IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel. DEPARTMENT OF TAXATION; THE HONORABLE DAN SCHWARTZ, in his official capacity as TREASURER OF THE STATE OF NEVADA; and THE LEGISLATURE OF THE STATE OF NEVADA,

Respondents.

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 20th day of May, 2015.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

APPELLANT'S OPENING BRIEF

Appellant City of Fernley, Nevada ("Fernley"), a municipal corporation of the State of Nevada, hereby files its Opening Brief in accordance with NRAP 28 and 32.

In this Opening Brief, Fernley respectfully asks the Court to reverse various final rulings by the district court in favor of Respondents the State of Nevada ex rel. the Nevada Department of Taxation ("Department"); the Honorable Dan Schwartz in his official capacity as Treasurer of the State of Nevada ("Treasurer"; together with the Department, "State"); and the Legislature of the State of Nevada ("Legislature"); together with the State, "Respondents"), and to declare that Nevada's Consolidated Tax ("C-Tax") system is unconstitutional and to direct the entry of an order enjoining the State from making allocations or distributions under the current system until the constitutional defects in the system are remedied.

I. JURISDICTIONAL STATEMENT

This case is properly before this Court based on the district court's October 6, 2014 Order and Judgment, which was a final judgment for purposes of NRAP 3A(b)(1) in that it rendered judgment on all claims pending among the parties. (JA 22:3948-4000). Notice of Entry of the Order and Judgment was served on October 8, 2014. (JA 22:4001-4057). Fernley's Notice of Appeal was filed on November 7, 2014 (JA 23:4205-4207), and was therefore timely pursuant to NRAP 4(a)(1).

Two related orders are also on appeal. First, that part of the district court's June 6, 2014 Order dismissing all claims against the Treasurer (JA 7:1451–1457). Second, the district court's October 15, 2014 Order Granting the Department's Motion for Costs (JA 23:4190-4194).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err in concluding that the general four-year statute of limitations contained in NRS 11.220 applies to constitutional claims brought pursuant to Article 3, Section 1 and Article 4, Sections 20 and 21 of the Nevada Constitution?

2. Does Nevada's C-Tax system violate the special-or-local-law provision of Article 4, Section 20 of the Nevada Constitution?

3. Does Nevada's C-Tax system violate the general-and-uniform-laws provision of Article 4, Section 21 of the Nevada Constitution?

4. Did the district court err in concluding that Fernley lacks standing to allege a violation of the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution?

5. Does Nevada's C-Tax system violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution?

6. Did the district court err in dismissing all claims against the Treasurer pursuant to NRS 41.032(1)?

7. Did the district court err in awarding costs to the State?

III. STATEMENT OF THE CASE

In 1997, the Nevada Legislature passed Senate Bill 254, enacting the C-Tax system whereby six different state taxes would be collected, placed in a segregated State account, and appropriated by the Department of Taxation and Nevada Treasurer to local governments via a statutory formula. (Senate Bill 254 (69th Session, 1997); JA 14:2513-2529; *see also* NRS 360.680-690). Since 1997, the C-Tax system and the distributions therefrom have been largely unchanged, although the circumstances of the City of Fernley, one of the recipients of C-Tax funds, have changed dramatically.

Fernley incorporated as a municipality in 2001, and is the only local government to incorporate as a municipality in Nevada since the passage of Senate Bill 254 in 1997. (JA 14:2586-2587). Fernley's population and assessed valuation has more than doubled since 1997, and consequently the service needs for its residents have increased exponentially. (JA 7:1496.) In 2001, Fernley received $100,032.03 in C-Tax. *See id*. In 2013, Fernley received $133,050.30 in C-Tax. *See id*. By comparison, comparably sized cities received millions of dollars more in that same time frame, despite growth rates significantly lower than Fernley. *See id*. The distribution to Mesquite from 2001 to 2013 increased by $2,119,650.26. *Id*. The distribution to Boulder City from 2001 to 2013 increased by $2,597,747.07.

See id. The distribution to Elko from 2001 to 2013 increased by $7,063,483.29. *See id*. Even the Elko Television District receives more C-Tax revenue than Fernley. (JA 8:1659)

These gross inequities have left Fernley unable to provide comparable, and in some cases even basic, levels of services to its residents, and have forced Fernley residents to pay high, and unique, property taxes, while comparably sized neighbors realize high levels of service and lower property taxes.

Even more egregious, the State of Nevada has created effective barriers that make it impossible for a city incorporating after 1997 to obtain any significant adjustment to its C-Tax distributions, has demonstrated a shocking level of indifference to the inequitable situation, and has chosen instead to ignore the plight of politically isolated communities like Fernley. The fact that Fernley is the only municipality to incorporate in Nevada in the last twenty years demonstrates that municipal incorporation in Nevada is functionally obsolete due to the C-Tax system. After repeated and futile attempts to seek additional revenues via administrative and legislative requests, Fernley had no choice but to seek relief from this Court.

As will be demonstrated below, the C-Tax system violates Article 3, Section 1 of the Nevada Constitution (separation of powers), Article 4, Section 20 of the Nevada Constitution (prohibition on special or local laws) and Article 4, Section

21 of the Nevada Constitution (guarantee of general and uniform laws). Fernley requests injunctive relief to ensure that distributions in the future meet constitutional standards.[1]

IV. PROCEDURAL HISTORY

On June 6, 2012, Fernley filed its Complaint against the State seeking monetary, injunctive, and declaratory relief under both the United States and Nevada Constitutions. (JA 1:1–12). Subsequently, and despite objection from Fernley as it being unnecessary and duplicative, the Legislature forcibly intervened in this case. (JA 2:324–330; 3:648-650). The Respondents subsequently filed respective motions to dismiss which were denied by the district court without prejudice to allow for discovery. (JA 7:1341–1343).

Respondents thereafter petitioned this Court for review of the denial of the motions to dismiss. *See generally State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013). On January 25, 2013, this Court issued its writ (JA 7:1371–1372) and order holding Fernley's federal constitutional claims were time barred, but declined Respondent's request to dismiss Fernley's state constitutional claims and ordered the parties to complete discovery (JA 7:1373–1377; 7:1390-1392). *See also State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013). Following completion of discovery, the

[1] Fernley originally sought monetary relief in this case, but abandons that claim for remedy on this appeal.

Respondents filed respective motions to dismiss, which were subsequently converted to motions for summary judgment. (JA 7:1414-1420; JA 7:1421-1423). The district court initially dismissed all claims against the Treasurer, including claims for declaratory and injunctive relief, on the grounds of sovereign immunity. (JA 7:1451-1457). Fernley filed its own motion for summary judgment and sought reconsideration of the dismissal of all claims against the Treasurer. (JA 7:1458-2004; JA 12:2005-2045).

On October 6, 2014, the district court entered its order denying Fernley's motions for summary judgment and reconsideration and granting Respondents' motions for summary judgment. (JA 22:3948-4000). Shortly thereafter, the district court awarded costs to the Department. (JA 23:4190-4194). Fernley now appeals the portion of district court's order of June 6, 2014, which dismissed the claims against the Treasurer, the October 6, 2014 order and judgment, and the district court's order of October 15, 2014 awarding costs to the State.

V. STATEMENT OF THE FACTS

A. The City Of Fernley.

Fernley is located in Lyon County, approximately 28 miles east of Reno, Nevada. Over the past two decades, Fernley's population has more than doubled from approximately 8,000 people in 1997 to about 19,000 people today, and now accounts for approximately 36 percent of Lyon County's population. (JA 7:1496;

JA 8:1526) During this time, Fernley has surpassed the populations of Mesquite and Boulder City and is approaching the population of Elko. (JA 7:1496). Fernley incorporated as a city on July 1, 2001, when its population stood at approximately 9,500 people, and currently is Nevada's seventh most populous city. *See id*.; (JA 8:1527). Fernley is the only city in Nevada to have incorporated since the inception of the C-Tax system in 1997. (JA 14:2586-2587).

B. The C-Tax System.

The C-Tax system is a complex mathematical formula to collect and distribute taxes to local governments and special entities in Nevada. At the broadest level, revenues from six different taxes are collected throughout Nevada by the Nevada Department of Taxation ("Department") and deposited into a segregated State account called the Local Government Distribution Account (the "C-Tax Account"). *See* NRS 360.660 et. seq.; *see also* (JA 14:2457).

The funds in the C-Tax Account are distributed on a monthly basis by the Department and the Nevada Treasurer to local governments, enterprise districts and special districts. *See* NRS 360.690. Local governments, enterprise districts and special districts have no restrictions on how funds from the C–Tax can be used and accordingly, funds are available for general operating purposes and are a primary source of local government revenue. (JA 14:2475-2476; JA 14:2447; JA 14:2510-2511; JA 14:2480-2481).

Distributions from the C-Tax Account are first made at the county level, commonly called a Tier 1 distribution. (JA 14:2521-2524). Tier 1 distributions are thereafter further segregated into Tier 2 distributions. *See id*. Tier 2 distributions are the actual dollar amounts provided to counties, cities, towns, and other C-Tax recipients within a county. (JA 13:2434-2435).

Tier 2 distributions are made at two levels – a base distribution and an excess distribution. *See* NRS 360.680-690. A base distribution is of paramount importance because that amount was set in 1997 and carries forward from year to year, and is adjusted for increases in the Consumer Protection Index ("CPI"). *See* NRS 360.680-690. For example, if a city had a base distribution of $100 in 1998, they can count on a base distribution of $100 (plus adjustments based on the CPI) in 1999, 2000, and so on.[2]

The excess distribution is based on increases to assessed valuation and population within a local government, and is an addition to the base distribution. *See* NRS 360.690. For example, if a city had a base distribution of $100 and experienced significant growth in population and assessed valuation resulting in an excess distribution multiplier of 100%, the excess distribution would be $100 and

[2] For example, in fiscal year 2001 Fernley's base distribution was $93,923.45. In fiscal year 2002 Fernley's base distribution was $97,116.85, and by fiscal year 2011, Fernley's base was $120,631.97. (JA 14:2561-2562). By comparison, Boulder City had a base of $6,113,660.93 in fiscal year 2001, and a base of $7,836,416.68 in fiscal year 2011. (JA 14:2551-2552)

the overall C-Tax distribution would be $200. For purposes of comparison, if a city with a base distribution of $10 had the same level of growth in population and assessed valuation, its excess distribution would be $10 and the overall C-Tax distribution would be $20.[3] As is evident, the base distribution, which was established in 1997, is of *critical importance* because the entire future of C-Tax distributions is based on that number – whether it be adjustments based on CPI or adjustments based on increased population and assessed valuation. Moreover, as demonstrated below, the C-Tax system is set up in a way that precludes adjustments to a base distribution, which endlessly perpetuates the status quo first established in 1997.[4]

C. The Purpose of the C-Tax System.

The Legislature's primary objectives behind the creation of the C-Tax system in 1997 included: (1) initially preserving the "status quo" in the distribution of C-Tax revenue; and (2) distributing future tax revenue to areas of growth. (JA 14:2653-2654, 2661-2663; JA 14:2463-2466; JA 14:2457). As time has told, however, the "status quo" has been preserved so well that it remains in place to this

[3] For example, in fiscal year 2001 Fernley had an excess distribution of $6,108.59 and an excess distribution in fiscal year 2011 of $22,511.38 despite more than doubling in population and nearly doubling in assessed valuation. (JA 14:2578-2579). In other words, Fernley's excess distribution increased by $16,402.79 despite a population increase of 9,368 people, equating to $1.75 for each new resident.

[4] For a more detailed description of the C-Tax system, see JA 7:1462-1478.

day nearly two decades later, eliminating revenue distribution to areas of growth such as Fernley.

The first consideration in the creation of the C-Tax system was that the participants be held harmless in terms of tax distributions. (JA 14:2463-2466; JA 14:2457). To accomplish this goal, the revenues previously received by each entity became the base distribution for that entity in the first year of the C-Tax. (JA 14:2600; JA 14:2651; JA 13:2438-2439; JA 14:2466; JA 14:2457; JA15:2696).

In setting the base distributions in 1997, there was no consideration of population, assessed valuation, or of what type of services were being provided by a local government, and indeed there was no prerequisite for any specific type of service. (JA 14:2629-2630, 2606). While this approach may have advanced the Legislature's short-term interest to preserve the status quo, it also had long-term implications because it established each recipient's initial distribution as its base for the allocation of C-Tax revenues in subsequent years, which carries on to this day.(JA 14:2651-2652; JA14:2601-2602).

The second consideration of the C-Tax system was to direct future revenues to areas of growth, which were defined as areas experiencing an increase in service needs based upon growth in population and the assessed value of taxable property. (JA 14:2661-2662; 2456-2457). However, since the inception of the C-Tax, the all-important base distribution has been unrelated to growth or to the nature and

cost of services rendered by recipients even though the demand for services generally increases or decreases as their populations grow or decline. (JA 15:2709; JA14:2606, 2626; JA 14:2464).

Only excess distributions were to follow growth under the C-Tax. (JA 14:2446). After the first fiscal year of the C-Tax, it was possible for the total revenue generated under the C-Tax system to exceed the total combined bases of all C-Tax recipients. (JA 14:2656). This excess revenue is allocated to higher growth areas as determined by increases in population and assessed value of real property.(JA 14:2661-2663.) Excess revenue may not exist, however, in every fiscal year. (JA 14:2662-2663; JA 14:2625). Also, even when a recipient has obtained a distribution of excess revenue in a particular year, the amount of the distribution has not been added to the recipient's base for the following year, except during the period from approximately 1999 to 2002, and on a going forward basis from July 1, 2014. (JA 14:2604-2605; JA 8:1708-1709). *See also* Assembly Bill 68 (77th Session, 2013).

Accordingly, and despite the intent to have revenue follow growth, the C-Tax system has ensured that each recipient would generally maintain the same position relative to other recipients under the C-Tax system regardless of how their individual circumstances may change over time. (JA 14:2664-15:2668). In other words, an entity with a low base distribution in 1997 as compared to other C-Tax

recipients would see that low base carried forward into the future, even as members with high base distributions would see that high base carried forward. Of course, any adjustments by percentage to the base would be significantly higher in terms of actual dollars for entities with a high base distribution, and nominal in terms of actual dollars for entities with a low base distribution. (JA 14:2457).

The C-Tax system has two other unique characteristics designed to perpetuate the 1997 status quo and which prevent revenues from following growth. First, there is no requirement that C-Tax distributions decrease for recipients that decrease or even discontinue any services. *See, e.g.,* NRS Ch. 360; *see also* JA 14:2626-2627, JA 13:2438. Second, there is no requirement that C-Tax distributions decrease if there is a decrease in population or assessed valuation. *See* NRS 360.695. Instead, the Department has the discretion to decrease C-Tax revenues if population and assessed values of a local government have decreased in the immediately preceding three fiscal years. *See id*.; (JA 14:2616, 2621-2622; JA 15:2683-2686; JA 14:2477-2478). Although such conditions have existed more than once, the Department has never decreased any C-Tax revenues. (JA 14:2477-2480; *see also* JA14:2627-2628.)

Thus, by its terms and as applied, the C-Tax system virtually guarantees that the revenue distributed to each recipient will be tied in perpetuity to its initial

revenue base established in 1997. (JA 14:2602-2603; JA 15:2675-2677; JA 13:2439).

D. Newly Created Local Government Entities, Such As Fernley, Receive Different Treatment Under The C-Tax Than Local Government Entities That Existed At The Time The System Was Enacted, and Do Not Have an Opportunity for a Greater Distribution.

There are only two statutory mechanisms for a Local Government to seek an adjustment to its C-Tax distributions. First, a governmental entity formed after 1998 (Fernley is the only such governmental entity), has a one-year window to request an adjustment. NRS 360.740. Second, governmental entities can enter into an interlocal agreement to redistribute revenues. NRS 360.740(7). Neither option exists for Fernley and in fact, are nothing more than illusory remedies.

NRS 360.740 provides that a local government created after July 1, 1998 could apply for a C-Tax adjustment if it provided police protection ***and*** at least two other specified services, including fire protection, construction, maintenance, and repair of roads, or parks and recreation, before it became eligible to receive C-Tax revenue. *See* NRS 360.740(1); *see also* JA 15:2672-2673; *see also* JA 15:2726. Local government entities that preexisted the C-Tax, by contrast, had no obligation to provide police protection or any other service as a prerequisite to their receipt of revenue under the C-Tax. (JA 14:2613-2614; JA 15:2674).

Regardless, a request under NRS 360.740 must be made by December 31 of the year before the first year it receives C-Tax. NRS 360.740(2); (JA 15:2728-2730). Because Fernley incorporated in 2001, this option is no longer available. *See id*.; JA 14:2615.

NRS 360.740 bears some additional comment as an example of an additional barricade to a C-Tax adjustment. First, the establishment of a municipal police department is an expensive proposition. (JA 15:2744-2746). Moreover, the statute provides that the local government must already provide a police department before it can even ask for C-Tax to fund a police department. See NRS 360.740(1) (stating that a local government "which provides police protection" is eligible for an adjustment, rather than saying "which will provide police protection."). This creates a classic catch-22 where a local government has to have a police department to ask for the funds to stand up a police department, but can't stand up a police department without the funds to do so. (JA 13:2436-2437). Furthermore, any request for an adjustment is subject to review by the Committee on Local Government Finance ("CLGF") and if it decides against an adjustment, *no appeal is allowed*. See NRS 360.740(4); JA 14:2472-2473. With membership of the CLGF made up of representatives of other local governments, who would stand to lose revenues with a redistribution, including one of whom is a lobbyist paid to

prevent Fernley from receiving an adjustment, there is no likelihood of success for a new entity in such a process. (JA 13:2427-2429; JA 14:2448-2450).

With all of these insurmountable obstacles, it is no surprise that Fernley, as the only entity to incorporate since the creation of the C-Tax, did not pursue the creation of a police department in 2001. Regardless, NRS 360.740 is only available for a limited window of time which has long expired for Fernley.

The only other statutory option for a C-Tax adjustment is the use of a cooperative or interlocal agreement *See* NRS 360.740(7); JA 14:2658-2659, JA 15:2667-2668. Notably, there have been no meaningful cooperative or interlocal agreements for the redistribution of C-Tax revenue since the system was enacted almost 20 years ago. *See* NRS 360.740(7); JA 14:2504-2505, 2509.

In fact, there have only been ***two*** cooperative or interlocal agreements between C-Tax recipients for the purpose of reallocating revenues during the lengthy history of the C-Tax. (JA 14:2504-2505, 2509; JA 14: 2462-2463; JA 15:2751). One agreement was between White Pine County and Ely, and another was between Clark County and five of its cities for a short period and to correct an error in the distribution calculation. (JA14:2505-2509; JA 14:2462-2463). Notably, neither agreement had anything to do with one local government taking over the services of another. *Id*.

Fernley has repeatedly attempted to obtain an adjustment via an interlocal agreement. Even though it comprises approximately one-third of Lyon County's population, only a fraction of the Tier 1 C-Tax money returns to Fernley.[5] (JA 15:2752-2779). Several times Fernley asked Lyon County to share a portion of its C-Tax revenues, and every time it was rebuffed. (JA 13:2415). One request was for a 10 percent redistribution of Lyon County's C-Tax revenue and the other was for $200,000. *See id*.; *see also* JA 15:2781-2785. Fernley intended to use these additional funds to, among other things, undertake essential road repairs, upgrade its parks, and provide more police services. (JA 13:2416-2417.; *see also* NRS 360.740 (7)). Not only does Fernley's past inability to persuade Lyon County to enter into a cooperative or interlocal agreement regarding the redistribution of C-Tax revenue suggest that future attempts to do so would likely meet a similar fate, the possibility of such an agreement is now even more remote because Lyon County has retained a professional lobbyist to oppose Fernley's legislative efforts to expand its C-Tax revenue base. (JA 14:2450).

Finally, legislative solutions to a local government entity's inadequate C-Tax revenue base have been virtually nonexistent. Only the City of Henderson has been able to obtain from the Legislature a substantial upward adjustment in its C-Tax

[5] For example, in fiscal year 2011-2012 (the most recent year information was provided for revenue collections in the record), $4,165,732.39 was collected in Lyon County in C-Tax, yet only $143,143.35 came back to Fernley via C-Tax distributions. (JA 15:2752-2779) (JA 14:2530-2583).

base, receiving an increase to its base distribution (which subsequently carried forward) of $4 million in or about 2000 when the Speaker of the State Assembly was one of its elected representatives. (JA 14:2611-2612; JA 15:2668-2669, 2684-2685; JA 14:2469-2470). Fernley, a rural city with little political power in the Legislature, has repeatedly but unsuccessfully attempted to obtain a base distribution adjustment. (JA 13:2418-2419, 2422; JA 14:2612; JA 15:2669-2671). At the time this brief was filed, with only a few days remaining in the 2015 legislative session, there is no indication that Fernley will obtain any legislative relief in 2015 either.

E. Fernley's C-Tax Distributions Are Only A Fraction Of The C-Tax Revenues Received By Comparably Sized Nevada Cities, Leaving Fernley Unable to Provide Basic Services to its Residents.

The C-Tax revenue currently distributed to Fernley is far below the C-Tax revenue received by the comparably sized Nevada cities of Mesquite, Boulder City, and Elko. (JA 7:1496). Fernley's initial revenue base upon the enactment of the C-Tax in 1997, when it was still an unincorporated town, was only approximately $86,000. When Fernley incorporated in 2001, its population was 9,529, the total assessed value of taxable property within the city was $233,552,164, and its C-Tax distributions totaled $100,032.03. (JA 7:1496; JA 13:2423). By 2013, Fernley's population had nearly doubled to 18,897 and the total assessed value of taxable property within the city had nearly doubled to

$444,251,962, but its C-Tax distributions had only increased to $133,050.30. (JA 7:1496). Stated otherwise, Fernley now receives only about $7 in C-Tax revenue per resident despite its nearly 100 percent growth during the past 13 years. *See id*.

The nominal amount of C-Tax revenue presently distributed to Fernley stands in stark contrast to the C-Tax revenue received by Mesquite, Boulder City, and Elko, which were in existence and incorporated when the Legislature enacted the C-Tax. *See id*. All three of these cities have populations and total assessed values similar to Fernley's, but received C-Tax distributions in 2012 totaling $7,336,084.71, $8,855,664.66, and $13,521,334.12 respectively. *See id*[6]. Fernley's C-Tax distributions even lag well behind the Elko Television District, which has annually received C-Tax revenue of more than $163,000 since 1997 despite having no obligation to provide police or fire protection, to construct, maintain, or repair roads, or to offer the public parks and recreation facilities. (JA 14:2555-2556; JA 15:2687-2688). Under these circumstances, it is not surprising that cities like Mesquite, Boulder City, and Elko have the financial wherewithal to establish sizable annual budgets for public safety, public works, culture, and recreation while Fernley plainly does not. (JA 7:1496).

[6] On a per capita basis for fiscal year 2013, Mesquite receives $419.76, Boulder City receives $400.25, and Elko receives $645.16. Again, Fernley receives $7 on a per capita basis. (JA 7:1496).

The minimal amount of C-Tax revenue distributed to Fernley has significantly and indisputably impaired its ability to provide essential services. Fernley has a greater property tax rate and imposes higher license and permit fees than those levied by Mesquite, Boulder City, and Elko, but it cannot meaningfully close the gap in the revenue shortfall caused by its low C-Tax base. (JA 7:1496). This lack of adequate revenue, for example, has caused Fernley to cut its workforce by 30 percent and has left its roads and parks in a general state of disrepair. (JA 13:2420-2421; JA15:2811-JA 17:2859).

Perhaps the most serious effect of Fernley's low C-Tax revenue is that the city now lacks funding to provide adequate police services. (JA 13:2411-2412; 2417). When Fernley incorporated in 2001, the Lyon County sheriff at the time, Sid Smith, guaranteed Fernley residents that his office would continue to provide them with police services and that they would experience no decline in necessary law enforcement. (JA 13:2409-2410; 2413-2414). Today, however, only three or four sheriff deputies patrol Fernley at any given time, despite an average national ratio of two officers per thousand population. (JA 15:2742-2744). Under that ratio, Fernley should have a minimum of 38 deputies patrolling its streets at all times. *See id*.; *see also* JA 17:2860-2874. By contrast, and as of 2012, Boulder City had 2.02 law enforcement officers for every 1,000 residents, Elko had 2.60 and Mesquite had 1.79. *See id*, at 2863.

With respect to public works, Fernley has been unable to maintain open space, parks and playgrounds have fallen into disrepair and cemeteries are covered with blowing sand. (JA 15:2812-17:2859). Moreover, of the 19 road projects in the reconstruction project from 2007-2013, only three have been completed. *See id*. Between 2009 and 2013, only 900 feet (less than a quarter mile) of road has been repaired. *See id*. As a result, it is common to see massive cracks in major Fernley thoroughfares as the roadways disintegrate.[7] *See id*.

Finally, Fernley residents shoulder a unique burden in Nevada by directly funding fire services of the North Lyon Fire Protection District through a property tax charge. *See* JA 17:2875-2899; NRS 266.043 (providing that fire protection districts are prohibited in incorporated cities except for Fernley). The total amount of this unique property tax burden has exceeded $1 million in the 2012-13 and 2013-14 budget years. (JA 17:2875-2899). No other municipal residents bear this tax burden for fire services.

Fernley is simply unable to satisfy the demands for services that have been created by its rapid growth over the past two decades, and the C-Tax system perpetuates low distributions to Fernley and compounds the inability to address fundamental service needs.

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[7] For further detail on the state of disrepair in Fernley, please see the report of Ms. Shari Whalen at JA 15:2812-17:2859. Ms. Whalen's report was not disputed in any way by Respondents.

F. The Legislature Establishes No Government Oversight Of The Revenue Distributions Made Under The C-Tax System.

The Legislature does not review, either on its own or through the Department, how recipients spend their C-Tax distributions. (JA 14:2447).

While the Department reviews the budgets of local governments, it only does so to verify that they are functioning within their overall budgetary constraints. (JA 14:2477). The Department does not review local government budgets for purposes of determining how C-Tax revenues are spent, does not determine whether C-Tax revenues are sufficient for service needs, and does not compare similarly situated local governments to determine whether C-Tax distributions are appropriate. (JA 14:2467-2468, 2471, 2474-2477). The Department accordingly takes no action if a recipient of C-Tax revenue provides services that are either insufficient or deficient. (JA 14:2603, 2608). The Legislature similarly takes a hands off approach to whether local government service needs are being met by the C-Tax system. (JA 15:2710-2712). (noting that local government budgets get put in a "file drawer" and are only referred to "periodically"; stating that budgets are not "submitted to, like, the Legislature or compiled in a document"). While the Legislature claims that it spends significant time contemplating the C-Tax system during legislative sessions, a closer review of those claims demonstrates that the Legislature only concerns itself with minutia

of the distribution formula, and not whether the distributions are meeting the stated goal of the C-Tax system to ensure that revenue follows growth.

VI. ARGUMENT

Although the district court found that Fernley's claims were time-barred by NRS 11.220, the district court ruled on the merits of Fernley's claims as well. Accordingly, all issues ruled upon by the district court are addressed below.

A. Standard of Review

The district court's order on the parties' cross-motions for summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* Although Fernley does not contest that any factual dispute could preclude the entry of summary judgment as to its state constitutional claims, there is no legal or factual basis sufficient to sustain Respondents' assertions that Fernley's state constitutional claims are barred by the statute of limitations or lack of standing.

The district court's order dismissing the Treasurer is subject to rigorous de novo appellate review, and such an order will not be upheld unless it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle him or her to relief. *Munda v. Summerlin Life & Health Ins. Co.*, 267 P.3d 771, 774

(Nev. 2011). As in the district court, this Court accepts the plaintiff's factual allegations as true and every reasonable inference is drawn in the plaintiff's favor when reviewing a claim on a motion to dismiss. *Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1280 (Nev. 2009).

B. NRS 11.220 Does Not Apply to Fernley's Constitutional Claims

The district court determined that the general four year limitations period in NRS 11.220 applied to Fernley's constitutional claims. (JA 22:3971-3976). The district court concluded that the statute of limitations began to run when Fernley incorporated as a city in 2001. (JA 22:3972-3973). The district court erred.

When this case was previously before this Court, Respondents argued for dismissal based upon NRS 11.220 and this Court held only that Fernley's federal constitutional claims were time barred, but declined to rule on Fernley's state constitutional claims. (JA 7:1375-1376). As this Court has explained, "[t]he law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Servs.*, 126 Nev.Adv.Op 4, slip op. 3, 223 P.3d 332, 334 (Nev. 2010). In order for the doctrine to apply, however, "the appellate court must actually address and decide the issue explicitly or by necessary implication." *Id.*

This Court's prior ruling was expressly based on a time period for federal claims only. This Court had a clear opportunity to address the time period for state claims but did not. Under the law-of-the-case doctrine, this Court has already addressed and decided that the four year limitations period in NRS 11.220 does not apply, and the district court should be reversed for that reason alone.

Regardless, a four year period of limitations for actions under Article 3, Section 1, or Articles 4, Sections 20 and 21 would create a severe limitation on the important protections in those constitutional provisions. In many circumstances, such as in this case, the impact of a tax law may not manifest itself immediately. No person, either an individual or a governmental entity, should lose their right to seek constitutional protections that may not become evident in the first few years of the enactment of an unconstitutional law, particularly a complex tax law.

This Court has never before considered what statute of limitations period, if any, applies to claims brought under Article 3, Section 1 or Article 4, Sections 20 and 21. Accordingly, it can reasonably be inferred that there is no period of limitations on such actions.

Nonetheless, this Court has previously utilized a fifteen-year statute of limitations for constitutional takings claims. *See White Pine Lumber Co. v. City of Reno*, 106 Nev. 778, 779, 801 P.2d 1370, 1371 (1990). Because at its essence

Fernley's claim is that it is being deprived of tax revenues, it is more appropriately analogized to a takings case for purposes of a statute of limitations analysis.

Fernley's state claims allege that the C-Tax system results in systematic and repeated constitutional violations with every dollar collected and distributed under its provisions. Even if this Court finds a period of limitations to apply, it should follow the lead of Nevada federal courts and adopt the continuing violations doctrine to determine whether a statute of limitations for state constitutional claims has run. *See Chachas v. City of Ely*, 615 F.Supp.2d 1193, 1204 (D.Nev. 2009) (applying the continuing violations doctrine to allow a challenge to utility fees that began outside the statute of limitations because the charges continued within the limitations period).

Under the continuing violations doctrine, a "systematic policy" of unlawful conduct "is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." *See Chachas*, 615 F.Supp.2d at 1203; *O'Loghlin v. Cnty. of Orange*, 229 F.3d 871, 875 (9th Cir. 2000). The application of the continuing violations doctrine is even more appropriate in this case, as Fernley has abandoned its claims for monetary relief and seeks only declaratory and injunctive relief. In this case, the C-Tax system's annual distribution of inadequate C-Tax revenue to Fernley qualifies as a continuing violation and satisfies the doctrine.

Finally, even if the NRS 11.220's four-year limitations period applies and was trigged by Fernley's incorporation, and even if the that the continuing violations doctrine is inapplicable, Fernley's claims are still not time barred. A statute of limitations does not begin to run until a wrong occurs *and* a party sustains injuries for which it may seek relief. *See Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). Fernley's injuries, both past and future, were not apparent in 1997 or even in 2001, and did not manifest until Fernley grew significantly without receiving comparable C-Tax revenues. Moreover, as Fernley seeks only prospective injunctive relief, the defects Fernley seeks to remedy are ongoing and will continue to occur in the future.

Its decision on this issue should be reversed so that this Court can properly consider the merits of Fernley's state constitutional claims.

C. The C-Tax Is A Local Or Special Law In Violation Of The Nevada Constitution.

Article 4, Section 20, of the Nevada Constitution expressly prohibits the Legislature from passing any local or special laws for "the assessment and collection of taxes for state, county, and township purposes." *See* Nev. Const., art. 4, § 20. The framers of the Nevada Constitution proscribed such laws for these and other purposes to "'remedy an evil into which it was supposed the territorial legislature had fallen in the practice of passing local and special laws for the benefit of individuals instead of enacting laws of a general nature for the benefit of

the public welfare.'" *See Clean Water Coal. v. The M Resort, LLC*, 127 Nev.Adv.Op. 24, slip op. at 13, 255 P.3d 247, 254 (2011). The Nevada Supreme Court explained the rationale underlying this prohibition:

> As previously announced by this court, the reasoning behind requiring that a statute be general in nature is that when a statute affects the entire state, then it is more likely to receive adequate and thorough consideration from all members of the legislature; whereas, if the bill is localized, it is apt not to be considered seriously by those who are not affected by it.

See Town of Pahrump v. County of Nye, 105 Nev. 227, 229, 773 P.2d 1224, 1225 (1989). Simply stated, a law is unconstitutional where, as here, it is a local or special law and comes within any of the cases enumerated in Article 4, Section 20. *See Attorney General v. Gypsum Res., LLC*, 129 Nev.Adv.Op. 4, slip op. at 9-10, 294 P.3d 404, 409 (2013) (holding that a Senate bill was unconstitutional because it was a local law and fell within one of the cases enumerated in Article 4, Section 20).

The C-Tax system is a tax collection and distribution scheme that is segregated and always maintained in a separate budget account. *See supra* Section V(B). Accordingly, the tax distributions are inextricably intertwined with the tax collections. Moreover, despite having over one-third of the population of Lyon County, Fernley receives less than one percent of the taxes collected in Lyon County. Accordingly, the C-Tax system collects and assesses significantly more tax from Fernley residents and businesses than it returns to them. (JA 7:1496; JA 8:1526).

The quandary that Fernley now finds itself in is a classic example of a city burdened by a local or special tax law which the framers of the Nevada Constitution sought to remedy through the adoption of Article 4, Section 20. Fernley is located in a small rural county, and is the only city to have incorporated since the enactment of the C-Tax in 1997. The consequence is that Fernley, despite having one-third of the population of Lyon County, receives substantially less C-Tax revenue than comparably sized Nevada cities, including Boulder City, Elko, and Mesquite. (JA 7:1496). Not only is the Legislature's design of the C-Tax system responsible for this discrepancy, it offers Fernley no meaningful statutory solution. *See supra* Sections II(D) and (E). The low C-Tax revenue base originally allocated to Fernley nearly twenty years ago, when it was a small unincorporated town, dictates the amount of C-Tax revenue Fernley receives today even though it has rapidly grown into Nevada's seventh largest city. Comparably sized cities like Boulder City, Elko, and Mesquite do not suffer from this same handicap because, having existed at the time the Legislature enacted the C-Tax, they started with significantly higher C-Tax bases. A law may have statewide effect, as the C-Tax does in this case, but it still lacks constitutionality under Article 4, Section 20, when it has the effect of burdening a particular locality, such as Fernley. *See Gypsum Res.*, 129 Nev.Adv.Op. 4, at 6-7, 294 P.3d at 407-08 (2013). The C-Tax system, as applied to Fernley, is no different than if the Legislature had passed a

law in 1997 saying Fernley residents, and only Fernley residents and businesses, would be subjected to the same taxes as every other Nevada resident, but their city would only receive a fraction of those taxes in return for perpetuity.

The hallmark of an unconstitutional local or special law, like the C-Tax, is that it raises little or no concern beyond the borders of the affected locality. *See Clean Water Coal.*, 127 Nev.Adv.Op. 24, at 13, 255 P.3d at 254 (when "'a law affects only one small area of the state, voters in most areas will be ignorant of and indifferent to it'"). Fernley's circumstances exemplify this problem in that its predicament has failed to garner any sympathy statewide. Because no provision of the C-Tax offers it relief, Fernley has been compelled to seek assistance from the Legislature and Lyon County. Not only have both the Legislature and Lyon County shown that they are not receptive to Fernley's needs, they have vigorously opposed Fernley's efforts to obtain an upward adjustment of its C-Tax base.

Fernley therefore is essentially at the mercy of others, and it is indisputable that no support has been forthcoming or is likely to come. Because the C-Tax as applied does not place Fernley on an equal basis with other participants in the system, but rather imposes on Fernley a far lesser status, the C-Tax plainly constitutes a local or special law in contravention of Article 4, Section 20. *See Clean Water Coal.*, 127 Nev.Adv.Op. 24, at 16, 255 P.3d at 255 ("the

determination on whether a law is local or special is based on how it is applied, not on how it actually operates").

D. The C-Tax System Violates the Constitutional Mandate for General and Uniform Laws.

Article 4, Section 21, of the Nevada Constitution, mandates that in "all" cases "where a general law can be made applicable, all laws ***shall*** be general and of uniform operation throughout the State." *See* Nev. Const., art 4, § 21 (emphasis added); *see also Clean Water Coal.*, 127 Nev.Adv.Op. 24, at 25, 255 P.3d at 259. The Court should begin and then immediately end its inquiry under Article 4, Section 21, because the C-Tax is a local or special law ***and*** falls within one of the cases enumerated in Article 4, Section 20, in that it involves the assessment and collection of taxes for state, county, and township purposes. *See supra* Section II. On this basis alone, the C-Tax cannot survive scrutiny under Article 4, Section 21, regardless of whether a general law could have been made applicable. *See Gypsum Res.*, 129 Nev.Adv.Op. 4, at 9-10, 294 P.3d at 409 (concluding that a violation of Article 4, Section 21, had occurred, irrespective of whether a general law could have been made applicable, because the subject bill was a local law and fell within one of the cases enumerated in Article 4, Section 20); *see also Goodwin v. City of Sparks*, 93 Nev. 400, 402, 566 P.2d 415, 416 (1977) (the constitutionality of a local or special law depends on whether a general law can be made applicable only

when the law does not come within one of the cases enumerated in Article 4, Section 20).

Even if the Court nevertheless were to consider whether a general law could have been made applicable here, which it should not according to the teachings of *Gypsum Resources* because the C-Tax is one of the cases enumerated in Article 4, Section 20*,* it should still find that the C-Tax is unconstitutional under Article 4, Section 21. *See Cauble v. Beemer*, 64 Nev. 77, 87, 177 P.2d 677, 682 (1947) ("'[i]t is a general rule, under such provisions as those of sections 20 and 21 of article 4 of the State constitution, that if a statute be either a special or local law, or both, and comes within any one or more of the cases enumerated in section 20, such statute is unconstitutional; if the statute be special or local, or both, but does not come within any of the cases enumerated in section 20, then its constitutionality depends upon whether a general law can be made applicable'"). When it has upheld local or special legislation, this Court has focused on whether "'the general legislation existing was insufficient to meet the peculiar needs of a particular situation,'" and "a general law could not be made applicable," or whether "a particular emergency situation existed, requiring more speedy action and relief than could be had by proceeding under the existing general law." *See Clean Water Coal.*, 127 Nev.Adv.Op. 24, at 26, 255 P.3d at 259. In this case, however, no

emergency situation prompted the Legislature's enactment of the C-Tax, and any notion that the C-Tax could not have been made generally applicable is untenable.

The Legislature readily could have enacted a general law relating to the collection and appropriation of the taxes that comprise the C-Tax. Rather than the C-Tax's automatic appropriation based on a mathematical formula that maintains the status quo that existed in 1997, the taxes could have been collected, deposited into a fund segregated for local governments, and appropriated biennially by the Legislature after a careful review of local government budgets. Although this process may have prompted challenges based on "political differences," such considerations do not establish the "special circumstances" necessary for dispensing with constitutional requirements. *See Clean Water Coal.*, 127 Nev.Adv.Op. 24, at 28, 255 P.3d at 260; *see also Town of Pahrump*, 105 Nev. at 229-30, 773 P.2d at 1225 (statute originally presented as a general law, but then limited to a single town and county based on oppositions lodged by various counties, was an unconstitutional local or special law). Because the C-Tax is a local or special law that could have been made generally applicable, it is "not permissible under Article 4, Section 21" and should be declared unconstitutional as a matter of law. *See Clean Water Coal.*, 127 Nev.Adv.Op. 24, at 31, 255 P.3d at 261-62; *see also Anthony v. State*, 94 Nev. 338, 342, 580 P.2d 939, 942 (1978) (holding that statutory amendments "directed at solving a problem special to Las

Vegas which could as easily be[en] resolved by a general law" violated Article 4, Section 21).

Finally, the C-Tax is unsustainable under this Court's analysis in *Anthony*, 94 Nev. at 338, 580 P.2d at 939. In that case, the Court considered the constitutionality of statutory amendments, which provided for the distribution of certain tax revenues, under Article 4, Section 21. *See id*. at 339, 580 P.2d at 940. The challenged law provided that, in a county with a population greater than 200,000, 68.5% of certain tax revenues "'shall be apportioned to the largest city and the remainder among the other cities in proportion to their respective populations.'" *See id*. at 340, 580 P.2d at 940-41. In holding that the law violated Article 4, Section 21, the Court found that the "Legislature's intent, though commendable, was to protect the fiscal policy of Clark County and not the financial ability of smaller cities to provide needed services." *See id*. at 341, 580 P.2d at 941. The Court determined that the "only purpose" of the statutory amendments at issue was "to perpetuate the existing state of affairs in Clark County," and observed that "[i]f the revenue allocation amendments had a reasonable relation to the needs of the other counties, rather than imposing Clark County's fiscal policies on them, the amendments would have had general application." *See id*. at 342, 580 P.2d at 941-42. The situation here is identical – the C-Tax has perpetuated the status quo of 1997 to protect the fiscal policy of

participants in the system at that time, all to the detriment and exclusion of local governments, like Fernley, that were subsequently established. The C-Tax therefore should be declared unconstitutional under Article 4, Section 21, as a matter of law.

E. The C-Tax Violates The Separation Of Powers Clause Of The Nevada Constitution As A Matter Of Law.

The separation of powers doctrine ensures that each branch of government – the Legislative, the Executive, and the Judicial – remains independent from the others. *See Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 241-42 (1967). The principles underlying this doctrine are set forth in Article 3, Section 1, of the Nevada Constitution, which "contains an express provision prohibiting any one branch of government from impinging on the functions of another." *See Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103-04 (2009); *see also Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) ("[u]nder the separation of powers doctrine, each branch of government is considered to be co-equal, with inherent powers to administer its own affairs"). Article, 3, Section 1, provides:

> The powers of the Government of the State of Nevada shall be divided into three separate departments, – the Legislative, – the Executive and the Judicial; ***and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.***

See Nev. Const., art. 3, § 1 (emphasis added). This "division of powers" between the three branches "is probably the most important single principle of government declaring and guaranteeing the liberties of the people." *See Galloway*, 83 Nev. at 18, 422 P.2d at 241. The C-Tax system fundamentally violates the separation of powers doctrine because it has resulted in the Legislature abdicating its authority over the collection and appropriation of C-Tax revenues to the Executive Branch.

As an initial matter, the district court erred by finding that Fernley lacked standing to allege a violation of Article 3, Section 1. It is widely recognized that local governments have standing to assert such a claim. *See City of Austin v. Quick*, 930 S.W.2d 678, 683-84 (Tex.App. 1996); *State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987); *see also* John Martinez, *Local Government Law*, Pt. I, Ch.3, § 3.2 ("local government units are held to have standing to invoke the following state constitutional provisions against the state: . . . (3) separation of powers"). Moreover, the cases cited by the district court for its ruling stand for the proposition that a local government cannot allege that the state gave or took away a local power under Article 3, Section 1. (JA 22:3982-3985). Here, however, Fernley is alleging that the legislative branch unconstitutionally delegated appropriation authority to the executive branch, and that Fernley has been harmed as a result thereof. Fernley should have standing to allege such a claim, just as it has standing to allege claims for violations of Article 4, Sections 20 and 21.

One of the Legislature's primary functions is to appropriate funds to local governments, commonly referred to as the "power of the purse." *See State of Nev. Emps. Ass'n, Inc. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992); *see also* Nev. Const., art. 4, § 19 ("[n]o money shall be drawn from the treasury but in consequence of appropriations made by law"); NRS 353.230 *et seq.* (appropriations are made through bills enacted by the Legislature). It is "well established," as the Nevada Supreme Court has pointed out, that "the power of controlling the public purse lies within legislative, not executive authority." *See Daines*, 108 Nev. at 21, 824 P.2d at 279. Although the Legislature may authorize other branches of government or administrative agencies to adopt rules and regulations that supplement legislation "if the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power," it is constitutionally barred from delegating its legislative functions "to any other body or authority." *See Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001). The power to make appropriations is one such non-delegable legislative function. *See Folsom v. Wynn*, 631 So.2d 890, 894 (Ala. 1993). The C-Tax enacted by the Legislature runs afoul of this constitutional limitation because it authorizes the Executive Branch, acting through the Department, to collect and appropriate C-Tax revenues without any legislative participation or oversight. The Legislature has acknowledged that, in the absence of a special request, it does not

refer to local government budgets for C-Tax purposes. (JA 9:1816-1817) (stating that the Legislature puts the budgets in "a file drawer" for future reference as needed).

Based on the Legislature's adoption of this "hands off" approach, the C-Tax system is essentially "appropriation by auto-pilot." Not only does the Department collect and appropriate C-Tax revenues based solely on the outcome of its mechanical application of a designated mathematical formula without regard to whether legislative objectives are being met, it has conceded that legislative considerations are irrelevant to this procedure. (JA 8:1712, 1571-1572, 1574, 1578-1581). The Department has acknowledged that its only concern is to ensure that the necessary mathematical calculations are performed correctly, and that C-Tax revenue has been collected and appropriated accordingly. (JA 8:1711, 1713-1714; JA 8:1585-1588). The Legislature has made a few minor adjustments to the applicable mathematical formula during the 14 years since it enacted the C-tax, but has offered the Department no guidance in the collection and appropriations process. Because this relinquishment of the Legislature's appropriations power to the Executive Branch has resulted in a patent violation of the separation of powers clause of the Nevada Constitution, the entry of summary judgment in Fernley's favor on its second claim for relief is warranted as a matter of law. *See* Nev. Const., art. 3, § 1; *see also Opinion of the Justices to the Senate*, 717 N.E.2d 655,

656 (Mass. 1999) (delegation of the power of appropriation from the legislative branch to the executive branch violates separation of powers); *State ex rel. Schwartz v. Johnson*, 907 P.2d 1001, 1002 (N.M. 1995) (legislature cannot delegate its appropriations power without specific authorization by the state constitution). The C-Tax violates the general and uniform clause of the Nevada Constitution as a matter of law.

F. The District Court Erred in Dismissing the Treasurer from All Claims.

In its order converting Respondents' motions to dismiss into motions for summary judgment, the district court, ruling *sua sponte*, concluded that the Treasurer was protected by absolute immunity under both NRS 41.032(1) and NRS 41.032(2) and, therefore, dismissed all claims against the Treasurer. The district court was in error for three reasons: (1) NRS 41.032 only applies to, and the Respondents only argued for, immunity as to Fernley's claim for money damages, and not as to Fernley's claims for declaratory or injunctive relief; (2) there was no evidence presented that the immunity was available under NRS 41.032(1) or NRS 41.032(2) in any event; and (3) the Treasurer is a necessary party to this case.

First, Respondents argued in their motions to dismiss that the Treasurer has sovereign immunity from Fernley's claim for an award of money damages. The district court, however, improperly reached beyond the limits of the Respondents' alleged defense and applied immunity under NRS 41.031 to all of Fernley's claims

against the Treasurer. Even more, it did so in a *sua sponte* order that denied Fernley the opportunity to brief the issue in opposition. Immunity under NRS 41.032 applies to actions brought for monetary relief against government actors. *See Hagblom v. State Dir. of Motor Vehicles*, 93 Nev. 599, 601, 571 P.2d 1172, 1174 (Nev. 1977) (upholding trial court's order dismissing claim for money damages because hearing on claim for declaratory relief as to whether law was invalid had yet to be held).

Second, immunity is available under NRS 41.032(1) only if the government officer is exercising due care in the execution of a statute or regulation. *Hagblom*, 93 Nev. at 603, 571 P.2d at 1174. Immunity is available under NRS 41.032(2) to actions that involve discretion on the part of government officers. *Id.* It was their burden to prove the applicability of sovereign immunity, but Respondents failed to produce any evidence to support its claim. To the contrary, the undisputed evidence in the case demonstrate that neither the State nor the Legislature has acted with "due care" in their implementation and administration of the C-Tax system. Neither the State nor the Legislature review how local government entities spend their C-Tax distributions. (JA 8:1551). Nor do they examine or assess how local government entities use C-Tax distributions. (JA 8:1571-1571, 1575, 1578-1581). Because neither the State nor the Legislature exercise any responsibility to verify that the C-Tax system is working correctly or that it is fulfilling legislative

objectives, they do not exercise due care over the C-Tax system and therefore sovereign immunity under NRS 41.032 does not apply.

Last, the Treasurer is a necessary party to this action because he controls the public's money, and, along with the Department, is responsible for collecting C-Tax and making appropriations under the C-Tax system. For these reasons, the district court's ruling should be overturned.[8]

G. The District Court Erred in Awarding Costs to the State

Subsequent to entry of its summary judgment order, and on the Department's motion, the district court awarded costs in the amount of $8,489.04 against Fernley on grounds that NRS 18.020(3) and NRS 18.025 requires costs to be awarded to a prevailing party in an action where the plaintiff seeks to recover more than $2,500, even if the prevailing party is a state agency. Because of the unique constitutional nature of this case, the district court abused its discretion by ordering costs be paid.

Although NRS 18.020(3) provides for costs in actions with a claim for money damages in excess of $2,500 and NRS 18.025 allows for costs to be awarded to state agencies such as the Department, this case has always been more about prospective constitutional relief for Fernley than its claim for money

[8] Fernley does not appeal the district court's subsequent ruling that sovereign immunity also bars Fernley's claim for money damages as the Department and the Legislature. Accordingly, the district court's dismissal of the Treasurer need only be overturned as to Fernley's claims for declaratory and injunctive relief.

damages. Fernley filed suit only as a last resort after efforts to reach an administrative and legislative resolution were unsuccessful. Despite ruling against Fernley, both in its summary judgment order and at oral argument, the district court repeatedly expressed sympathy for Fernley's situation, which has indisputably resulted in financial inequities for Fernley as compared to other Nevada cities and which has left Fernley facing tremendous difficulties in providing even the most basic levels of service to its citizens. Fernley's situation should not be made worse by the Department's attempt to extract even more taxpayer dollars from Fernley for attempting to protect the best interests of its community and its citizens.

The determination of whether to award costs is within the discretion of the trial court. *See, e.g.*, *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). The district court, here, abused that discretion when it awarded costs rather than ordering that all parties bear their own given the unique constitutional nature of the case, and the fact that all parties to this case are governmental entities.

Even if an award of costs was statutorily proper, the district court should have barred the claim on grounds of sovereign immunity. As more fully described in Section G, above, NRS 41.032 (2) prohibits monetary claims against government actors for their discretionary actions. *Hagblom*, 93 Nev. at 603, 571 P.2d at 1174. Although the term "action" is not defined by NRS 41.032, the

doctrine is often—as in this case—applied by courts to claims within a suit. Its application to a claim for costs against an immune government entity is no different. As previously described, Fernley exercised its discretion to undertake a good faith legal challenge to the C-Tax system. As such, Fernley is entitled to protection under NRS 41.032(2), and the Department's claim for costs against it should have been dismissed by the district court.

VII. CONCLUSION.

The C-Tax system may have been created with good intentions, but its faults and inequities have been exposed and exacerbated over time, resulting in constitutional violations. While it may be attractive to view this case as a political problem for Fernley, as did the district court, it is the province of the courts to strike down a law that is unconstitutional, regardless of the political breadth of the law. *See, e.g.*, *Clean Water Coalition v. The M Resort, LLC*, 255 P.3d 247, 250 (Nev. 2011) ("We recognize that the Legislature is endowed with considerable lawmaking authority under Article 4, Section 1. But that authority is not without some restraints."). The protections of the Nevada Constitution are even more critical when a law violates the constitutional rights of those with limited political power, such as Fernley.

For all of the foregoing reasons, Fernley respectfully requests that the Court reverse the order of the district court and order that summary judgment be entered

in Fernley's favor, granting injunctive relief to Fernley so that future C-Tax distributions meet constitutional standards.

DATED this 20th day of May, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word in size 14 Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding parts of this brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 10,200 words.

Finally, I hereby certify that to the best of my knowledge, information, and belief, this brief is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2015, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System.

I certify that all participants in the case are listed below and are registered electronic filing users and that service will be accomplished by the Court's Electronic Filing System:

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