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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PETITIONERS' REPLY BRIEF

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REPLY BRIEF

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 Reply Brief in support of their Petition for Writ of Mandamus.

ARGUMENT

A. The remedy of mandamus is necessary and appropriate in this case because all of Fernley's claims are barred as a matter of law and the State's right to a dismissal is clear.

Fernley contends that the remedy of mandamus is not necessary or appropriate in this case because: (1) the request for mandamus relief is premature in that the district court has not ruled yet on the merits of the State's and the Legislature's motions to dismiss; (2) the State and the Legislature did not timely and properly oppose Fernley's requests for a continuance to conduct discovery; (3) the district court properly exercised its discretion when it treated the motions to dismiss as motions for summary judgment and granted Fernley a continuance to conduct discovery; (4) no urgency exists that would militate in favor of granting mandamus relief; and (5) Fernley has stated claims upon which relief can be granted.

As will be discussed below, Fernley's contentions are wrong as a matter of law, and they have no merit. Because all of Fernley's claims are barred as a matter of law and the State's right to a dismissal is clear, the remedy of mandamus is necessary and appropriate to compel the district court to rule properly and dismiss all of Fernley's claims because Fernley is not entitled to any of the legal or equitable relief sought against the State in its complaint.

B. The request for mandamus relief is not premature because the district court ruled on the merits of the motions to dismiss when it denied them and granted Fernley a continuance to conduct discovery.

Fernley contends that the request for mandamus relief is premature in that the district court has not ruled yet on the merits of the State's and the Legislature's motions to dismiss. (Ans. Br. 10-11.) In its order, the district court stated:

> IT IS HEREBY ORDERED that the Motions to Dismiss are *DENIED* at this time in order to allow the Plaintiff a period of time to complete discovery; and
>
> IT IS HEREBY FURTHER ORDERED that the Defendants, upon completion of a reasonable discovery period, may renew their Motions to Dismiss which will then be duly considered by the Court.

(*PA6:1298*) (emphasis added).[1]

Under the civil rules, when the district court rules on a motion to dismiss, the district court must enter an order that either "denies the motion or postpones its disposition until the trial on the merits." NRCP 12(a)(4)(A). Based on the plain

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

language of the district court's order, the district court "denied" the State's and the Legislature's motions to dismiss. (*PA6:1298*.)

In their motions to dismiss, the State and the Legislature argued that it appeared beyond a doubt that Fernley could prove no set of facts which would entitle it to relief because all of its claims are barred as a matter of law. (*PA1:18-27; PA1:41-72*.) However, when the district court denied the motions to dismiss and allowed Fernley to proceed with discovery, the district court necessarily concluded that, after viewing all factual allegations in Fernley's complaint as true and drawing all inferences in Fernley's favor, it did not appear beyond a doubt that Fernley could prove no set of facts which would entitle it to relief. NRCP 12(b)(5); Buzz Stew v. N. Las Vegas, 124 Nev. 224, 228 (2008). By denying the State's and the Legislature's motions to dismiss and granting Fernley a continuance to conduct discovery, the district court clearly ruled on the merits of the State's and the Legislature's motions to dismiss.

Furthermore, although the district court also stated that the State and the Legislature may "renew their Motions to Dismiss" upon completion of a reasonable discovery period, the district court's use of the term "motions to dismiss" to describe the renewed motions is an inaccurate description because the renewed motions would not be motions to dismiss but would be motions for summary judgment. The purpose of a motion to dismiss is to test the legal

sufficiency of the allegations in the complaint *before* discovery. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989) (explaining that the rule authorizing motions to dismiss "streamlines litigation by dispensing with needless discovery and factfinding."); Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997) ("Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should, however, be resolved before discovery begins."). Because the renewed "motions to dismiss" authorized by the district court would challenge the sufficiency of Fernley's claims after discovery, the renewed motions would be motions for summary judgment, not motions to dismiss.

Therefore, because the district court expressly "denied" the motions to dismiss and granted Fernley a continuance to conduct discovery, the district court clearly ruled on the merits of the motions to dismiss, and the request for mandamus relief is not premature, but it is timely and appropriate.

C. The State and the Legislature timely and properly opposed Fernley's requests for a continuance to conduct discovery.

Fernley contends that the State and the Legislature did not timely and properly oppose Fernley's requests for a continuance to conduct discovery. (Ans. Br. 2-4.) Fernley's contention is based on the erroneous belief that its requests were actually motions. However, because Fernley decided to include the requests for a continuance in its opposition memoranda filed in the district court and

because Fernley attached its supporting affidavits under NRCP 56(f) to its opposition memoranda, Fernley's requests for a continuance were not motions under NRCP 7(b) or FJDCR 15. Instead, Fernley's requests for a continuance were simply part of its arguments in its opposition memoranda to the State's and the Legislature's motions to dismiss. As a result, the State and the Legislature were not required to file new opposition memoranda to oppose Fernley's requests for a continuance. Rather, the State and the Legislature only needed to oppose Fernley's requests for a continuance in their reply memoranda in support of their motions to dismiss. FJDCR 15.

When a party makes a request for a continuance under NRCP 56(f) to conduct discovery, courts have recognized two methods for making such a request. 11-56 Moore's Federal Practice-Civil §56.101[1] (LexisNexis 2012). First, because the party must support its request for a continuance under NRCP 56(f) with a proper affidavit or declaration, "[o]ne way of submitting the affidavit or declaration is to submit it along with the party's response to the summary judgment motion. In that situation, the party may incorporate its views on the need for additional discovery into its response brief and reference the attached affidavit or declaration in its argument." Id.

Alternatively, the party may request a continuance under NRCP 56(f) "separately from—and in advance of—its summary-judgment response. Note that,

under Rule 7(b), every request for a court order should take the form of a written motion." Id. Under this second method, "courts have stated that if the request is filed before the response to the summary judgment motion, it should be filed as a separate motion with the affidavit or declaration attached in support of the motion." Id.

In response to the State's and the Legislature's motions to dismiss, Fernley did not file separate motions with its supporting affidavits under NRCP 56(f) attached to the motions. Instead, Fernley attached its supporting affidavits under NRCP 56(f) to its opposition memoranda to the motions to dismiss. (*PA2:317-18; PA4:658-59.*) Fernley also incorporated its views on the need for discovery under NRCP 56(f) into its opposition memoranda, and it referenced the attached affidavits as part of its arguments in opposition to the motions to dismiss. (*PA2:299-301; PA4:640-42.*)

Because Fernley decided to include its requests for a continuance in its opposition memoranda and because Fernley attached its supporting affidavits to its opposition memoranda, Fernley's requests were not motions under NRCP 7(b) and FJDCR 15. Given that Fernley's requests were not motions, the State and the Legislature were not required to file new opposition memoranda to oppose Fernley's requests for a continuance. Instead, the State and the Legislature only

needed to oppose Fernley's requests for a continuance in their reply memoranda in support of their motions to dismiss. FJDCR 15.

Fernley also contends that in the State's reply memorandum, the State did not address or otherwise oppose Fernley's request a continuance under NRCP 56(f). (Ans. Br. 3.) Although the State did not specifically reference NRCP 56(f) in its reply memorandum, the State argued extensively that all of Fernley's claims are barred as a matter of law. (*PA3:3-11.*) When 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). 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. Adv. Op. 5, 249 P.3d 501, 508 n.7 (2011). Therefore, by arguing that all of Fernley's claims are barred as a matter of law, the State opposed Fernley's request for a continuance under NRCP 56(f).

Moreover, there is no question that the Legislature explicitly opposed Fernley's request for a continuance under NRCP 56(f) in the Legislature's reply memorandum. (*PA6:1277-78.*) The Legislature specifically argued that the district court "should not grant 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 would not change the result of this case."

(*PA6:1277*.) In its order denying the motions to dismiss and granting the continuance under NRCP 56(f), the district court also expressly found that the Legislature opposed Fernley's request for a continuance in the Legislature's reply memorandum. (*PA6:1298*.) Therefore, as clearly reflected in the record, the State and the Legislature timely and properly opposed Fernley's requests for a continuance under NRCP 56(f) to conduct discovery.

D. The district court manifestly abused its discretion when it treated the motions to dismiss as motions for summary judgment and granted Fernley a continuance to conduct discovery.

Fernley contends that the plain language of NRCP 12(b) required the district court to treat the motions to dismiss as motions for summary judgment because the State and the Legislature supported their motions to dismiss with materials outside the pleadings. (Ans. Br. 11-16.) Because the State and the Legislature presented only matters of public record with their motions to dismiss, Fernley's contention is wrong as a matter of law.

When interpreting and applying the Nevada Rules of Civil Procedure, this Court generally follows federal caselaw interpreting and applying the Federal Rules of Civil Procedure because "'federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules.'" Foster v. Dingwall, 126 Nev. Adv. Op. 5, 228 P.3d 453, 456 (2010)

(quoting Nelson v. Heer, 121 Nev. 832, 834 (2005)).[2] Under federal caselaw, the district court is not required to convert a motion to dismiss into a motion for summary judgment when the moving party attaches exhibits that concern matters of which the court may take judicial notice, such as matters of public record. Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012); Lee v. Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001); Nevada v. Burford, 708 F.Supp. 289, 292 (D. Nev. 1989); 2-12 Moore's Federal Practice-Civil §12.34[2] (LexisNexis 2012) (collecting cases). As explained by the United States Supreme Court, in deciding a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and *matters of which a court may take judicial notice*." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (emphasis added) (citing 5B Wright & Miller, Federal Practice and Procedure, §1357 (3d ed. 2004 & Supp. 2007)).

[2] Accord Lund v. Dist. Ct., 127 Nev. Adv. Op. 28, 255 P.3d 280, 283 (2011); Moseley v. Dist. Ct., 124 Nev. 654, 662-63 (2008); In re Petition of Phillip A.C., 122 Nev. 1284, 1290 (2006); Am. Home Assurance Co. v. Dist. Ct., 122 Nev. 1229, 1238 n.29 (2006); Blaine Equip. Co. v. State Purchasing Div., 122 Nev. 860, 865 (2006); Winston Prods. Co. v. Deboer, 122 Nev. 517, 523 (2006); Exec. Mgmt., Ltd. v. Ticor Title Ins., 118 Nev. 46, 53 (2002).

Under Nevada's evidence code, the district court may take judicial notice of any fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." NRS 47.130(2)(b). Such facts include matters of public record and any information that is verifiable from public records. Jory v. Bennight, 91 Nev. 763, 766 (1975); Cannon v. Taylor, 88 Nev. 89, 92 (1972). In determining the type of matters that the district court may consider in ruling on a motion to dismiss, this Court has followed the federal caselaw and has held that the district court "may take into account *matters of public record* . . . when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted." Breliant v. Preferred Equities Corp., 109 Nev. 842, 847 (1993) (emphasis added) (following 5A Wright & Miller, Federal Practice and Procedure, §1356 (2d ed. 1990)).

With their motions to dismiss, the State and the Legislature presented only matters of public record and information that is verifiable from public records. The State presented information concerning the C-Tax system that was obtained and is verifiable from public records of the Department of Taxation. (*PA1:30.*) And the Legislature presented public records that are part of the legislative history of Senate Bill No. 254 (SB254), 1997 Nev. Stat., ch. 660, at 3278-3304, which enacted the C-Tax system codified in NRS 360.600-360.740. (*PA1:79-88; PA1:90-212; PA2:213-94.*). Because the State and the Legislature presented only

matters of public record with their motions to dismiss, the district court manifestly abused its discretion when it treated the motions to dismiss as motions for summary judgment.

Fernley also contends that the State and the Legislature did not formally request the district court to take judicial notice of any of their exhibits. (Ans. Br. 12-13.) However, the State and the Legislature were not required to make a formal request for judicial notice because under Nevada's evidence code, "[a] judge or court may take judicial notice, *whether requested or not*." NRS 47.150(1) (emphasis added).

Furthermore, the Legislature made a formal request for judicial notice in its motion to dismiss. (*PA1:41-42.*) Under Nevada's evidence code, "[a] judge or court shall take judicial notice if requested by a party and supplied with the necessary information." NRS 47.150(2). There is nothing in the evidence code that precludes a party from making a formal request for judicial notice in a motion to dismiss.

With the Legislature's motion to dismiss, the Legislature provided the district court with public records that are part of the legislative history of SB254, and those public records, by their very nature, supplied the district court with the necessary information to take judicial notice. 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."); Experian Info. Solutions v. Lifelock, Inc., 633 F.Supp.2d 1104, 1107 (C.D. Cal. 2009) ("court may take judicial notice of the legislative history of a statute"). The Legislature also advised the district court that it "has the authority to consider materials outside the pleadings that are properly subject to judicial notice, such as matters of public record," and that it "may take judicial notice of public records without converting the motion to dismiss into a motion for summary judgment." (*PA1:41-42.*)

As clearly reflected in the record, the Legislature made a formal request for judicial notice in its motion to dismiss. Based on that request, the district court should have taken judicial notice of the exhibits attached to the State's and the Legislature's motions to dismiss without converting the motions to dismiss into motions for summary judgment. By failing to do so, the district court manifestly abused its discretion when it treated the motions to dismiss as motions for summary judgment.

The district court also manifestly abused its discretion when it granted Fernley a continuance under NRCP 56(f) to conduct discovery. As discussed previously, when 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). See Nylund, 117 Nev. at 917 & n.10; J.E. Dunn, 249 P.3d at 508 n.7. 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, the district court manifestly abused its discretion by granting Fernley a continuance under NRCP 56(f) to conduct discovery.

E. Fernley's constitutional challenges to the C-Tax system raise important and urgent issues of law that need clarification and public policy would be best served by the Court's consideration of the mandamus petition.

Fernley contends that no urgency exists that would militate in favor of granting mandamus relief. (Ans. Br. 37-39.) However, 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 issues of law that implicate the fiscal policy of the entire state. So long as Fernley's constitutional challenges remain pending, the budget of every local government that receives C-Tax distributions rests on an uncertain foundation. To have confidence in their budgets, Nevada's local governments clearly have an urgent need for the Court to determine whether Fernley's constitutional challenges are barred as a matter of law and the C-Tax system is a valid exercise of the State's fiscal powers.

Moreover, as Fernley acknowledges in its answering brief, 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 is self-evident that the Legislature's

consideration of such legislation would be impacted by the Court's resolution of the legal issues in the mandamus petition. And as explained in the Petitioners' supplement to their mandamus petition, under the proposed deadline calendar for the 2013 legislative session, the sooner the Court is able to conclusively resolve the issues in the mandamus petition, the more time there will be available during the 2013 legislative session for committees in both Houses and the Houses themselves to consider legislation pertaining to the C-Tax system in light of the Court's determination of whether Fernley's constitutional challenges are barred as a matter of law and the C-Tax system is a valid exercise of the State's fiscal powers.

Therefore, Fernley's constitutional challenges to the C-Tax system raise important and urgent issues of law that need clarification, and it would be in the best interests of the State and its local governments for the Court to conclusively resolve the issues in the mandamus petition as soon as is reasonably possible before the important deadlines in the 2013 legislative session.

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

In their mandamus petition, the Petitioners argue that Fernley's claims for money damages on its federal constitutional claims are barred as a matter of law by the State's sovereign immunity. In its answering brief, Fernley fails to make any argument or cite any authority to refute the Petitioners' argument and authority. (Ans. Br. 16-18.) Therefore, given that Fernley has failed to oppose the

Petitioners' argument and authority, Fernley's claims for money damages on its federal constitutional claims are barred as a matter of law. See Polk v. State, 126 Nev. Adv. Op. 19, 233 P.3d 357, 360 (2010) ("a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal").

In their mandamus petition, the Petitioners argue that Fernley's claims for money damages on its state constitutional claims are barred as a matter of law by the State's sovereign immunity under subsection 1 *and* subsection 2 of NRS 41.032. Each subsection of NRS 41.032 provides a separate basis for claiming sovereign immunity. Hagblom v. State Dir. Mtr. Vehs., 93 Nev. 599, 603-05 (1977).

In its answering brief, although Fernley makes an argument and cites authority regarding sovereign immunity under subsection 2 of NRS 41.032, Fernley does not make any argument or cite any authority regarding sovereign immunity under subsection 1 of NRS 41.032. (Ans. Br. 16-18.) Therefore, given that Fernley has failed to oppose the Petitioners' argument and authority regarding sovereign immunity under subsection 1 of NRS 41.032, Fernley's claims for money damages on its state constitutional claims are barred as a matter of law.

In addition, Fernley's state constitutional claims for money damages are also barred as a matter of law by sovereign immunity under subsection 2 of

NRS 41.032. Fernley contends that such sovereign immunity is not available because the act of administering the C-Tax system does not require the performance of official duties which involve an element of official discretion or judgment or which are grounded in the creation or execution of social, economic or political policy. (Ans. Br. 16-18.) Fernley's contention is wrong as a matter of law.

Under subsection 2 of NRS 41.032, state agencies and officials are entitled to sovereign immunity whenever "the injury-producing conduct is an integral part of governmental policy-making or planning." Martinez v. Maruszczak, 123 Nev. 433, 446 (2007). In this case, the alleged injury-producing conduct arises from the performance of official duties by 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 under subsection 2 of NRS 41.032.

Finally, Fernley contends that issues of sovereign immunity under NRS 41.032 are mixed questions of law and fact which should not be summarily

adjudicated at the motion-to-dismiss stage. (Ans. Br. 17-18.) However, when it is apparent from the face of the complaint that the defendants are entitled to sovereign immunity under NRS 41.032 as a matter of law, dismissal is required.[3]

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

In its answering brief, Fernley acknowledges the existence of the doctrine precluding political subdivisions from bringing Fourteenth Amendment claims against the State. Fernley contends, however, that courts in other jurisdictions have found limited exceptions which allow political subdivisions to bring Fourteenth Amendment claims against the State. In particular, Fernley contends that courts have recognized limited exceptions when the legislation being challenged: (1) adversely affects a municipality's proprietary interest in a specific fund of moneys; or (2) involves issues concerning taxation that are of great public interest. (Ans. Br. 21-24.) The Court should reject Fernley's contentions because the limited exceptions advocated by Fernley should not be applied to this case.

Fernley cites City of New York v. State, 655 N.E.2d 649, 652 (N.Y. 1995), for the proposition that a political subdivision may bring Fourteenth Amendment

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[3] See, e.g., Foster v. Washoe County, 114 Nev. 936, 941-43 (1998); Nev. Power v. Clark County, 107 Nev. 428, 428-30 (1991); Ramirez v. Harris, 105 Nev. 219, 220 (1989); Scott v. Dep't of Commerce, 104 Nev. 580, 583-85 (1988); Hagblom, 93 Nev. at 599-605.

claims against the State "where the State legislation adversely affects a municipality's *proprietary* interest in a specific fund of moneys." (Emphasis added.) Generally speaking, a municipality performs both governmental and proprietary functions. 56 Am.Jur.2d Municipal Corporations, Etc. §§170-172 (2010). A "governmental function" is a function performed by a municipality for the benefit of the general public. Id. By contrast, a "proprietary function" is function performed by a municipality for the profit or benefit of the municipality, such the operation of a local governmental utility. Id.

When a municipality receives distributions of tax money from the State to perform its governmental functions, the municipality does not have a proprietary interest in that money because the collection and distribution of tax money is a governmental function. Albany County v. Hooker, 97 N.E. 403, 408 (N.Y. 1912) ("The raising of money by tax . . . is, in itself, a governmental act."); City of Buffalo v. State Bd. of Equal., 272 N.Y.S.2d 168, 170 (N.Y. App. Div. 1966) ("The collection of taxes is governmental in nature."). Because the municipality does not have a proprietary interest in such tax money, the municipality lacks standing to bring Fourteenth Amendment claims against the State regarding distribution of the tax money. Id.

For example, in City of New York v. State, the City of New York and its Board of Education claimed that the State's funding of public schools resulted in

separate and unequal treatment of the city's public schools in violation of the Equal Protection Clause of the Fourteenth Amendment. 655 N.E.2d at 650. The political subdivisions contended that they could bring a Fourteenth Amendment claim against the State because they were challenging legislation that adversely affected their proprietary interests. The New York Court of Appeals rejected the their contention, stating that:

> Their claim is merely to a greater portion of the general State funds which the Legislature chooses to appropriate for public education. Accordingly, they lack a proprietary interest in a fund or property to which their claims relate and cannot ground capacity to sue on that basis . . . Finding a proprietary interest of the City of New York sufficient to confer capacity to sue without regard to a cognizable right in a specific fund would create a municipal power to sue the State in any dispute over the appropriate amount of State aid to a governmental subdivision or the appropriate State/local mix of shared governmental expenses. The narrow proprietary interest exception would then ultimately swallow up the general rule barring suit against the State by local governments.

Id. at 654.

In this case, Fernley's claim is merely to a greater portion of the State tax money which the Legislature chooses to appropriate to local governments through the C-Tax system. Because Fernley receives C-Tax money from the State to perform its governmental functions, Fernley does not have a proprietary interest in the tax money distributed under the C-Tax system. Therefore, Fernley lacks standing to bring Fourteenth Amendment claims against the State alleging unconstitutional distribution of C-Tax money.

Fernley cites several cases for the proposition that a political subdivision may bring Fourteenth Amendment claims against the State when the challenged state legislation involves issues of great public interest. Sanchez v. City of Modesto, 51 Cal.Rptr.3d 821, 834 (Cal. Ct. App. 2006); Minn. State Bd. of Health v. City of Brainerd, 241 N.W.2d 624, 628 (Minn. 1976); Associated Hosp. Serv. v. City of Milwaukee, 109 N.W.2d 271, 282 (Wis. 1961).[4]

In Sanchez v. City of Modesto, the court addressed the issue of whether the city had standing to claim that the California Voting Rights Act of 2001 violated the Equal Protection Clause as applied to the city's at-large city council elections. 51 Cal.Rptr.3d at 825-35. The court held that the city could proceed with its equal protection challenge only because it had third-party standing to assert the

[4] Fernley also cites cases that permitted *state* officials to bring Fourteenth Amendment challenges against state statutes, but these cases are inapt because they did not involve challenges by political subdivisions. Thompson v. S.C. Comm'n on Alcohol & Drug Abuse, 229 S.E.2d 718, 719 (S.C. 1976); Fulton Found. v. Wis. Dep't of Tax'n, 108 N.W.2d 312, 317 (Wis. 1961).

Fernley also cites Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979). That case is inapt because the political subdivision alleged that the State violated the Supremacy Clause, not the Equal Protection or Due Proces Clause. See Donelon v. La. Div. of Admin. Law, 522 F.3d 564, 567 (5th Cir. 2008) (explaining that in Rogers v. Brockette, "this court took the anomalous, if not unique, position that a political subdivision might have standing to challenge state laws that allegedly violate the Supremacy Clause.").

individual rights of its residents who faced genuine obstacles to asserting their own rights to be protected from racially discriminatory elections. Id.

In Minnesota State Board of Health v. City of Brainerd, the court addressed the issue of whether the city had standing to bring a Fourteenth Amendment challenge against a state statute that required the city to fluoridate its municipal water supply. 241 N.W.2d at 626-28. The court held that the city had standing because the question of fluoridating the city's drinking water involved an issue of substantial public interest that affected the individual rights of its residents. Id. at 628. The court also held that the city had standing because in its capacity as proprietor of the municipal water supply, the city had a very specific and concrete interest in protecting its municipal water works from alleged damage that fluoridation could cause to city's water filtration system.

Finally, in Associated Hospital Service v. City of Milwaukee, the court addressed the issue of whether the city had standing to bring a Fourteenth Amendment challenge against a state statute that granted certain nonprofit hospital-service corporations exemptions from municipal taxes on real and personal property. 109 N.W.2d at 281-82. The court held that the city had standing because it was not protecting its own rights to due process or equal protection, but was acting "in a representative capacity and in behalf of its resident taxpayers, who might be adversely affected if such statute is made effective." Id.

Based on these cases, Fernley contends that it brought this action on behalf of its residents because they are not receiving the benefit of a legally appropriate share of C-Tax revenues and are paying significantly more into the C-Tax system than they are receiving from it. Therefore, Fernley argues that this case justifies applying an exception to the general rule which precludes political subdivisions from bringing Fourteenth Amendment claims against the State because this case involves a matter of taxation that is of great public interest. (Ans. Br. at 22-23.) The Court should reject Fernley's argument for the following reasons.

First, the Court should not adopt a "great public interest" exception to the general rule barring political subdivisions from bringing Fourteenth Amendment claims against the State. At the federal level, neither the United States Supreme Court nor any federal circuit court has adopted such an exception. See Harold A. Olsen, Note, Procedural Barriers to Suits Against the State by Local Government, 62 Brooklyn L. Rev. 431, 442-59 (1996). At the state level, it appears that only California, Minnesota, New York, Wisconsin and Utah have adopted any exceptions to the general rule barring political subdivisions from bringing Fourteenth Amendment claims against the State. Id. However, the Wisconsin Supreme Court has held that the "great public interest" exception applies only when a political subdivision challenges the constitutionality of a state statute in an action against a private litigant. It does not apply when a political subdivision

challenges the constitutionality of a state statute in an action against the State. Columbia County v. Bd. of Trustees, 116 N.W.2d 142, 146 (Wis. 1962); City of Kenosha v. State, 151 N.W.2d 36, 42-44 (Wis. 1967). Given that so few jurisdictions have adopted the "great public interest" exception, there is no compelling reason for the Court to adopt it in this case.

Second, if the Court were to adopt the "great public interest" exception, that exception would ultimately swallow up the general rule barring political subdivisions from bringing Fourteenth Amendment claims against the State. It is reasonable to assume that most political subdivisions will attempt to resolve their differences with the State by resort to the political branches, and that they will not bring a judicial action against the State unless it is a matter of great public importance. Therefore, the very fact that a political subdivision has sued the State for an alleged violation of the Fourteenth Amendment is a matter of great public interest, and it is hard to imagine a case between a political subdivision and the State that would not qualify for the "great public interest" exception.

Accordingly, the Court should reject the "great public interest" exception because it is overbroad and unworkable. Instead, the Court should continue to apply its long-standing precedent that bars political subdivisions from bringing Fourteenth Amendment claims against the State. 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). Under that long-standing precedent, Fernley's Fourteenth Amendment claims are barred as a matter of law by Fernley's lack of standing to bring the claims.

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

In their mandamus petition, the Petitioners argue that a political subdivision does not have standing to bring claims against the State alleging violations of state constitutional provisions, unless the state constitutional provisions exist for the protection of political subdivisions of the State. Fernley contends that although a local government lacks standing to challenge certain decisions in which the State itself takes away or gives rights or powers to a local government, that does not mean that a local government cannot allege that the state government is acting outside the confines of its constitutionally defined scope of authority. (Ans. Br. 25.)

Fernley's contention is wrong as a matter of law because a local government has standing to allege that the state government is acting outside the confines of its constitutionally defined scope of authority *only if* the state constitutional provisions at issue exist for the protection of political subdivisions of the State. Reno v. County of Washoe, 94 Nev. 327, 329-32 (1978); City of New York v. State, 655 N.E.2d 649, 652 (N.Y. 1995). 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.

Furthermore, contrary to Fernley's contentions, the Petitioners are not arguing that "only a branch of state government has standing to assert a separation of powers claim." (Ans. Br. 25.) Instead, the Petitioners are arguing that a *political subdivision* does not have standing to assert a separation-of-powers claim against the State. Whether any other person or entity has standing to assert a separation-of-powers claim against the State is irrelevant to this case. Therefore, because Fernley lacks standing to bring separation-of-powers claims against the State, its separation-of-powers claims are barred as a matter of law.

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

Fernley contends that its constitutional claims are not time-barred by the statute of limitations based on the continuing violations doctrine. (Ans. Br. 18-19.) Fernley's contention is wrong as a matter of law.

As thoroughly discussed by the Petitioners in their mandamus petition, 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 42 U.S.C. §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). Under the Morgan limitations, 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 its answering brief, Fernley fails to discuss the Morgan limitations, and it contends that there are repeated violations every time there is a collection and distribution under the C-Tax formula. (Ans. Br. 18-19.) However, because 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, the constitutional violation occurred, if at all, in 2001. Therefore, 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. Because all of Fernley's federal constitutional claims accrued in 2001, the claims are time-barred by the statute of limitations as a matter of law.

With regard to Fernley's state constitutional claims, this Court has not recognized a continuing violations doctrine for state constitutional claims.

Nevertheless, Fernley contends that its constitutional rights are violated every time a dollar is collected and distributed under the C-Tax formula. (Ans. Br. 18-19.)

As thoroughly discussed by the Petitioners in their mandamus petition, courts in other jurisdictions 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); Davidson v. United States, 66 Fed. Cl. 206, 207-10 (Fed. Cl. 2005).

In this case, the alleged "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. Therefore, 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. Because the alleged "wrong" occurred in 2001, all of

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

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

In its answering brief, Fernley does not contest that it delayed bringing its constitutional challenge to the C-Tax system for at least eleven years. (Ans. Br. 20-21.) However, Fernley contends that laches does not apply because it has never acquiesced in the alleged inequities of the C-Tax system but "has actively, albeit unsuccessfully, sought a C-Tax adjustment before both the executive and legislative branches of state government." Id. at 20. Fernley also contends that its eleven-year delay has not "prejudiced other participants in the C-Tax system." Id. Neither of Fernley's contentions defeats the bar of laches.

First, the fact that Fernley has allegedly pursued remedies in the legislative and executive branches during the past eleven years does not excuse the Fernley'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). Second, 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. 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 as a matter of law.

K. 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.

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

In its answering brief, Fernley contends that the rational-basis test may not be the correct constitutional test and that a rational-basis analysis cannot be conducted until the facts of the case are developed through discovery. (Ans. Br. 23-24.) Fernley's contentions are wrong as a matter of law.

First, because Fernley is making a Fourteenth Amendment challenge to a tax statute, the only way for Fernley to prove its equal protection and due process claims 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). Second, a court may decide a Fourteenth Amendment challenge to a tax statute on a motion to dismiss "if any state of facts reasonably can be conceived that would sustain [the tax statute]" under the rational-basis test. N.Y. Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938) (affirming lower court's dismissal of complaint for failure to state a

claim where challenged tax statute satisfied rational-basis test under Equal Protection and Due Process Clauses).

As thoroughly discussed by the Petitioners in their mandamus petition, there are many states of facts which reasonably can be conceived to sustain the C-Tax system under the rational-basis test. Therefore, Fernley's Fourteenth Amendment claims fail to state a claim for relief as a matter of law.

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

In its answering brief, Fernley contends that the C-Tax system violates separation of powers because the Legislature has unconstitutionally delegated the "power of the purse" to the executive branch. In particular, Fernley contends that appropriation determinations cannot be delegated to the executive branch even with clear enough standards. (Ans. Br. 26-28.) Fernley's contentions are wrong as a matter of law.

As thoroughly discussed by the Petitioners in their mandamus petition, 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); 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 as a matter of law.

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

In its answering brief, Fernley contends that it is not on equal footing with other participants in the C-Tax system and that, as applied to Fernley, the C-Tax statutes are special or local laws. (Ans. Br. 29-33.) Fernley's contention is wrong as a matter of law.

First, the C-Tax statutes do not have any of the hallmarks of special or local laws which typically subject only a few named political subdivisions to specialized burdens that would not be imposed on other similarly situated political subdivisions. On the contrary, the C-Tax statutes apply to almost every local

government in Nevada, and they 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 v. M Resort, 127 Nev. Adv. Op. 24, 255 P.3d 247, 254 (2011).

Second, even if Fernley is not on equal footing with other cities and towns in the C-Tax system, there is a rational basis for placing Fernley in a different class from those other cities and towns. 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. However, 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 under the C-Tax system. Therefore, 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 as a matter of law.

In its answering brief, Fernley also contends that the C-Tax statutes are special or local laws "[f]or the assessment and collection of taxes" which violate Article 4, §20. (Ans. Br. 29-34.) First, Fernley's contention is wrong as a matter

of law because, as discussed previously, the C-Tax statutes are not special or local laws but are general laws of uniform operation throughout the State.

Second, as thoroughly discussed by the Petitioners in their mandamus petition, Fernley's contention is also wrong as a matter of law because the C-Tax statutes contain no provisions dealing with the assessment or collection of the six statewide taxes that are deposited in Local Government Tax Distribution 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 special or local laws, they would not be special or local 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.

In its answering brief, Fernley also contends that the C-Tax statutes are unconstitutional special or local laws under Article 4, §21. (Ans. Br. 34-37.) In particular, Fernley contends that the C-Tax statutes violate Article 4, §21 because:

> [A] general law can easily be made applicable with respect to the collection and appropriation of the six taxes that make up the C-Tax system. Instead of an automatic appropriation based on a complex mathematical formula . . . the taxes could simply be collected, deposited into a fund segregated for local governments, and appropriated biennially by the Legislature after a careful review of local government budgets.

(Ans. Br. 35.)

Fernley's argument is defeated by its own example. Under that example, the Legislature would be required to make individualized special and local appropriations during each regular session to each separate local government based on an individualized special and local review of each separate local government budget. That is the antithesis of a law that is "general and of uniform operation throughout the State." Nev.Const. art.4, §21. Instead of following the special and local approach advocated by Fernley's example, the Legislature enacted C-Tax statutes that apply uniformly to all similarly situated local governments embraced in classes founded upon natural, intrinsic and rational distinctions. As a result, the C-Tax statutes are general laws of uniform operation throughout the State, and they do not violate Article 4, §21 as a matter of law.

Finally, Fernley's arguments that the C-Tax statutes violate Article 4, §21 are not supported by the Court's decision in Anthony v. State, 94 Nev. 337 (1978). In that case, the Legislature enacted several tax distribution statutes which provided that in "a county having a population of more than 200,000, 68.5% of the money shall be apportioned to the largest city and the remainder among the other cities in proportion to their respective populations." 94 Nev. at 340. The Court found that although the statutes contained an open-ended population classification, other provisions of the legislation made it clear that the legislation was intended to benefit only the City of Las Vegas and that it imposed specialized burdens on the

other local governments in Clark County. Id. at 339-42. In particular, the Court determined the statutes were "special local legislation which statutorily assures a fixed percentage of allocated funds for Las Vegas, while other cities within Clark County must share the remainder in proportion to their population." Id. at 342.

In reviewing the constitutionality of the statutes under Article 4, §21, the Court concluded that there was no rational basis for treating Las Vegas differently from other cities. Id. As explained by the Court:

> While the Legislature may, within constitutional limits, disburse the proceeds of taxes, fees, and penalties to various communities inequitably according to need, when the Legislature chooses to disburse among other cities according to population proportion, however, there must be some rational basis for treating the largest city in a particular county different from other cities.

Id. Finding that "such rationality is absent," the Court held that the tax distribution statutes violated Article 4, §21 because the statutes "specify rather than classify and are therefore constitutionally impermissible. The legislation is directed at solving a problem special to Las Vegas which could as easily be resolved by a general law." Id.

Unlike the statutes struck down in Anthony, the C-Tax statutes were not enacted to solve a problem special to a particular political subdivision. Instead, as the legislative history of SB254 makes clear, the C-Tax statutes were enacted to solve statewide problems with the distribution of revenue to almost every local government in Nevada. (*PA1:90-212; PA2:213-94.*) Thus, the C-Tax statutes do

not apply to or benefit just one city or locality like the statutes struck down in Anthony. Rather, 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.

Consequently, 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 Article 4, §21 claims as a matter of law.

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

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 **17th** day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. We hereby certify that the foregoing Reply Brief 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 Reply Brief 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 Reply Brief, 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 Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief 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 Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **17th** day of December, 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 **17th** day of December, 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 Petitioners' Reply Brief, as follows:

By means of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to:

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FIRST JUDICIAL DISTRICT COURT
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Carson City, NV 89701
Respondent District Judge

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