

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. NICOLE J. CANNIZZARO, in her official capacity as Senate Majority Leader of the Senate of the State of Nevada; CLAIRE J. CLIFT, in her official capacity as Secretary of the Senate of the State of Nevada; LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION, in its official capacity as the legal agency of the Legislative Department of the State of Nevada; BRENDA J. ERDOES, Esq., in her official capacity as Legislative Counsel and Chief of the Legislative Counsel Bureau, Legal Division, and in her professional capacity as an attorney and licensed member of the State Bar of Nevada; and KEVIN C. POWERS, Esq., in his official capacity as Chief Litigation Counsel of the Legislative Counsel Bureau, Legal Division, and in his professional capacity as an attorney and licensed member of the State Bar 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

JAMES A. SETTELMAYER, JOSEPH P. HARDY, HEIDI SEEVERS GANSERT,

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Clerk of Supreme Court

Case No. 80313

Original Action for Writ to
First Judicial District Court,
Carson City, Nevada,
Case No. 19 OC 00127 1B

**PETITIONERS'
EMERGENCY MOTION
UNDER NRAP 8(a)(2) AND
NRAP 27(e) FOR STAY OF
ALL DISTRICT COURT
PROCEEDINGS
PENDING RESOLUTION
OF PETITION FOR
WRIT OF MANDAMUS**

**Action necessary by
January 13, 2020**

SCOTT T. HAMMOND, PETE
GOICOECHEA, BEN KIECKHEFER,
IRA D. HANSEN, and KEITH F.
PICKARD, in their official capacities as
members of the Senate of the State of
Nevada and individually,

Real Parties in Interest.

**PETITIONERS' EMERGENCY MOTION UNDER NRAP 8(a)(2) AND
NRAP 27(e) FOR STAY OF ALL DISTRICT COURT PROCEEDINGS
PENDING RESOLUTION OF PETITION FOR WRIT OF
MANDAMUS**

Action necessary by January 13, 2020

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EMERGENCY MOTION FOR STAY

Petitioners State of Nevada ex rel. Senate Majority Leader Nicole Cannizzaro and Secretary of the Senate Claire Clift (“Legislative Defendants”), by and through their counsel the Legal Division of the Legislative Counsel Bureau (“LCB Legal”) under NRS 218F.720; and LCB Legal, in its official capacity as the legal agency of the Legislative Department of the State of Nevada; Brenda J. Erdoes, Esq., in her official capacity as Legislative Counsel and Chief of LCB Legal and in her professional capacity as an attorney and licensed member of the State Bar of Nevada; and Kevin C. Powers, Esq., in his official capacity as Chief Litigation Counsel of LCB Legal and in his professional capacity as an attorney and licensed member of the State Bar of Nevada, hereby file this emergency motion under NRAP 8(a)(2) and NRAP 27(e) for a stay of all district court proceedings pending resolution of their petition for writ of mandamus (“writ petition”) which was electronically filed at 3:31 p.m. on January 2, 2020, and accepted and file-stamped on January 3, 2020. This emergency motion is based upon: (1) the arguments made herein and the arguments made in the writ petition; and (2) all pleadings, documents and exhibits included in the Petitioners’ appendix.¹

¹ As required by NRAP 27(e), the Petitioners have attached their “NRAP 27(e) Certificate” to this emergency motion.

STATEMENT OF EMERGENCY CIRCUMSTANCES

In the underlying action for declaratory and injunctive relief, the Plaintiffs are challenging the constitutionality of Senate Bill No. 542 (SB 542) and Senate Bill No. 551 (SB 551) of the 2019 legislative session. SB 542, 2019 Nev. Stat., ch. 400, at 2501; SB 551, 2019 Nev. Stat., ch. 537, at 3271. The Plaintiffs allege that SB 542 and SB 551 were each subject to the two-thirds majority requirement in Article 4, Section 18(2) of the Nevada Constitution and that each bill is unconstitutional because the Senate passed each bill by a majority of all the members elected to the Senate, instead of a two-thirds majority of all the members elected to the Senate. (*PA1:0035-37.*)²

The Plaintiffs consist of: (1) eight members of the Senate (“Plaintiff Senators”) who voted against SB 542 and SB 551; and (2) several private businesses, associations and other entities that pay—or whose members pay—certain fees and taxes associated with SB 542 and SB 551 (“Plaintiff Businesses”). (*PA1:0023-27.*) Because the Plaintiff Senators are the parties who filed the motion to disqualify LCB Legal and because the Plaintiff Businesses did not join in that motion (*PA2:0394-95*), the Plaintiff Senators are the Real Parties in Interest to the writ petition, and the Plaintiff Businesses are not parties to the writ petition.

² Citations to “PA” are to volume and page numbers of the Petitioners’ appendix.

The Plaintiffs named several state officers and agencies of the executive branch and legislative branch as defendants in their official capacity. (*PA1:0027-28.*) The executive branch defendants are: (1) the Honorable Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and President of the Senate; (2) the Honorable Steve Sisolak, in his official capacity as Governor of the State of Nevada; (3) the Nevada Department of Taxation; and (4) the Nevada Department of Motor Vehicles (“Executive Defendants”). (*PA1:0027-28.*) The Executive Defendants have been represented in their official capacity in this litigation by the Office of the Attorney General. Because the Executive Defendants did not file any responsive documents or make any oral arguments in the district court with regard to the motion to disqualify LCB Legal (*PA3:0558-59*), the Executive Defendants are not parties to the writ petition.

The Legislative Defendants are the Honorable Nicole Cannizzaro, in her official capacity as Senate Majority Leader, and Claire Clift, in her official capacity as the Secretary of the Senate. (*PA1:0027.*) From the onset of this litigation, the Legislative Defendants have been represented in their official capacity by LCB Legal as their statutorily authorized counsel under NRS 218F.720.³

³ NRS 218F.720 is reproduced in the addendum to this emergency motion.

This emergency motion and the Petitioners' writ petition concern the order entered by the district court in the underlying action on December 19, 2019, which: (1) disqualified LCB Legal from representing the Legislative Defendants in their official capacity in this litigation as their statutorily authorized counsel under NRS 218F.720; (2) required the Legislative Defendants to obtain separate outside counsel to represent them in their official capacity in this litigation; (3) denied a stay of the district court proceedings requested by LCB Legal to address the consequences of the order requiring the Legislative Defendants to obtain separate outside counsel to represent them in their official capacity in this litigation; and (4) set a procedural schedule for briefing dispositive motions on the merits of the underlying action requiring the Legislative Defendants to file an opposition to the Plaintiffs' motion for summary judgment and file their own counter-motion for summary judgment not later than January 21, 2020. (*PA3:0597-605.*)

On the same date that the district court entered its order disqualifying LCB Legal as counsel for the Legislative Defendants in their official capacity, the district court entered a separate order granting the Legislature's motion to intervene as a defendant-intervenor. (*PA3:0607.*) In that order, the district court also denied a motion to disqualify LCB Legal from representing the Legislature in this litigation as its statutorily authorized counsel under NRS 218F.720. (*PA3:0607.*)

Thus, under the district court's orders, LCB Legal may represent the Legislature in this litigation as its statutorily authorized counsel under NRS 218F.720 for the purpose of defending the Legislature's official interests. However, LCB Legal is prohibited from representing the individual Legislative Defendants in this litigation even though the Legislative Defendants are being sued in their official capacity as constituents of the Legislature as an organization and even though LCB Legal has the same statutory authorization under NRS 218F.720 to represent the Legislative Defendants in this litigation for the purpose of defending the Legislature's official interests.

On December 30, 2019, at the next scheduled meeting of the Legislative Commission following entry of the district court's disqualification order, the Legislative Commission directed LCB Legal under NRS 218F.720 to take all actions necessary to obtain appellate review of the disqualification order in order to protect the official interests of the Legislature. LCB Legal electronically filed the writ petition at 3:31 p.m. on January 2, 2020, and the writ petition was accepted and file-stamped on January 3, 2020. Also on January 3, 2020, LCB Legal filed this emergency motion for a stay of all district court proceedings pending resolution of the writ petition.

Under NRAP 8(a)(1), when parties want a stay of the district court proceedings pending resolution of their writ petition, the parties ordinarily must

first move for a stay in the district court. Fritz Hansen v. Dist. Ct., 116 Nev. 650, 657 (2000). However, to address emergency circumstances and prevent irreparable harm, the parties may forgo moving for a stay in the district court and may move for a stay in this Court when it would be impracticable to move for a stay in the district court. NRAP 8(a)(2).

In this case, to address emergency circumstances and prevent irreparable harm arising from the district court's disqualification order, it would be impracticable for the Petitioners to move for a stay in the district court. NRAP 8(a)(2). First, the district court has already indicated that it would not grant a stay regardless of the circumstances. (PA3:0587.) Specifically, at the hearing held on November 19, 2019, concerning the motion to disqualify LCB Legal as counsel for the Legislative Defendants, LCB Legal requested a stay of the district court proceedings to address the consequences of the order requiring the Legislative Defendants to obtain separate outside counsel to represent them in their official capacity in this litigation. In response to LCB Legal's request for a stay, the district court stated: "I'm not staying anything. I want you to know that." (PA3:0587.)

Second, the district court has set a procedural schedule for briefing dispositive motions on the merits of the underlying action requiring the Legislative Defendants to file an opposition to the Plaintiffs' motion for summary judgment and file their

own counter-motion for summary judgment not later than January 21, 2020. Thus, unless this Court stays the district court proceedings, the Legislative Defendants must obtain separate outside counsel and fully prepare their summary-judgment briefs by January 21, 2020. As a result, the Petitioners are asking this Court to take action on this emergency motion for a stay by January 13, 2020.

Third, unless this Court stays the district court proceedings, the object of the Petitioners' writ petition—to obtain appellate review of the district court's disqualification order—will be entirely defeated and irretrievably lost. This Court has determined that a writ petition is the appropriate vehicle for challenging disqualification orders because an appeal after a final judgment does not provide an adequate legal remedy to rectify the irreparable harm caused by erroneous disqualification orders that permanently separate parties from their attorneys whom they have chosen to represent them in the litigation. See Nev. Yellow Cab Corp. v. Dist. Ct., 123 Nev. 44, 49 (2007). Consequently, if the Legislative Defendants are required under the district court's disqualification order to litigate the merits of this litigation to a final judgment without LCB Legal as their statutorily authorized counsel under NRS 218F.720, the Legislative Defendants will have already suffered irreparable harm by the time the district court renders a final judgment because they will have been permanently deprived of their statutorily authorized

counsel and the specialized knowledge, skills and experience that LCB Legal would have otherwise brought to the litigation.

Finally, unless this Court stays the district court proceedings, the LCB will be required to incur expenses for attorney's fees that must be paid from the Legislative Fund to provide the Legislative Defendants with separate outside counsel to represent them in their official capacity in this litigation. See NRS 218A.150 (providing for payment of expenses from the Legislative Fund). In the absence of a stay, if the LCB is required to incur expenses for outside counsel and this Court later vacates the district court's disqualification order, the LCB will be irreparably harmed because it will not be able to recover those expenses for the legal services already provided by outside counsel.

Accordingly, to address these emergency circumstances and prevent irreparable harm arising from the district court's disqualification order, this Court should grant the Petitioners' emergency motion for a stay of all district court proceedings pending resolution of their writ petition.

ARGUMENT

I. Standards for deciding stay motions.

In deciding stay motions, this Court usually considers four factors: (1) whether the object of the Petitioners' writ petition will be defeated if the stay is denied; (2) whether the Petitioners will suffer irreparable or serious harm if the

stay is denied; (3) whether the other parties will suffer irreparable or serious harm if the stay is granted; and (4) whether the Petitioners are likely to prevail on the merits of their writ petition. NRAP 8(c); Fritz Hansen, 116 Nev. at 657. Generally, no single factor “carries more weight than the others.” Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 251 (2004). However, “if one or two factors are especially strong, they may counterbalance other weak factors.” Id.

For example, when the first stay factor is especially strong because the object of the writ petition will be defeated without a stay, then the first stay factor takes precedence, and the other parties can defeat the stay motion only by “making a strong showing that appellate relief is unattainable.” Id. at 253. To make that showing, the other parties must demonstrate that the writ petition “appears to be frivolous or the stay [is] sought purely for dilatory purposes.” State v. Robles-Nieves, 129 Nev. 537, 546 (2013). Moreover, the Petitioners do not have to establish an absolute probability of success on the merits to be granted a stay. Id. Instead, the Petitioners need only “present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.” Fritz Hansen, 116 Nev. at 659 (quoting Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981)).

II. Without a stay, the object of the writ petition will be entirely defeated because LCB Legal will be disqualified as counsel for Legislative Defendants and they will have an imminent duty under the district court’s

order to litigate this case to a final judgment while being represented by counsel other than their statutorily authorized counsel under NRS 218F.720.

This Court has determined that a writ petition for “mandamus is the appropriate vehicle for challenging orders that disqualify counsel.” Nev. Yellow Cab Corp. v. Dist. Ct., 123 Nev. 44, 49 (2007). Because disqualification orders deprive clients of their right to counsel of their choice, the clients have standing to bring such writ petitions. See Brown v. Dist. Ct., 116 Nev. 1200, 1202 (2000). Additionally, because disqualification orders also inflict significant reputational harm on the disqualified attorneys, this harm provides an additional and independent basis for those attorneys to have standing to bring such writ petitions. See Valley Health Sys. v. Estate of Doe, 134 Nev. 634, 643-45 (2018). As explained by this Court, “the importance of an attorney’s reputation alone provides a basis for justiciability [of such a writ petition] where the district court made a finding that the attorney violated the rules of professional conduct.” Id. at 644; see also Harris v. Griffith, 413 P.3d 51, 56 (Wash. Ct. App. 2018); State ex rel. Swanson v. 3M Co., 845 N.W.2d 808, 815 (Minn. 2014). Consequently, because a writ petition is the appropriate vehicle for challenging disqualification orders, an appeal after a final judgment does not provide an adequate legal remedy to rectify the irreparable harm caused by erroneous disqualification orders that permanently separate parties from their attorneys whom they have chosen to represent them in the litigation.

Like this Court, other courts have held that writ relief—or an interlocutory appeal—is available to challenge disqualification orders because an appeal after a final judgment does not provide an adequate legal remedy.⁴ The reason for this rule is that disqualification orders have an immediate adverse effect on fundamental litigation rights by permanently separating parties from their attorneys whom they have chosen to represent them in the litigation. *Id.* If the parties are thereafter required to litigate the merits of their cases to a final judgment without those attorneys, the parties will have already suffered—by the time the district court renders a final judgment—the significant harm associated with being deprived of those attorneys and the specialized knowledge, skills and experience that they would have otherwise brought to the litigation. *Id.* At that point, the significant harm inflicted on the parties and their attorneys has become indelible and irreparable, and the harm cannot be remedied effectively or adequately through a later appeal after a final judgment. *Id.* As explained by the North Carolina Supreme Court:

⁴ See, e.g., *Borman v. Borman*, 393 N.E.2d 847, 852 (Mass. 1979); *Goldston v. Am. Motors Corp.*, 392 S.E.2d 735, 736-37 (N.C. 1990); *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 420 S.E.2d 426, 429 (N.C. 1992); *State ex rel. Ogden Newspapers v. Wilkes*, 482 S.E.2d 204, 206 (W.Va. 1996); *Hurley v. Hurley*, 923 A.2d 908, 910 (Me. 2007); *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390, 393 (Mo. Ct. App. 2011); *Kidd v. Kidd*, 219 So. 3d 1021, 1022 (Fla. Dist. Ct. App. 2017).

We recognize that in Goldston v. American Motors Corp., 326 N.C. 723, 392 S.E.2d 735 (1990), we held that an interlocutory order granting a motion to disqualify counsel was immediately appealable. The granting of a motion to disqualify counsel, unlike a denial of the motion, has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client's choice. **Neither deprivation can be adequately redressed by a later appeal of a final judgment adverse to the client.**

Travco Hotels, 420 S.E.2d at 429 (emphasis added).

Thus, without a stay of the district court proceedings, the object of the Petitioners' writ petition—to obtain appellate review of the district court's disqualification order—will be entirely defeated and irretrievably lost. Accordingly, the first stay factor is entitled to added significance in the stay analysis and weighs heavily in favor of a stay. See Robles-Nieves, 129 Nev. at 542; Mikohn Gaming, 120 Nev. at 253.

III. The Petitioners will suffer serious and irreparable harm if the stay is denied.

This Court has recognized the importance of “a client's right to counsel of the client's choosing and the likelihood of prejudice and economic harm to the client when severance of the attorney-client relationship is ordered.” Leibowitz v. Dist. Ct., 119 Nev. 523, 532 (2003). Furthermore, this Court has determined that “[l]awyers, simply, are not fungible goods. One lawyer cannot substitute for another lawyer's skills, experience, and other unquantifiable characteristics.”

Ryan's Express v. Amador Stage Lines, 128 Nev. 289, 296 (2012) (citations omitted). Consequently, this Court has acknowledged that disqualification orders cause serious and irreparable harm because “disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing.” Id. at 295 n.3 (quoting Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982)).

Like this Court, other courts have recognized that disqualification orders cause serious and irreparable harm to the affected parties and their disqualified attorneys that cannot be remedied by an appeal after a final judgment.⁵ As stated by the California appellate courts:

[T]he consequence of staying enforcement of an order disqualifying an attorney is to avoid, in all likelihood, mootng the appeal. If the order is not stayed, appellants will need to move on without [their disqualified attorneys] and hire replacement counsel. Even if the disqualification order is ultimately reversed, appellants will have already suffered the financial burden of replacing counsel in the middle of a case. Appellants may even decide that the appeal is not worth pursuing because it will not make sense to reinsert [their disqualified attorneys] into the proceedings even if the order is reversed. The lack of a stay is not merely a short term inconvenience for [such] disqualified attorneys and their clients. It (probably) sounds the death knell of the representation in the matter at hand, and it (potentially) will affect the attorney-client relationship more broadly.

⁵ See the cases cited in footnote 4.

URS Corp. v. Atkinson/Walsh Joint Venture, 223 Cal. Rptr. 3d 674, 683-84 (Cal. Ct. App. 2017). Thus, because the Petitioners will suffer serious and irreparable harm if the stay is denied, the second stay factor is entitled to added significance in the stay analysis and weighs heavily in favor of a stay. See Robles-Nieves, 129 Nev. at 542.

IV. The Plaintiffs will not suffer serious and irreparable harm if the stay is granted.

In their first amended complaint, the Plaintiffs ask for a declaratory judgment that SB 542 and SB 551 are unconstitutional in violation of the two-thirds majority requirement, and the Plaintiffs request an injunction to enjoin the Department of Taxation and Department of Motor Vehicles from collecting the allegedly unconstitutional amounts of the fees and taxes imposed under those bills. (PA1:0035-37.) The Plaintiffs also claim that they will suffer irreparable harm from having to pay the allegedly unconstitutional amounts of the fees and taxes imposed under those bills. Id.

However, under well-established case law, the Plaintiffs will not suffer serious and irreparable harm if the stay is granted because the Plaintiffs will have an adequate legal remedy available to them if the bills are declared to be unconstitutional later in this litigation, given that the Plaintiffs will be entitled to the remedy of a refund of the allegedly unconstitutional amounts of the fees and taxes. Therefore, because the Plaintiffs will have an adequate legal remedy

available to them if the bills are declared to be unconstitutional later in this litigation, the Plaintiffs will not suffer serious and irreparable harm if the stay is granted in order for this Court to consider and resolve the disqualification issues raised in the writ petition.

For the purposes of the stay analysis, the Plaintiffs can show serious and irreparable harm only if the stay will result in harm for which compensatory damages or other corrective relief would be an inadequate legal remedy. Fritz Hansen, 116 Nev. at 658 (applying the irreparable harm standards for preliminary injunctions). As a result, “[p]urely monetary injuries are not normally considered irreparable.” Lydo Enters. v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984). The reason for this rule is that “[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” Sampson v. Murray, 415 U.S. 61, 90 (1974) (quoting Va. Petro. Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C.Cir.1958)).

When parties challenge the constitutionality of fees and taxes, the remedy of a refund is an adequate legal remedy that ordinarily precludes a finding of irreparable harm to justify injunctive relief. Dows v. City of Chicago, 78 U.S. 108, 112 (1870); Wells, Fargo & Co. v. Dayton, 11 Nev. 161, 166 (1876). As a result, this Court has stated that “[w]hen a tax statute is determined to be unconstitutional,

the taxpayer is entitled to a refund.” Worldcorp v. State, Dep’t of Tax’n, 113 Nev. 1032, 1038 (1997); State, Dep’t of Taxation v. Scotsman Mfg., 109 Nev. 252, 254-56 (1993) (requiring the Department of Taxation to refund amounts collected under an unconstitutionally imposed tax); Op. Nev. Att’y Gen. No. 1997-14 (Apr. 3, 1997) (advising the Department of Motor Vehicles to refund amounts collected under an unlawfully imposed fee).

In this case, the Plaintiffs are challenging the constitutionality of SB 542 which involves the technology fee collected by the Department of Motor Vehicles under NRS 481.064. The Plaintiffs are also challenging the constitutionality of SB 551 which involves taxes collected by the Department of Taxation under NRS Chapters 363A and 363B. If the bills are declared to be unconstitutional later in this litigation, the Plaintiffs will be entitled to the remedy of a refund of the allegedly unconstitutional amounts of the fees and taxes. Therefore, because the Plaintiffs will have an adequate legal remedy available to them if the bills are declared to be unconstitutional later in this litigation, the Plaintiffs will not suffer serious and irreparable harm if the stay is granted in order for this Court to consider and resolve the disqualification issues raised in the writ petition.

Finally, the Plaintiffs seek declaratory and injunctive relief against Senate Majority Leader Cannizzaro, Secretary of the Senate Clift, Governor Sisolak and Lieutenant Governor Marshall for legislative actions taken in their official capacity

in the passage and approval of SB 542 and SB 551. (*PA1:0027-28.*) With regard to these defendants, the Plaintiffs will not suffer serious and irreparable harm if the stay is granted because the Plaintiffs cannot obtain declaratory or injunctive relief against these defendants—under any circumstances as a matter of law—based on the doctrine of absolute legislative immunity.

As legislative branch defendants sued in their official capacity, Senate Majority Leader Cannizzaro and Secretary of the Senate Clift are not proper parties to this litigation because they are entitled to absolute legislative immunity from declaratory and injunctive relief for “any actions, in any form, taken or performed within the sphere of legitimate legislative activity.” NRS 41.071; Supreme Ct. of Va. v. Consumers Union, 446 U.S. 719, 731-34 (1980); Chappell v. Robbins, 73 F.3d 918, 920-22 (9th Cir. 1996); Scott v. Taylor, 405 F.3d 1251, 1253-56 (11th Cir. 2005). Legislative immunity is a form of absolute immunity, and it protects all legislative actions regardless of the motive or intent of the official performing the actions. Bogan v. Scott-Harris, 523 U.S. 44, 54-55 (1998). Thus, legislative immunity applies broadly to all legislative actions that are “integral steps in the legislative process,” including all actions relating to introducing, sponsoring, voting for or signing legislation. Id. at 54-55.

Based on the doctrine of absolute legislative immunity, the Plaintiffs cannot obtain declaratory or injunctive relief against Senate Majority Leader Cannizzaro

and Secretary of the Senate Clift as a matter of law because they are entitled to absolute legislative immunity from declaratory and injunctive relief for all actions taken in their official capacity in the passage and approval of SB 542 and SB 551. Similarly, executive officials “outside the legislative branch are entitled to legislative immunity when they perform legislative functions.” Bogan, 523 U.S. at 55. Therefore, the Plaintiffs cannot obtain declaratory or injunctive relief against Governor Sisolak and Lieutenant Governor Marshall as a matter of law because they are entitled to absolute legislative immunity from declaratory and injunctive relief for all actions taken in their official capacity in the passage and approval of SB 542 and SB 551.

Because the Plaintiffs cannot obtain declaratory or injunctive relief against these defendants—under any circumstances as a matter of law—the Plaintiffs will not suffer serious and irreparable harm if the stay is granted. Accordingly, because the Plaintiffs will not suffer serious and irreparable harm if the stay is granted, the third stay factor weighs heavily in favor of a stay.

V. Because the writ petition involves important and unsettled issues of law and presents a substantial case on the merits, the balance of equities weighs heavily in favor of granting the stay.

Under this Court’s stay factors, because the object of the Petitioners’ writ petition will be defeated without a stay, the first stay factor takes precedence, and the other parties can defeat the Petitioners’ stay motion only by “making a strong

showing that appellate relief is unattainable.” Mikohn Gaming, 120 Nev. at 253. To make that showing, the other parties must demonstrate that the writ petition “appears to be frivolous or the stay [is] sought purely for dilatory purposes.” Robles-Nieves, 129 Nev. at 546. Because the Petitioners’ writ petition involves important and unsettled issues of law and presents a substantial case on the merits, the other parties cannot make that showing. Therefore, the balance of equities weighs heavily in favor of granting the stay.

In its disqualification order, the district court concluded that LCB Legal could not represent the Legislative Defendants because the district court believed that LCB Legal’s representation of the Legislative Defendants is governed by the conflict-of-interest rules in RPC 1.7. (*PA3:0601-03.*) With certain exceptions, RPC 1.7 provides that a lawyer cannot represent a client if the representation of that client would be directly adverse to another client. RPC 1.7(a)(1). Based on its belief that RPC 1.7 applied, the district court determined that LCB Legal could not represent the Legislative Defendants because that representation would be directly adverse to the interests of the Plaintiff Senators. (*PA3:0601-03.*)

In the writ petition, the Petitioners contend that the district court committed a manifest abuse of discretion because LCB Legal’s representation of the Legislative Defendants is governed by RPC 1.11, which applies specifically to government lawyers. Under RPC 1.11(d), although the conflict-of-interest rules in RPC 1.7

generally apply to government lawyers, RPC 1.11(d) also contains an “except” clause stating that the conflict-of interest rules are applicable to government lawyers “[e]xcept as law may otherwise expressly permit.”

Based on the constitutional separation of powers and the rules of construction, the “except” clause in RPC 1.11(d) is intended to create an exception from the conflict-of-interest rules in order for government lawyers to provide legal representation to their government clients when required by law. In this case, because LCB Legal has been directed by law under the statutory provisions in NRS 218F.720 to provide legal representation in this litigation to the Legislative Defendants in their official capacity, the conflict-of-interest rules in RPC 1.7 are not applicable under the “except” clause in RPC 1.11(d), and LCB Legal must be allowed to fulfill its statutory duties under NRS 218F.720 to provide legal representation to its legislative branch clients in order to ensure the proper functioning of state government and guarantee the separation of powers.

Furthermore, under well-established case law, the Plaintiff Senators did not have standing to bring a motion to disqualify LCB Legal as counsel for the Legislative Defendants in their official capacity given that LCB Legal does not have a separate attorney-client relationship with the Plaintiff Senators which can form the basis for disqualification because LCB Legal represents individual

members of the Legislature in their official capacity as constituents of the organization and not as separate individuals.

Even assuming for the sake of argument that LCB Legal has a conflict of interest, disqualification would not be an appropriate remedy in this litigation because the balance of competing interests and prejudices weighs against disqualification and in favor of LCB Legal representing the Legislative Defendants in their official capacity in this litigation as their statutorily authorized counsel under NRS 218F.720. For decades, LCB Legal has been directed by law to provide representation to members of the legislative branch sued in their official capacity when deemed necessary or advisable to protect the official interests of the Legislature under NRS 218F.720. During that time, LCB Legal has been able to provide essential and effective representation to its legislative branch clients sued in their official capacity in such litigation. This case is no different, and under the balancing of competing interests and prejudices, LCB Legal should not be disqualified from representing the Legislative Defendants in their official capacity in this litigation as their statutorily authorized counsel under NRS 218F.720.

Finally, even assuming for the sake of argument that LCB Legal has a conflict of interest, the Plaintiff Senators should be barred—under the equitable doctrines of estoppel and waiver—from challenging the conflict of interest based on their calculated and tactical litigation decisions in this case. The Plaintiff Senators

intentionally introduced the conflict of interest into this litigation when they made a calculated and tactical litigation decision to name the Legislative Defendants in their official capacity with full knowledge that the Legislative Defendants are not necessary parties to this litigation and with full knowledge that LCB Legal is expressly authorized to represent the Legislative Defendants in their official capacity as their statutorily authorized counsel under NRS 218F.720. Under such circumstances and in the interests of equity, justice and fairness, the Plaintiff Senators should be required to accept the consequences of their own calculated and tactical litigation decisions, and they should not be permitted to use their disqualification motion to prejudice the rights of the Legislative Defendants to their statutorily authorized counsel under NRS 218F.720.

Based on the foregoing arguments made by the Petitioners, the writ petition involves important and unsettled issues of law and presents a substantial case on the merits. Therefore, the balance of equities weighs heavily in favor of granting the stay. Accordingly, because all four factors in the stay analysis weigh heavily in favor of granting the stay, the Petitioners ask this Court to grant their emergency motion for a stay of all district court proceedings pending resolution of the writ petition.

CONCLUSION

Based on the foregoing, the Petitioners ask this Court to grant their emergency motion under NRAP 8(a)(2) and NRAP 27(e) for a stay of all district court proceedings pending resolution of the writ petition.

DATED: This **3rd** day of January, 2020.

Respectfully submitted,

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ADDENDUM

NRS 218F.720 Authority to provide legal representation in actions and proceedings; exemption from fees, costs and expenses; standards and procedures for exercising unconditional right and standing to intervene; payment of costs and expenses of representation.

1. When deemed necessary or advisable to protect the official interests of the Legislature in any action or proceeding, the Legislative Commission, or the Chair of the Legislative Commission in cases where action is required before a meeting of the Legislative Commission is scheduled to be held, may direct the Legislative Counsel and the Legal Division to appear in, commence, prosecute, defend or intervene in any action or proceeding before any court, agency or officer of the United States, this State or any other jurisdiction, or any political subdivision thereof. In any such action or proceeding, the Legislature may not be assessed or held liable for:

- (a) Any filing or other court or agency fees; or
- (b) The attorney's fees or any other fees, costs or expenses of any other parties.

2. If a party to any action or proceeding before any court, agency or officer:

(a) Alleges that the Legislature, by its actions or failure to act, has violated the Constitution, treaties or laws of the United States or the Constitution or laws of this State; or

(b) Challenges, contests or raises as an issue, either in law or in equity, in whole or in part, or facially or as applied, the meaning, intent, purpose, scope, applicability, validity, enforceability or constitutionality of any law, resolution, initiative, referendum or other legislative or constitutional measure, including, without limitation, on grounds that it is ambiguous, unclear, uncertain, imprecise, indefinite or vague, is preempted by federal law or is otherwise inapplicable, invalid, unenforceable or unconstitutional,

➡ the Legislature may elect to intervene in the action or proceeding by filing a motion or request to intervene in the form required by the rules, laws or regulations applicable to the action or proceeding. The motion or request to intervene must be accompanied by an appropriate pleading, brief or dispositive motion setting forth the Legislature's arguments, claims, objections or defenses, in law or fact, or by a motion or request to file such a pleading, brief or dispositive motion at a later time.

3. Notwithstanding any other law to the contrary, upon the filing of a motion or request to intervene pursuant to subsection 2, the Legislature has an unconditional right and standing to intervene in the action or proceeding and to present its arguments, claims, objections or defenses, in law or fact, whether or not the Legislature's interests are adequately represented by existing parties and

whether or not the State or any agency, officer or employee of the State is an existing party. If the Legislature intervenes in the action or proceeding, the Legislature has all the rights of a party.

4. The provisions of this section do not make the Legislature a necessary or indispensable party to any action or proceeding unless the Legislature intervenes in the action or proceeding, and no party to any action or proceeding may name the Legislature as a party or move to join the Legislature as a party based on the provisions of this section.

5. The Legislative Commission may authorize payment of the expenses and costs incurred pursuant to this section from the Legislative Fund.

6. As used in this section:

(a) “Action or proceeding” means any action, suit, matter, cause, hearing, appeal or proceeding.

(b) “Agency” means any agency, office, department, division, bureau, unit, board, commission, authority, institution, committee, subcommittee or other similar body or entity, including, without limitation, any body or entity created by an interstate, cooperative, joint or interlocal agreement or compact.

(c) “Legislature” means:

(1) The Legislature or either House; or

(2) Any current or former agency, member, officer or employee of the Legislature, the Legislative Counsel Bureau or the Legislative Department.

(Added to NRS by 1965, 1461; A 1971, 1546; 1995, 1108; 1999, 2203; 2007, 3305; 2009, 1565; 2011, 3244)—(Substituted in revision for NRS 218.697)

NRAP 27(e) CERTIFICATE

1. Contact information of the attorneys for the parties.

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in the District Court Proceedings:
State of Nevada ex rel. Governor Steve
Sisolak, Lieutenant Governor Kate
Marshall, Nevada Department of
Taxation and Nevada Department of
Motor Vehicles*

2. Notification and service of the attorneys for the parties.

On January 3, 2020, the Petitioners provided the required notice of this emergency motion to: (1) Karen A. Peterson and Justin Townsend, with the law firm of Allison Mackenzie, Ltd., the attorneys for all real parties in interest and all other plaintiffs in the district court proceedings; and (2) Craig A. Newby, Deputy Solicitor General, with the Office of the Attorney General, the attorneys for all the Executive Defendants in the district court proceedings (State of Nevada ex rel. Governor Steve Sisolak, Lieutenant Governor Kate Marshall, Nevada Department of Taxation and Nevada Department of Motor Vehicles).

The Petitioners provided the required notice of this emergency motion to those attorneys by electronic mail, and the Petitioners also served this emergency motion on those attorneys by means of the Nevada Supreme Court's electronic filing system and by electronic mail pursuant to the parties' stipulation and consent to service by electronic mail. (PA2:0389-93).

3. Facts showing the existence and nature of the emergency.

This emergency motion and the Petitioners' writ petition concern the order entered by the district court in the underlying action on December 19, 2019, which: (1) disqualified LCB Legal from representing the Legislative Defendants in their official capacity in this litigation as their statutorily authorized counsel under NRS 218F.720; (2) required the Legislative Defendants to obtain separate outside counsel to represent them in their official capacity in this litigation; (3) denied a stay of the district court proceedings requested by LCB Legal to address the consequences of the order requiring the Legislative Defendants to obtain separate outside counsel to represent them in their official capacity in this litigation; and (4) set a procedural schedule for briefing dispositive motions on the merits of the underlying action requiring the Legislative Defendants to file an opposition to the Plaintiffs' motion for summary judgment and file their own counter-motion for summary judgment not later than January 21, 2020. (PA3:0597-605.)

On the same date that the district court entered its order disqualifying LCB Legal as counsel for the Legislative Defendants in their official capacity, the district court entered a separate order granting the Legislature's motion to intervene as a defendant-intervenor. (*PA3:0607.*) In that order, the district court also denied a motion to disqualify LCB Legal from representing the Legislature in this litigation as its statutorily authorized counsel under NRS 218F.720. (*PA3:0607.*)

Thus, under the district court's orders, LCB Legal may represent the Legislature in this litigation as its statutorily authorized counsel under NRS 218F.720 for the purpose of defending the Legislature's official interests. However, LCB Legal is prohibited from representing the individual Legislative Defendants in this litigation even though the Legislative Defendants are being sued in their official capacity as constituents of the Legislature as an organization and even though LCB Legal has the same statutory authorization under NRS 218F.720 to represent the Legislative Defendants in this litigation for the purpose of defending the Legislature's official interests.

On December 30, 2019, at the next scheduled meeting of the Legislative Commission following entry of the district court's disqualification order, the Legislative Commission directed LCB Legal under NRS 218F.720 to take all actions necessary to obtain appellate review of the disqualification order in order to

protect the official interests of the Legislature. LCB Legal electronically filed the writ petition at 3:31 p.m. on January 2, 2020, and the writ petition was accepted and file-stamped on January 3, 2020. Also on January 3, 2020, LCB Legal filed this emergency motion for a stay of all district court proceedings pending resolution of the writ petition.

Under NRAP 8(a)(1), when parties want a stay of the district court proceedings pending resolution of their writ petition, the parties ordinarily must first move for a stay in the district court. Fritz Hansen v. Dist. Ct., 116 Nev. 650, 657 (2000). However, to address emergency circumstances and prevent irreparable harm, the parties may forgo moving for a stay in the district court and may move for a stay in this Court when it would be impracticable to move for a stay in the district court. NRAP 8(a)(2).

In this case, to address emergency circumstances and prevent irreparable harm arising from the district court's disqualification order, it would be impracticable for the Petitioners to move for a stay in the district court. NRAP 8(a)(2). First, the district court has already indicated that it would not grant a stay regardless of the circumstances. (PA3:0587.) Specifically, at the hearing held on November 19, 2019, concerning the motion to disqualify LCB Legal as counsel for the Legislative Defendants, LCB Legal requested a stay of the district court proceedings to address the consequences of the order requiring the

Legislative Defendants to obtain separate outside counsel to represent them in their official capacity in this litigation. In response to LCB Legal’s request for a stay, the district court stated: “I’m not staying anything. I want you to know that.” (PA3:0587.)

Second, the district court has set a procedural schedule for briefing dispositive motions on the merits of the underlying action requiring the Legislative Defendants to file an opposition to the Plaintiffs’ motion for summary judgment and file their own counter-motion for summary judgment not later than January 21, 2020. Thus, unless this Court stays the district court proceedings, the Legislative Defendants must obtain separate outside counsel and fully prepare their summary-judgment briefs by January 21, 2020. As a result, the Petitioners are asking this Court to take action on this emergency motion for a stay by January 13, 2020.

Third, unless this Court stays the district court proceedings, the object of the Petitioners’ writ petition—to obtain appellate review of the district court’s disqualification order—will be entirely defeated and irretrievably lost. This Court has determined that a writ petition is the appropriate vehicle for challenging disqualification orders because an appeal after a final judgment does not provide an adequate legal remedy to rectify the irreparable harm caused by erroneous disqualification orders that permanently separate parties from their attorneys whom they have chosen to represent them in the litigation. See Nev. Yellow Cab Corp. v.

Dist. Ct., 123 Nev. 44, 49 (2007). Consequently, if the Legislative Defendants are required under the district court's disqualification order to litigate the merits of this litigation to a final judgment without LCB Legal as their statutorily authorized counsel under NRS 218F.720, the Legislative Defendants will have already suffered irreparable harm by the time the district court renders a final judgment because they will have been permanently deprived of their statutorily authorized counsel and the specialized knowledge, skills and experience that LCB Legal would have otherwise brought to the litigation.

Finally, unless this Court stays the district court proceedings, the LCB will be required to incur expenses for attorney's fees that must be paid from the Legislative Fund to provide the Legislative Defendants with separate outside counsel to represent them in their official capacity in this litigation. See NRS 218A.150 (providing for payment of expenses from the Legislative Fund). In the absence of a stay, if the LCB is required to incur expenses for outside counsel and this Court later vacates the district court's disqualification order, the LCB will be irreparably harmed because it will not be able to recover those expenses for the legal services already provided by outside counsel.

Accordingly, to address these emergency circumstances and prevent irreparable harm arising from the district court's disqualification order, this Court

should grant the Petitioners' emergency motion for a stay of all district court proceedings pending resolution of their writ petition.

DATED: This 3rd day of January, 2020.

Respectfully submitted,

BRENDA J. ERDOES
Legislative Counsel

By: /s/ Kevin C. Powers

KEVIN C. POWERS

Chief Litigation Counsel

Nevada Bar No. 6781

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 3rd day of January, 2020, pursuant to NRAP 25 and the parties' stipulation and consent to service by electronic mail, I served a true and correct copy of the Petitioners' Emergency Motion under NRAP 8(a)(2) and NRAP 27(e) for Stay of All District Court Proceedings Pending Resolution of Petition for Writ of Mandamus, as follows:

By means of the Nevada Supreme Court's electronic filing system and electronic mail directed to:
KAREN A. PETERSON, ESQ.
JUSTIN TOWNSEND, ESQ.
ALLISON MACKENZIE, LTD.
402 N. Division St.
Carson City, NV 89703
kpeterson@allisonmackenzie.com
jtownsend@allisonmackenzie.com
Attorneys for All Real Parties in Interest and All Other Plaintiffs in the District Court Proceedings

By United States Mail, postage prepaid, directed to:
HONORABLE JAMES T. RUSSELL
FIRST JUDICIAL DISTRICT COURT
885 E. Musser St. Room 3061
Carson City, NV 89701
Respondent District Judge

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

By electronic mail directed to:
AARON D. FORD
Attorney General
CRAIG A. NEWBY
Deputy Solicitor General
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Attorneys for All Executive Defendants in the District Court Proceedings:
State of Nevada ex rel. Governor Steve Sisolak, Lieutenant Governor Kate Marshall, Nevada Department of Taxation and Nevada Department of Motor Vehicles