matter of law. Stockmeier v. State Dep't of Corr., 124 Nev. 313, 316 (2008). A defendant is also entitled to a summary judgment "when there is no genuine issue of material fact and the [defendant] is entitled to judgment as a matter of law." Ozawa, 125 Nev. at 560.

Under these standards, the district court was obligated to dismiss or grant summary judgment to the State on all of Fernley's claims.

III. Fernley's claims for money damages are barred as a matter of law by the State's sovereign immunity.

The Court has granted writ petitions when the district court was obligated to dismiss an action because the plaintiff's claims were barred by sovereign immunity as a matter of law. County of Washoe, 98 Nev. at 457. The Court grants writ petitions in such circumstances because "[a]bsolute immunity is a broad grant of immunity not just from the imposition of civil damages, but also from the burdens of litigation, generally." State v. Dist. Ct., 118 Nev. 609, 615 (2002). Even in the context of qualified immunity, it is not merely a defense to liability, it is "an entitlement not to stand trial or face the other burdens of litigation. Accordingly, a

defense of qualified immunity should be resolved at the earliest possible stage in litigation." Butler v. Bayer, 123 Nev. 450, 458 (2007) (quoting Saucier v. Katz, 533 U.S. 194, 200 (2001)) (internal quotations and footnotes omitted).

In this case, Fernley asked for money damages on its federal and state constitutional claims. (*PA1:10-11.*) However, when the Legislature raised the defense of absolute immunity from money damages under 42 U.S.C. §1983 and NRS 41.032(1), Fernley did not offer any opposition to the Legislature's argument and authority. (*PA4:625-27.*) This is not surprising because the State is absolutely immune from money damages on Fernley's constitutional claims under federal and state law. Therefore, because the State is entitled to the defense of absolute sovereign immunity as a matter of federal and state law, the remedy of mandamus is appropriate to compel the district court to rule properly and dismiss Fernley's constitutional claims for money damages based on sovereign immunity.

A. Federal law.

To bring a cause of action for a federal constitutional violation, a plaintiff must plead a civil rights claim under 42 U.S.C. §1983 (section 1983). Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001) ("a litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. §1983."); Martinez v. Los Angeles, 141 F.3d 1373, 1382 (9th Cir. 1998); Azul-Pacifico, Inc.

v. Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992). In this case, although Fernley alleged federal constitutional violations, Fernley did not plead any civil rights claims under section 1983. As a general rule, when a plaintiff alleges federal constitutional violations but fails to plead civil rights claims under section 1983, the court will nevertheless "construe [the plaintiff's] allegations under the umbrella of §1983." Bank of Lake Tahoe v. Bank of Am., 318 F.3d 914, 917 (9th Cir. 2003). Consequently, regardless of Fernley's inadequate pleading, its alleged federal constitutional violations must be construed as civil rights claims under section 1983.

Civil rights claims under section 1983 "must meet federal standards even if brought in state court." Madera v. SIIS, 114 Nev. 253, 259 (1998); Will v. Mich. Dep't State Police, 491 U.S. 58, 66 (1989). Under section 1983, the State and its agencies and officials acting in their official capacities are absolutely immune from money damages because "neither states nor their officials acting in their official capacities are 'persons' under 42 U.S.C. §1983 and therefore neither may be sued in state courts [for money damages] under the federal civil rights statutes." N. Nev. Ass'n Injured Workers v. SIIS, 107 Nev. 108, 114 (1991) (citing Will, 491 U.S. at 71); State v. Dist. Ct., 118 Nev. 140, 153 (2002); Cuzze v. Univ. Sys., 123 Nev. 598, 605 (2007). Therefore, when a complaint alleges federal constitutional violations and asks for money damages from the State and its agencies and

officials acting in their official capacities, "the complaint fails to state an actionable claim." N. Nev. Ass'n Injured Workers, 107 Nev. at 114.[6]

In this case, Fernley's complaint alleged federal constitutional violations and asked for money damages from the State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity. Because the State and its agencies and officials acting in their official capacities are absolutely immune from money damages under section 1983, the district court was obligated to dismiss or grant summary judgment to the State on Fernley's federal constitutional claims for money damages as a matter of law.

B. State law.

A plaintiff may bring a state-law claim for money damages against the State and its agencies and officials acting in their official capacities only to the extent authorized by Nevada's conditional waiver of its sovereign immunity. NRS 41.031 et seq.; Hagblom v. State Dir. Mtr. Vehs., 93 Nev. 599, 601-04 (1977). Nevada's conditional waiver of its sovereign immunity is expressly limited by NRS 41.032, which provides in relevant part:

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[6] Although section 1983 bars claims for money damages against the State and its agencies and officials acting in their official capacities, it does not bar claims for prospective declaratory or injunctive relief against state officials acting in their official capacities. N. Nev. Ass'n Injured Workers, 107 Nev. at 115-16 (citing Will, 491 U.S. at 71 n.10).

> [N]o action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:
>
> 1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or
>
> 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

Each subsection of NRS 41.032 provides a separate basis for claiming sovereign immunity. Hagblom, 93 Nev. at 603-05. Under NRS 41.032(1), the State and its agencies and officials acting in their official capacities are absolutely immune from money damages based on any acts or omissions in their execution and administration of statutory provisions which have not been declared invalid by a court of competent jurisdiction. Hagblom, 93 Nev. at 603-04.

In its state constitutional claims, Fernley alleged that the State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity violated the Nevada Constitution in their execution and administration of the C-Tax system under NRS 360.600-360.740. Because those statutory provisions have not been declared invalid by a court of competent jurisdiction, the State and its agencies and officials acting in their official capacities enjoy absolute immunity from money damages under NRS 41.032(1) based on any acts or omissions in their

execution and administration of the C-Tax system. Furthermore, Fernley did not offer any opposition in the district court to this argument and authority. (*PA4:625-27.*) Therefore, based on NRS 41.032(1), the district court was obligated to dismiss or grant summary judgment to the State on Fernley's state constitutional claims for money damages as a matter of law.

Even though sovereign immunity under NRS 41.032(1) is sufficient by itself to require dismissal of Fernley's state constitutional claims for money damages, those claims are also barred as a matter of law by sovereign immunity under NRS 41.032(2). Under that provision, the State and its agencies and officials acting in their official capacities are absolutely immune from money damages when their actions are based on the performance of official duties which involve an element of official discretion or judgment and are grounded in the creation or *execution* of social, economic or political policy. Martinez v. Maruszczak, 123 Nev. 433, 445-47 (2007); Scott v. Dep't of Commerce, 104 Nev. 580, 583-86 (1988). As a general rule, this test is met when state agencies and officials are performing official duties to execute or carry out the policy of a statutory scheme. See Boulder Excavating, 124 Nev. at 757-60. Thus, state agencies and officials are entitled to sovereign immunity under NRS 41.032(2) whenever "the injury-producing conduct is an integral part of governmental policy-making or planning." Martinez, 123 Nev. at 446.

In this case, the alleged injury-producing conduct arises from the performance of official duties by the named state agencies and officials to execute and carry out the social, economic and political policy of the C-Tax statutes which are an integral part of governmental policy-making or planning. Even though the state agencies and officials must perform their official duties within clearly defined statutory parameters, they still must exercise official discretion and judgment within those statutory parameters to execute and carry out the policy of the C-Tax's statutory scheme. Under such circumstances, the state agencies and officials are entitled to sovereign immunity from money damages under NRS 41.032(2). Therefore, based on NRS 41.032(2), the district court was obligated to dismiss or grant summary judgment to the State on Fernley's state constitutional claims for money damages as a matter of law.

IV. Fernley's Fourteenth Amendment claims are barred as a matter of law by Fernley's lack of standing to bring the claims.

The Court has considered writ petitions when the issue was whether the plaintiff lacked standing to bring its claims. D.R. Horton, 125 Nev. at 453-54. The Court considers writ petitions in such circumstances because when the plaintiff lacks standing to bring its claims, the plaintiff does not have the legal right to set judicial machinery in motion, and the plaintiff is barred as a matter of law from prosecuting its claims. Heller, 120 Nev. at 460-62.

In numerous cases, both the United States Supreme Court and this Court have held that because cities, counties and other political subdivisions are entities created by the State merely for the convenient administration of government, such political subdivisions lack standing to bring Fourteenth Amendment claims against the State, their creator. City of Trenton v. New Jersey, 262 U.S. 182 (1923); City of Pawhuska v. Pawhuska Oil & Gas, 250 U.S. 394 (1919); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); State ex rel. List v. County of Douglas, 90 Nev. 272, 279-81 (1974); Reno v. County of Washoe, 94 Nev. 327, 329-31 (1978); Boulder City v. State, 106 Nev. 390, 392 (1990). In explaining this doctrine, the High Court has stated that:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The State, therefore, at its pleasure may modify or withdraw all [municipal] powers, may take without compensation [municipal] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. . . . In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

Hunter, 207 U.S. at 178-79.

When applying this doctrine to Nevada's political subdivisions, this Court has determined that "a political subdivision of the State of Nevada, may not invoke the

proscriptions of the Fourteenth Amendment in opposition to the will of its creator." List, 90 Nev. at 280 (holding that Nevada's counties lack standing to bring Fourteenth Amendment claims against the State); Reno, 94 Nev. at 329-31, and Boulder City, 106 Nev. at 392 (holding that Nevada's cities lack standing to bring Fourteenth Amendment claims against the State). Thus, because Fernley as a political subdivision of the State of Nevada lacks standing to bring Fourteenth Amendment claims against the State, the district court was obligated to dismiss or grant summary judgment to the State on Fernley's Fourteenth Amendment claims as a matter of law.

In the district court, although Fernley acknowledged the existence of the doctrine precluding political subdivisions from bringing Fourteenth Amendment claims against the State, Fernley contended that courts in other jurisdictions have found limited exceptions which allow political subdivisions to bring Fourteenth Amendment claims against the State. (*PA2:301-03.*) However, because this Court has never recognized such exceptions, the district court was bound under the doctrine of stare decisis to follow this Court's long-standing precedent and dismiss Fernley's Fourteenth Amendment claims as a matter of law. See Boulder City, 106 Nev. at 392 ("Boulder City's due process argument clearly falls within the proscriptions outlined in both City of Reno and County of Douglas, supra. Boulder City has no basis upon which to support its due process claim against the State.");

20 Am.Jur.2d Courts § 142 (2005) ("under the doctrine of stare decisis, a decision of the state's highest or supreme court binds the state's court of appeals and the trial courts.").

To the extent Fernley contends that there are exceptions which allow political subdivisions to bring Fourteenth Amendment claims against the State, such a contention raises an important issue of law in need of clarification which can be decided only by this Court after reexamining long-standing decisions that "now hold positions of permanence in this court's jurisprudence—precedent that, under the doctrine of stare decisis, [this court] will not overturn absent compelling reasons for so doing. Mere disagreement does not suffice." Miller v. Burk, 124 Nev. 579, 597 (2008) (footnotes omitted). Furthermore, considerations of sound judicial economy and administration militate in favor of the Court resolving the issue of Fernley's standing to bring Fourteenth Amendment claims *before* the State is burdened with time-consuming and costly discovery regarding those claims.

Therefore, the Court should entertain the State's writ petition to: (1) compel the district court to rule properly and dismiss Fernley's Fourteenth Amendment claims against the State under long-standing precedent that precludes political subdivisions from bringing Fourteenth Amendment claims against the State; or (2) reexamine that long-standing precedent to resolve the important issue of law of whether there are exceptions which allow political subdivisions to bring Fourteenth

Amendment claims against the State. In either situation, the Court's consideration of the State's writ petition would promote sound judicial economy and administration and ensure that the State is not improperly compelled to participate in discovery that is unnecessary, pointless and futile.

V. Fernley's separation-of-powers claims are barred as a matter of law by Fernley's lack of standing to bring the claims.

It is well established that political subdivisions lack standing to bring claims against the State alleging violations of state constitutional provisions, unless the state constitutional provisions exist for the protection of the political subdivisions. Reno, 94 Nev. at 329-32; see also City of New York v. State, 655 N.E.2d 649, 652 (N.Y. 1995) ("our Court has extended the doctrine of no capacity to sue by municipal corporate bodies to a wide variety of challenges based as well upon claimed violations of the State Constitution"). For example, Nevada's political subdivisions lack standing to bring claims against the State for violations of the Due Process Clause of Article 1, §8 of the Nevada Constitution because that provision does not exist for the protection of political subdivisions. Reno, 94 Nev. at 330. However, Nevada's political subdivisions have standing to bring claims against the State for violations of Article 4, §§20-21 of the Nevada Constitution because those provisions "exist for the protection of political subdivisions of the State. Their effect is to limit the Legislature, in certain instances, to the enactment of general, rather than special or local, laws." Id. at 332.

The reason that political subdivisions are generally prohibited from bringing claims against the State alleging constitutional violations is that political subdivisions are not independent sovereigns with plenary authority to act contrary to the will of their creator. List, 90 Nev. at 279-81. Rather, political subdivisions are created by the State for the convenient administration of government, and they are entitled to challenge the actions of their creator *only if* a constitutional provision is enacted specifically to protect political subdivisions from the State's actions. Reno, 94 Nev. at 329-32.

The separation-of-powers provision of the Nevada Constitution does not exist for the protection of political subdivisions. It exists for the protection of *state* government by prohibiting one branch of state government from impinging on the functions of another branch of state government. Nev. Const. art. 3, §1(1); Comm'n on Ethics v. Hardy, 125 Nev. 285, 291-94 (2009); Heller, 120 Nev. at 466-72; Sawyer v. Dooley, 21 Nev. 390, 396 (1893) ("As will be noticed, it is the *state* government as created by the constitution which is divided into departments.") (emphasis added).

The conclusion that the separation-of-powers provision does not exist for the protection of political subdivisions is reinforced by the fact that the separation-of-powers provision does not apply to local governments in any way. In interpreting the separation-of-powers provision of the California Constitution of 1849, which

was the model for Nevada's separation-of-powers provision, the California Supreme Court has stated that "the Third Article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments." People v. Provines, 34 Cal. 520, 534 (1868). Thus, "it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government." Mariposa County v. Merced Irrig. Dist., 196 P.2d 920, 926 (Cal. 1948).

Because the separation-of-powers provision of the Nevada Constitution does not exist for the protection of political subdivisions, Fernley lacks standing to bring separation-of-powers claims against the State, and the district court was obligated to dismiss or grant summary judgment to the State on Fernley's separation-of-powers claims as a matter of law.

VI. Fernley's claims are time-barred as a matter of law by the statute of limitations.

The Court has granted writ petitions when the district court was obligated to dismiss an action because the plaintiff's claims were time-barred by the statute of limitations as a matter of law. Ash Springs Dev., 95 Nev. at 847. Under such circumstances, "[w]here an action is barred by statute of limitations, no issue of material fact exists and mandamus is a proper remedy to compel entry of summary judgment." Id.

In this case, the events that form the basis of Fernley's constitutional claims occurred when Fernley incorporated in 2001 and the State used an allegedly unconstitutional formula to calculate Fernley's C-Tax distribution as an incorporated city. At that time, Fernley had a complete and present cause of action, and it could have filed suit to obtain relief. However, because Fernley did not commence this action until 2012, more than a decade later, all of its claims are time-barred by the statute of limitations under federal and state law.

A. Federal law.

It is well established that the statute of limitations applies to constitutional claims and that "[a] constitutional claim can become time-barred just as any other claim can." Block v. North Dakota ex rel. Bd. of Univ. & School Lands, 461 U.S. 273, 292 (1983); United States v. Clintwood Elkhorn Mining, 553 U.S. 1, 9 (2008). The statute of limitations for federal constitutional claims under section 1983 is calculated by using the statute of limitations for personal injury actions in the state where the claims arose. Wilson v. Garcia, 471 U.S. 261, 279-80 (1985); Owens v. Okure, 488 U.S. 235, 236 (1989). In Nevada, based on the statute of limitations for personal injury actions in NRS 11.190(4)(e), the statute of limitations for federal constitutional claims under section 1983 is two years. Day v. Zubel, 112 Nev. 972, 977 (1996); Perez v. Seevers, 869 F.2d 425, 426 (9th Cir. 1989).

The statute of limitations for federal constitutional claims under section 1983 applies to both legal claims for monetary damages and equitable claims for declaratory and injunctive relief because "where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy." Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 688 (9th Cir. 1993) (quoting Gilbert v. City of Cambridge, 932 F.2d 51, 57 (1st Cir. 1991)); see also Cope v. Anderson, 331 U.S. 461, 464 (1947) ("equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy."); Russell v. Todd, 309 U.S. 280, 289 (1940) ("equity will withhold its remedy if the legal right is barred by the local statute of limitations.").

The statute of limitations for federal constitutional claims under section 1983 begins to run when the plaintiff has a complete and present cause of action and can file suit to obtain relief. Wallace v. Kato, 549 U.S. 384, 388 (2007). This occurs when the plaintiff knows or has reason to know of the alleged events that form the basis of the cause of action. McCoy v. San Francisco, 14 F.3d 28, 29 (9th Cir. 1994). Courts apply this rule of accrual strictly, even if the alleged constitutional violation creates lasting effects that continue to adversely impact the plaintiff long after the violation has occurred. Id. at 30 ("statute of limitations period is triggered by the decision constituting the discriminatory act and not by the consequences of

that act."). Thus, continuing impact from past violations does not extend the statute of limitations. McDougal v. County of Imperial, 942 F.2d 668, 674-75 (9th Cir. 1991).

Although courts previously recognized a continuing violations doctrine for federal constitutional claims, the United States Supreme Court substantially limited the continuing violations doctrine in National Railway Passenger Corp. v. Morgan, 536 U.S. 101 (2002), and courts must now follow the Morgan limitations when applying the continuing violations doctrine to federal constitutional claims under section 1983. Cherosky v. Henderson, 330 F.3d 1243, 1246 n.3 (9th Cir. 2003); RK Ventures v. Seattle, 307 F.3d 1045, 1058, 1061 (9th Cir. 2002).

After the High Court's decision in Morgan, courts must look solely to when the operative governmental action or decision occurred to trigger the statute of limitations, and they must disregard any continuing harmful effects or consequences produced by the operative action or decision because those continuing harmful effects or consequences are not separately actionable. RK Ventures, 307 F.3d at 1058 ("in determining when an act occurs for statute of limitations purposes, we look at when the 'operative decision' occurred, and separate from the operative decision[] those inevitable consequences that are not separately actionable.") (citations omitted).

In this case, the operative governmental action occurred when Fernley incorporated in 2001 and the State did not increase Fernley's C-Tax distribution as a result of its incorporation. At that time, Fernley knew the State would continue to calculate and adjust Fernley's C-Tax distribution using Fernley's original base amount under section 35-36 of SB254 and the statutory formulas in NRS 360.680 and 360.690, unless Fernley began to provide the requisite public services or assumed the functions of another local governmental entity. NRS 360.740; NRS 354.598747. Because Fernley did not provide the requisite public services or assume the functions of another local governmental entity, the State did not change the basis for calculating Fernley's C-Tax distribution as a result of its incorporation in 2001. Consequently, the operative governmental action which allegedly harmed Fernley occurred in 2001 when the State did not increase Fernley's C-Tax distribution as a result of its incorporation.

Thus, even though Fernley alleges that each C-Tax distribution since 2001 has violated its constitutional rights, the constitutional violation occurred, if at all, when the State did not increase Fernley's C-Tax distribution as a result of its incorporation in 2001. Even if the amount of each C-Tax distribution to Fernley since 2001 has been deficient, each deficiency is nothing more than a continuing harmful effect or consequence of the operative governmental action which allegedly harmed Fernley in 2001.

Therefore, the events that form the basis of Fernley's federal constitutional claims occurred when Fernley incorporated in 2001, and that is when Fernley's federal constitutional claims accrued. At that time, Fernley had a complete and present cause of action and could have filed suit to obtain relief. Even though the events which triggered the statute of limitations in 2001 have had lasting effects that continue to impact Fernley, such a continuing impact does not extend the statute of limitations. Accordingly, because Fernley's federal constitutional claims accrued in 2001, the two-year statute of limitations expired in 2003, and the district court was obligated to dismiss or grant summary judgment to the State on all of Fernley's federal constitutional claims as a matter of law.

B. State law.

In Nevada, the statute of limitations applies to all causes of action, legal and equitable. State v. Yellow Jacket Mining, 14 Nev. 220, 230 (1879). This Court has not determined which limitations period applies to state constitutional claims. If the Court were to follow the lead of the United States Supreme Court, the two-year statute of limitations in NRS 11.190(4)(e) would apply. But if that is not the applicable statute of limitations, then the general four-year statute of limitations in NRS 11.220 would govern. NRS 11.220 ("An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."); Yellow Jacket Mining, 14 Nev. at 230 ("if the cause of action is

not particularly specified elsewhere in the statute, it is embraced in section 1033 [presently codified in NRS 11.220], and the action must be commenced within four years after the cause of action accrued."). Under either the two-year or four-year statute of limitations, Fernley's state constitutional claims are time-barred as a matter of state law.

Under Nevada law, "[t]he general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought." Petersen v. Bruen, 106 Nev. 271, 274 (1990). In the district court, Fernley contended that its constitutional rights are violated "every time a dollar is collected and distributed under the C-Tax formula." (*PA4:628.*) Thus, Fernley contended that a separate "wrong" has occurred with each C-Tax distribution since 2001.

This Court has not recognized a continuing violations doctrine for state constitutional claims, nor has this Court addressed an argument similar to Fernley's in the context of Nevada's statute of limitations. However, in applying statutes of limitations in other jurisdictions, courts have considered and rejected arguments similar to Fernley's where the alleged "wrong" is the government's use of an unlawful formula and where alleged deficiencies in future distributions are simply continued ill effects resulting from the ongoing use of the allegedly unlawful formula. Under such circumstances, the courts have concluded that the

"wrong" occurred when the government first used the allegedly unlawful formula and that any alleged deficiencies in future distributions are not separate "wrongs" for statute-of-limitations purposes. See, e.g., Brown Park Estates-Fairfield Dev. Co. v. United States, 127 F.3d 1449, 1456 (Fed. Cir. 1997) (where HUD allegedly used unlawful formula to calculate government rent subsidies, "wrong" occurred when HUD first used formula to calculate subsidies and alleged deficiencies in future subsidies are not separate "wrongs" for statute-of-limitations purposes); Davidson v. United States, 66 Fed. Cl. 206, 207-10 (Fed. Cl. 2005) (where Defense Department allegedly used unlawful formula to recalculate survivor benefit payments, "wrong" occurred when Defense Department first recalculated the payments and alleged deficiencies in future payments are not separate "wrongs" for statute-of-limitations purposes).

In this case, even though Fernley alleged that a separate "wrong" has occurred with each C-Tax distribution since 2001, any "wrong" occurred, if at all, when the State used an allegedly unlawful formula to calculate Fernley's C-Tax distribution as a result of its incorporation in 2001. Even if the amount of each C-Tax distribution to Fernley since 2001 has been deficient, the deficiencies are simply continued ill effects resulting from the ongoing use of the allegedly unlawful formula established in 2001. Therefore, because the alleged "wrong" to Fernley occurred in 2001 and because Fernley did not commence this action until 2012,

more than a decade later, all of Fernley's state constitutional claims are time-barred by the two-year and four-year statute of limitations, and the district court was obligated to dismiss or grant summary judgment to the State on all of Fernley's state constitutional claims as a matter of law.

VII. Fernley's claims are time-barred as a matter of law by laches.

Under both federal and state law, constitutional claims may be time-barred by the equitable doctrine of laches when there has been an unreasonable or inexcusable delay in bringing the claims and such delay has worked to the disadvantage or prejudice of others or has resulted in a change of circumstances which would make the granting of relief inequitable. Miller v. Burk, 124 Nev. 579, 598-99 (2008); Southside Fair Hous. Comm. v. New York, 928 F.2d 1336, 1354 (2d Cir. 1991) ("Laches can bar constitutional claims."); Soules v. Kauaians Campaign Comm., 849 F.2d 1176, 1180-82 (9th Cir. 1988) (applying laches to bar equal protection claims); Envtl. Def. Fund v. Alexander, 614 F.2d 474, 480 (5th Cir. 1980) ("The defense [of laches] is not restricted to cases in which only private law claims are asserted; it is also applicable to complaints based on constitutional claims and those based on alleged violation of separation of powers."); Partee v. Cook County Sheriff's Dep't, 863 F. Supp. 778, 783 (N.D. Ill. 1994) ("a §1983 complaint that is filed within the limitations period may still be subject to dismissal for laches.").

The doctrine of laches is based on the maxim that equity aids the vigilant, not those who sleep on their rights. Am. Int'l Group v. Am. Int'l Bank, 926 F.2d 829, 835 (9th Cir. 1991) ("The fundamental premise of laches is that those who sleep on their rights surrender them; if you snooze, you lose."). To determine whether a constitutional challenge is barred by laches, courts consider: (1) whether the party inexcusably delayed bringing the challenge and the length of the delay; (2) whether the delay constitutes acquiescence by the party in the validity of the legislation; and (3) whether the delay was prejudicial to others who relied on the validity of the legislation. Burk, 124 Nev. at 598-99; Southside Fair Hous. Comm., 928 F.2d at 1354. The applicability of laches turns upon the particular facts and circumstances of each case. Carson City v. Price, 113 Nev. 409, 412 (1997).

For purposes of applying laches, the fact that the plaintiff has publicly opposed governmental action in the political branches does not excuse the plaintiff's failure to promptly commence a judicial action. See, e.g., Batiste v. New Haven, 239 F. Supp. 2d 213, 225 (D. Conn. 2002); Mussington v. St. Luke's-Roosevelt Hosp., 824 F. Supp. 427, 434 (S.D.N.Y. 1993), *aff'd*, 18 F.3d 1033 (2d Cir. 1994). In Batiste and Mussington, the plaintiffs argued that laches did not bar their untimely constitutional claims because they had engaged in "vociferous public opposition" to the defendants' construction projects at the local agency level before they commenced their judicial actions. The courts rejected the plaintiffs'

arguments and found that their claims were barred by laches because "despite the plaintiffs' 'vociferous public opposition' to the defendants' construction plans, the plaintiffs were required to address their grievance in court, not in the political arena, in order to preserve their claims." Batiste, 239 F. Supp. at 225; Mussington, 824 F. Supp. at 434.

For more than a decade after its incorporation, Fernley inexcusably and unreasonably slept on its rights and did not challenge the constitutionality of the C-Tax system in a judicial action. Even though Fernley allegedly pursued remedies in the legislative and executive branches during the past eleven years, nothing stopped Fernley from timely pursuing remedies in a judicial action while concurrently pursuing remedies in the political branches. Thus, all of Fernley's claims are time-barred by laches because Fernley inexcusably and unreasonably delayed bringing its judicial action for at least eleven years, and that delay constitutes acquiescence in the validity of the C-Tax system.

Furthermore, because the State and local governments have reasonably relied on the validity of the C-Tax system and have structured their fiscal affairs around its long-standing provisions, they would suffer extreme prejudice and harm if Fernley were permitted to challenge the validity of the C-Tax system now after such a long period of continued and successful operation. Indeed, if the C-Tax system were to be declared invalid now after such a long period of operation, such

a declaration would bring chaos to Nevada's tax distribution system and would clearly upset the settled expectations of the other participants in the C-Tax system and the State. Therefore, because Fernley inexcusably and unreasonably slept on its rights to the prejudice of others, all of its federal and state constitutional claims are time-barred by laches, and the district court was obligated to dismiss or grant summary judgment to the State on all of Fernley's federal and state constitutional claims as a matter of law.

VIII. Fernley's claims are barred as a matter of law because they fail to state a claim for relief even if all of Fernley's allegations are true.

A defendant is entitled to a dismissal when the allegations in the complaint, even if true, are insufficient to establish the elements of a claim for relief as a matter of law. Stockmeier, 124 Nev. at 316. A defendant is entitled to a summary judgment "when there is no genuine issue of material fact and the [defendant] is entitled to judgment as a matter of law." Ozawa, 125 Nev. at 560. Under these standards, the district court was obligated to dismiss or grant summary judgment to the State on all of Fernley's claims.

A. Fernley's Fourteenth Amendment claims fail to state a claim for relief as a matter of law.

In its complaint, Fernley alleged that it has been denied equal protection because it receives, as an incorporated city, C-Tax distributions "that are substantially less than what is received by other, comparably populated and

similarly situated Nevada towns and cities." (*PA1:5.*) Fernley also alleged that the C-Tax system is "non-uniform and unequal in its effect upon Fernley as compared to other similarly situated Nevada towns and cities." Id. In support of its contention that it has been denied due process, Fernley alleged that the C-Tax system "results in Fernley receiving tax revenue distributions that are substantially less than what is received by other local governments and provides no process by which Fernley can obtain a meaningful and effective adjustment of such tax distributions." (*PA1:8.*)

Under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, there is no constitutional right to an equal receipt of tax revenues distributed by the State. See N.Y. Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938) ("The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states."). As explained by the Ninth Circuit, "[n]o requirements of uniformity or of equal protection of the law limit the power of a legislature in respect to allocation and distribution of public funds." Hess v. Mullaney, 213 F.2d 635, 640 (9th Cir. 1954) (citing Gen. Am. Tank Car v. Day, 270 U.S. 367, 372 (1926), and Carmichael v. S. Coal Co., 301 U.S. 495, 521 (1937)). Thus, courts have consistently rejected the

premise that the Equal Protection and Due Process Clauses require uniformity in the distribution of the tax revenues.[7]

As a result, even when tax revenues are distributed unevenly to local governmental entities under a statutory distribution scheme, that scheme must be upheld unless the challenger can prove there is no rational basis for the method of distribution chosen by the legislative body. Dane v. Jackson, 256 U.S. 589, 594-601 (1921); Ball v. Rapides Parish, 746 F.2d 1049, 1055-63 (5th Cir. 1984). Based on this long-standing precedent, even if Fernley's allegations are true that the C-Tax system is non-uniform and unequal in its effect upon Fernley as compared to other similarly situated Nevada towns and cities, the lack of uniformity in the C-Tax system is insufficient as a matter of law to prove an equal protection or due process claim. The only way for Fernley to prove an equal protection or due process claim is to establish that there is no rational basis for the method of distribution chosen by the Legislature in the C-Tax system. See Armour v. Indianapolis, ___ U.S. ___, 132 S.Ct. 2073, 2080-81 (2012).

[7] See, e.g., Bd. of Comm'rs v. Cooper, 264 S.E.2d 193, 198 (Ga. 1980); Leonardson v. Moon, 451 P.2d 542, 554-55 (Idaho 1969); McBreairty v. Comm'r Admin. & Fin. Servs., 663 A.2d 50, 54-55 (Me. 1995); McKenney v. Byrne, 412 A.2d 1041, 1045-49 (N.J. 1980); Beech Mtn. v. County of Watauga, 370 S.E.2d 453, 454-55 (N.C. Ct. App. 1988); Douglas Indep. Sch. Dist. v. Bell, 272 N.W.2d 825, 827 (S.D. 1978).

In Armour, the United States Supreme Court reiterated its long-standing rules for reviewing Fourteenth Amendment challenges to tax statutes. So long as a distinction made in a tax statute "has a rational basis, that distinction does not violate the Equal Protection Clause." 132 S.Ct. at 2079-80. Therefore, disparity in treatment in a tax statute "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Id. at 2080 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)). Moreover, "rational basis review requires deference to reasonable underlying legislative judgments," and courts must remain mindful that "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'" Id. (quoting Regan v. Taxation With Representation, 461 U.S. 540, 547 (1983)). Under the rational-basis test, tax classifications must be upheld if "'there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Id. (quoting FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993)). And "because the classification is presumed constitutional, the 'burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" Id. at 2080-81 (quoting Heller, 509 U.S. at 320).

Given the long-standing rules for reviewing Fourteenth Amendment challenges to tax statutes, it is clear that Fernley needed to plead in its complaint

that there is no rational basis for the method of distribution chosen by the Legislature in the C-Tax system. Because Fernley's complaint does not contain any allegations to that effect, its equal protection and due process claims fail to state a claim for relief as a matter of law.

Furthermore, even if Fernley's complaint had contained allegations to that effect, its equal protection and due process claims would still fail as a matter of law because there is a rational basis for the method of distribution chosen by the Legislature in the C-Tax system. The Legislature enacted the C-Tax system based on "the idea of distributing governmental revenues to governments performing governmental functions." (*PA1:140.*) The State clearly has a legitimate interest in ensuring that more tax revenues are distributed to those local governments which provide more public services, such as police and fire-protection services. Thus, as a matter of economic and fiscal policy, the Legislature could have rationally concluded that those local governments which provide more public services should receive more C-Tax distributions to offset their increased expenditures. Because Fernley does not provide police and fire-protection services, it is not similarly situated to other cities and towns which provide those services, so there is a rational basis for treating Fernley differently under the C-Tax system. That rational basis is sufficient to defeat Fernley's equal protection and due process claims as a matter of law. See Flamingo Paradise Gaming v. Chanos, 125 Nev.

502, 520-22 (2009) (holding that businesses with nonrestricted gaming licenses were not similarly situated to businesses with restricted gaming licenses and because these businesses have different impacts on the economy, there was a rational basis for treating them differently).

Even if the C-Tax system does not operate "with mathematical nicety or . . . in practice it results in some inequality," it still does not violate the Fourteenth Amendment because "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)). Consequently, "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution." Id.

For example in Ball v. Rapides Parish, the plaintiffs complained that although the Town of Ball was the fastest growing incorporated government in Rapides Parish, Louisiana, the town received no share of revenues generated from a parishwide sales tax even though every other incorporated government in the parish received a share of such revenues. 746 F.2d at 1051-52. Under a state law allowing certain parishes to levy and collect a retail sale and use tax, the governing

body of Rapides Parish enacted such a tax and specified the distribution of the tax revenues among the parish, the school board, and each of the nine incorporated governments within the parish. Id. Because the Town of Ball did not incorporate until several years after the parishwide tax and distribution system went into effect, the distribution plan did not account for the newly-incorporated town, and the town did not receive a portion of the parish's tax revenues for over a decade. Id. at 1053. As described by the court, even though the "citizens of Ball have forked over their share of fiscal fixings for 12 years . . . when the annual economic entree is ready to be served the Town has never had a place at the Parish table." Id. at 1053-54. And the town's attempts to have the Louisiana Legislature grant relief from the tax plan was met with no success. Id. at 1054 n.15.

The plaintiffs brought suit against each of the governmental bodies receiving funds under the distribution plan claiming that the plan violated the due process and equal protection rights of the town's residents. Id. at 1054. The complaint sought the "fair share" of all revenue produced from the parishwide tax since the town's incorporation, the "fair share" of all current and future revenue generated by the tax, injunctive relief barring further collection of the tax until the distribution plan was revised to be constitutional, and other general and equitable relief. Id. In analyzing the claims, the court first determined that the Equal Protection Clause did apply, but that only a rational basis level of scrutiny was

applicable because the distribution scheme "does not create a suspect classification nor infringe rights or interests heretofore recognized as constitutionally fundamental." Id. at 1055-60. The court also noted that the judiciary must avoid acting as a "superlegislature to judge the wisdom or desirability of legislative policy determinations made in . . . the local economic sphere." Id. at 1060 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

In examining the "conceivable" purposes behind the distribution plan, the court found that the governing body could have determined that the Town of Ball did not require the tax proceeds as much as the other municipalities, or the governing body could have intended to dissuade the incorporation of another municipality, or the governing body could have feared that participation of new municipalities in the distribution plan would jeopardize the repayment of bonds. Id. at 1062. Because any of these conceivable purposes was rationally related to a legitimate governmental interest, the court concluded there were no Fourteenth Amendment violations.

In this case, it is conceivable that the Legislature wanted to persuade newly incorporated cities to provide certain public services by offering greater C-Tax distributions to such cities when they undertake the financial burden to provide those services. Because Fernley declined to provide police and fire protection services after it incorporated, Fernley is different from other cities and towns

which provide those public services, so there is a rational basis for treating Fernley differently under the C-Tax system. Even if the C-Tax system is imperfect and does not operate with mathematical nicety or results in some inequality, the Legislature nevertheless had a rational basis for making distinctions among the various local governments based on the types of public services they provide. Therefore, because any differential treatment of Fernley under the C-Tax system is rationally related to legitimate governmental interests, Fernley's allegations fail to state a claim for relief under the Fourteenth Amendment, and the district court was obligated to dismiss or grant summary judgment to the State on Fernley's Fourteenth Amendment claims as a matter of law.

Finally, Fernley's allegation that the C-Tax system provides no process by which Fernley can obtain a meaningful and effective adjustment of C-Tax distributions also fails to state a claim for a Fourteenth Amendment violation. By enacting the C-Tax system, the Legislature used the legislative process to adjust the distribution of tax revenues to local governmental entities. When the Legislature uses the legislative process to adjust legal rights through the passage of legislation, the legislative process "provides all the process that is due." Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982); Bi-Metallic Inv. Co. v. State Bd. of Equal., 239 U.S. 441, 445-46 (1915). Because the inherent checks and balances of the legislative process provide their own procedural safeguards, "the

legislative process is sufficient to comport with minimal federal due process requirements." Rea v. Matteucci, 121 F.3d 483, 485 (9th Cir. 1997).

Thus, even assuming that Fernley is entitled to the protections of the Due Process Clause, the legislative process provides all the process that is due. And even though Fernley has been unsuccessful in its efforts in the legislative process to change the C-Tax system, the Due Process Clause does not entitle Fernley to a favorable result. At most, it entitles Fernley to an opportunity to ask for statutory changes through the legislative process, and Fernley has not been denied that opportunity. Therefore, Fernley's allegations fail to state a claim for relief under the Fourteenth Amendment, and the district court was obligated to dismiss or grant summary judgment to the State on Fernley's Fourteenth Amendment claims as a matter of law.

B. Fernley's separation-of-powers claims fail to state a claim for relief as a matter of law.

In its complaint, Fernley alleged that "[t]he C-Tax system, which is administered by the executive branch of the state government, is set up so that the legislative authority over the C-Tax system is abdicated to and exercised by the executive branch of state government." (*PA1:6*.) Fernley's allegations fail to state a claim for relief as a matter of law because the Legislature has lawfully delegated administrative and ministerial duties to the Department of Taxation and the State

Treasurer under the C-Tax system which they must perform in accordance with clearly defined statutory standards.

This Court has recognized that there is no impermissible delegation of legislative authority to an executive branch agency when the agency must work within sufficiently defined statutory standards in exercising its power to give effect to a statute. Sheriff v. Luqman, 101 Nev. 149, 151 (1985); State ex rel. Brennan v. Bowman, 89 Nev. 330, 334 (1973); State v. Shaughnessy, 47 Nev. 129, 135 (1923). The Court has explained the standards for reviewing claims of unconstitutional delegation of power in the following terms:

> Although the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend. Thus, the legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency. In doing so the legislature vests the agency with mere fact finding authority and not the authority to legislate. The agency is only authorized to determine the facts which will make the statute effective. Such authority will be upheld as constitutional so long as suitable standards are established by the legislature for the agency's use of its power. These standards must be sufficient to guide the agency with respect to the purpose of the law and the power authorized. Sufficient legislative standards are required in order to assure that the agency will neither act capriciously nor arbitrarily.

Luqman, 101 Nev. at 153-54 (citations omitted).

In the context of tax statutes, the Court has determined that the Legislature may delegate administrative authority to execute tax statutes so long as the agency

charged with that responsibility must work within sufficiently defined statutory standards. Las Vegas v. Mack, 87 Nev. 105, 107-09 (1971). In Mack, business owners alleged that a tax law which authorized counties to adopt an ordinance imposing a county sales tax was an unconstitutional delegation of the Legislature's own power to impose a tax. The Court rejected this contention as "unsound" because the tax statute left nothing to discretion and any ordinance enacted pursuant to the tax statute had to be written in substantial compliance with the statutory requirements. Id. at 109.

Courts in other jurisdictions have held that there is no separation-of-powers violation when the state legislature authorizes agencies to distribute tax proceeds pursuant to specific statutory formulas. In Board of Comm'rs v. Cooper, 264 S.E.2d 193, 198 (Ga. 1980), taxpayers alleged that the state's statutory procedures allowing local taxing authorities to distribute certain tax proceeds within their jurisdictional boundaries was an impermissible delegation of legislative authority. The Georgia Supreme Court rejected this assertion, reasoning that the ability of a taxing authority to simply distribute proceeds was not objectionable. Id. The court also noted that no impermissible delegation of legislative authority occurred by virtue of the tax legislation creating certain special districts, authorizing the imposition of a local option sales tax by those districts, fixing the rate of the tax,

determining which transactions the tax would be levied against and specifying the purposes for which the proceeds be spent. Id.

In Amos v. Andrew, 99 Fla. 65, 78-79, 126 So. 308 (Fla. 1930), the Florida Supreme Court also rejected a claim of a separation-of-powers violation concerning legislation that created a depository for certain funds of counties and special road and bridge districts and required the Board of Administration, comprised of the governor, the comptroller and the state treasurer, to administer and disburse those funds under certain conditions prescribed by statute. Pursuant to the legislation, the Board was required, among other things, to make an annual estimate of all monies available to each county and special road and bridge district for the next fiscal year, to anticipate and appropriate certain funds and to approve the issuance of refunding bonds by county commissioners. Id. Such duties, the court held, were not legislative but instead only administrative in nature. Id.

In this case, because the Legislature has delegated only administrative and ministerial duties to the Department of Taxation and State Treasurer under the C-Tax system which they must perform in accordance with clearly defined statutory standards, there has been no unconstitutional delegation of legislative authority. And because all distributions under the C-Tax system must be done in accordance with specific statutory formulas, the Department of Taxation and the State Treasurer must exercise their official discretion and judgment within those

statutory parameters to execute and carry out the policy of the C-Tax's statutory scheme. NRS 360.680-360.690. In executing its duties under the C-Tax system, the Department of Taxation can only apply findings of fact, based on fiscal data, to the mathematical equations. Thus, the Legislature has vested the Department of Taxation with mere fact-finding authority and not with the authority to legislate. Therefore, Fernley's separation-of-powers claims fail to state a claim for relief as a matter of law.

In the district court, Fernley also contended that the C-Tax system violates separation of powers because "the Legislature may not constitutionally delegate the 'power of the purse' to an administrative branch. Appropriation determinations involve fundamental, [state]wide policy and discretionary judgments, and cannot be delegated even with clear enough standards." (*PA2:304*.) Fernley's contention fails as a matter of law because the Legislature may enact an appropriation that operates prospectively on a recurrent basis so long as the Legislature has provided a method whereby the exact amount to be appropriated may be ascertained under the law in future years. Norcross v. Cole, 44 Nev. 88, 93 (1920).

With regard to appropriations, the Nevada Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." Nev. Const. art. 4, §19. Under this constitutional provision, "[i]t is not necessary that all expenditures be authorized by the general appropriation bill. The

language in any act which shows that the legislature intended to authorize the expenditure, and which fixes the amount and indicates the fund, is sufficient." State v. Eggers, 29 Nev. 469, 475 (1907). Furthermore, the Legislature may enact an appropriation that operates prospectively on a recurrent basis so long as "a method is provided whereby the exact amount to be expended in pursuance of the act may be ascertained." Norcross, 44 Nev. at 93; State v. LaGrave, 23 Nev. 25, 26-27 (1895) ("an appropriation may be prospective, that is, it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues." (quoting Ristine v. State, 20 Ind. 328, 339 (1863))).

Under the C-Tax statutes, the Legislature has provided a method whereby the exact amount to be appropriated from the Local Government Tax Distribution Account may be ascertained under the C-Tax statutes in future years in accordance with clearly defined statutory standards and specific statutory formulas. Because those standards and formulas provide a method whereby the exact amount to be expended under the C-Tax system may be ascertained in future years, the Legislature has not unconstitutionally delegated the power of appropriation. Therefore, Fernley's allegations fail to state a claim for relief under the separation-of-powers provision, and the district court was obligated to dismiss or grant

summary judgment to the State on Fernley's separation-of-powers claims as a matter of law.

C. Fernley's Article 4, §§20-21 claims fail to state a claim for relief as a matter of law.

When a statute is challenged as an invalid special or local law, the threshold issue is whether the statute is, in fact, a special or local law. Youngs v. Hall, 9 Nev. 212, 217-22 (1874). If the statute is a general law, Article 4, §§20-21 are not implicated, and the statute must be upheld. Id. A statute that applies "upon all persons similarly situated is a general law." Id. at 222. In other words, "[a] law is general when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction." Clean Water Coalition v. M Resort, 127 Nev. ___, 255 P.3d 247, 254 (2011) (quoting Colman v. Utah State Land Bd., 795 P.2d 622, 636 (Utah 1990)). The determination of whether a law is general "is based on how it is applied, not on how it actually operates." Id. at 255.

The C-Tax statutes apply statewide to all similarly situated local governments. All distributions under the C-Tax system are subject to the same statutory formulas that take into account changes in a local government's population and the assessed valuation of taxable property. The C-Tax statutes do not single out Fernley by name or subject it to specialized burdens that would not be imposed on other similarly situated cities or towns. Cf. Clean Water Coalition, 255 P.3d at 253-62 (holding that a statute which singled out a political subdivision

by name and subjected it to specialized burdens not imposed on other political subdivisions was not a general law).

Under the C-Tax statutes, if Fernley provided the requisite public services, it would be placed in the same class as other similarly situated cities and towns which provide those public services. NRS 360.740; NRS 354.598747. But because Fernley does not provide the requisite public services, it is not similarly situated to those other cities and towns, so there is a rational basis for placing Fernley in a different class from those other cities and towns. Thus, because the C-Tax statutes apply uniformly to all similarly situated local governments embraced in classes founded upon natural, intrinsic and rational distinctions, the C-Tax statutes are general laws of uniform operation throughout the state, and they do not violate Article 4, §§20-21. Therefore, Fernley's Article 4, §§20-21 claims fail to state a claim for relief as a matter of law.

Furthermore, even if the C-Tax statutes were local or special laws, they still would not violate Article 4, §§20-21. Although the Nevada Constitution expresses a preference for general laws, local and special laws are not per se unconstitutional. Clean Water Coalition, 255 P.3d at 255. A local or special law must be upheld when: (1) it does not come within any of prohibited categories in Article 4, §20; and (2) it conforms with Article 4, §21 because a general law could not have been made applicable under the circumstances. Id.

In the district court, Fernley alleged that the C-Tax statutes are local or special laws "[f]or the assessment and collection of taxes" which violate Article 4, §20. (*PA1:7*.) However, the prohibition in Article 4, §20 regarding "the assessment and collection of taxes" applies only to laws which regulate the method or manner in which local assessors and collectors of taxes perform their assessment and collection duties. Reno, 94 Nev. at 334-35; Cauble v. Beemer, 64 Nev. 77, 87-88 (1947); Washoe County Water Dist. v. Beemer, 56 Nev. 104, 117 (1935). As further explained by the Court, "[w]e are clearly of opinion that the constitutional provision simply prohibits special legislation regulating those acts which the assessors and collectors of taxes generally perform, and which are denominated 'assessment' and 'collection of taxes.'" Gibson v. Mason, 5 Nev. 283, 305 (1869). A law cannot violate Article 4, §20 when it "contains no provision whatever respecting the assessment or collection of the tax complained of, in the sense in which those words are employed in the Constitution." Id.

The six statewide taxes whose proceeds are deposited in the Local Government Tax Distribution Account are all collected under different general laws that are separate from the C-Tax statutes. Fernley does not allege that any of the different general laws governing the collection of the six statewide taxes violates Article 4, §20. Instead, all of Fernley's allegations concern the distribution of the proceeds of the taxes after they are assessed and collected.

Furthermore, the C-Tax statutes contain no provisions dealing with the assessment or collection of the six statewide taxes that are deposited in the Account. The C-Tax statutes deal only with distribution of the proceeds of the taxes after they are assessed and collected. Thus, even if the C-Tax statutes were local or special laws, they would not be local or special laws "[f]or the assessment and collection of taxes" which violate Article 4, §20. Therefore, Fernley's Article 4, §20 claims fail to state a claim for relief as a matter of law.

Finally, under Article 4, §21, the Legislature has the power to enact special and local laws "unless it manifestly appear[s] that a general law could have been made applicable." Hess v. Pegg, 7 Nev. 23, 28 (1871). This Court has rejected the notion that a special or local law is invalid simply because it is possible to conceive of general laws that could have addressed some of the purposes of the legislation. State ex rel. Clarke v. Irwin, 5 Nev. 111, 122-25 (1869); Hess, 7 Nev. at 28. The Court focuses on whether such general laws would sufficiently "answer the just purposes of [the] legislation; that is, best subserve the interests of the people of the State, or such class or portion as the particular legislation is intended to affect." Clarke, 5 Nev. at 122. In applying the test, the Court has stated that the Legislature's decision to enact a special or local law must stand where a general law "fails to accomplish the proper and legitimate objects of [the] legislation." Hess, 7 Nev. at 30; Evans v. Job, 8 Nev. 322, 340-41 (1873).

Furthermore, because the determination of whether a general law could have been made applicable involves the exercise of legislative policy-making and judgment, the Court gives great deference to such legislative judgment because "[p]rimarily, the legislature must decide whether or not, in a given case, a general law can be made applicable." Hess, 7 Nev. at 28. Although the decision of the Legislature may be reviewed by the courts, any such review must begin with the presumption that the decision of the Legislature is correct. Id. Thus, "in the absence of a showing to the contrary, the court seldom goes contra to the very strong presumption that the legislature has good reason for determining that a general law is not or would not be applicable in some particular cases." Washoe County Water Dist., 56 Nev. at 121.

The Court has identified and explained the types of situations under which the Legislature's decision to enact a special or local law will be upheld:

> The legislature, and not the courts, is the supreme arbiter of public policy and of the wisdom and necessity of legislative action. This court has repeatedly upheld the constitutionality of special or local acts of the legislature, passed, in some instances, because the general legislation existing was insufficient to meet the peculiar needs of a particular situation, and, in other instances, for the reason that facts and circumstances existed, in relation to a particular situation, amounting to an emergency which required more speedy action and relief than could be had by proceeding under the existing general law.

Cauble, 64 Nev. at 96.

Thus, the Legislature may enact special or local laws under circumstances where the Legislature reasonably believes that: (1) general laws would be insufficient to meet the peculiar needs of the particular situation; or (2) the exigencies of the particular situation amount to an emergency which requires more speedy action and relief than could be had by proceeding under general laws. These two situations are separate and distinct. If the Legislature enacts a special or local law under either type of situation, the special or local law must be upheld. In applying these principles to specific cases, the Court has upheld a special and local law which transferred property from a city to another political subdivision because such a transfer was necessary to answer the just purposes of the legislation and best serve the interests of the people. Reno, 94 Nev. at 327.

The Legislature enacted the C-Tax system based on "the idea of distributing governmental revenues to governments performing governmental functions." (*PA1:140.*) The Legislature wanted to ensure that more tax revenues are distributed to those local governments which provide more public services, such as police and fire-protection services. Unlike many other cities and towns, Fernley does not provide police and fire-protection services. Thus, Fernley stands in stark contrast to other cities and towns under the C-Tax system, and its distinct and different circumstances present peculiar needs in a particular situation. Given the unique nature of Fernley's circumstances, it would be reasonable for the

Legislature to believe that general laws would be insufficient to meet the peculiar needs of this particular situation and that special or local laws were necessary to answer the just purposes of the legislation and best serve the interests of the people of the state. Therefore, even if the C-Tax statutes were special or local laws, they still would be constitutional under Article 4, §21 because no general law could have been made applicable given the unique nature of Fernley's circumstances. Accordingly, Fernley's claims under Article 4, §21 fail to state a claim for relief as a matter of law.

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CONCLUSION

Based on the foregoing, the State respectfully asks the Court to exercise its original jurisdiction and issue a writ of mandamus directing the district court to dismiss all of Fernley's claims.

DATED: This **5th** day of November, 2012.

Respectfully submitted,

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VERIFICATION

Under penalty of perjury pursuant to the laws of the State of Nevada, we hereby declare that we are the attorneys for the Petitioners named in the foregoing Petition for Writ of Mandamus; that we know the contents of the Petition; that the facts alleged in the Petition are true of our own knowledge, except as to those matters stated on information and belief; and that as to those matters stated on information and belief, we believe the Petition to be true.

DATED: This **5th** day of November, 2012.

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CERTIFICATE OF COMPLIANCE

1. We hereby certify that the foregoing Petition for Writ of Mandamus complies with the formatting requirements of NRAP 21(d), NRAP 32(c)(2) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the Petition has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point font and Times New Roman type.

2. We hereby certify that we have read the foregoing Petition for Writ of Mandamus, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that the Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **5th** day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **5th** day of November, 2012, pursuant to NRAP 25(c) and the parties' stipulation and written consent to service by electronic means, I served a true and correct copy of the foregoing Petition for Writ of Mandamus, as follows:

By means of the Nevada Supreme Court's electronic filing system, by electronic mail and by United States Mail, postage prepaid, directed to:

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HONORABLE JAMES T. RUSSELL
FIRST JUDICIAL DISTRICT COURT
885 E. Musser St. Room 3061
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Respondent District Judge

/s/ Kevin C. Powers
An Employee of the Legislative Counsel Bureau