

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

THE STATE OF NEVADA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
in and for THE COUNTY OF CLARK;  
and THE HONORABLE RICHARD  
SCOTTI, District Judge,

Respondents, and

MATTHEW HANEY MOLEN,

Real Party in Interest.

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Elizabeth A. Brown  
Clerk of Supreme Court

**Case No. 82249**

Original Action for Writ to  
Eighth Judicial District Court,  
Clark County, Nevada,  
Case No. C-20-348754-A

**NEVADA LEGISLATURE'S MOTION FOR EXTENSION OF TIME  
TO FILE AMICUS CURIAE BRIEF AND TO EXCEED WORD LIMIT  
FOR SUCH BRIEF IN CASES NOS. 82236 AND 82249 AND  
SUGGESTION FOR CONSOLIDATION AND EN BANC  
CONSIDERATION OF THE CASES**

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## **MOTION**

The Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau (“LCB Legal”) under NRS 218F.720, hereby files this Motion for Extension of Time to File Amicus Curiae Brief and to Exceed Word Limit for Such Brief in Cases Nos. 82236 and 82249 and Suggestion for Consolidation and En Banc Consideration of the Cases. If the Court grants the Legislature’s motion, the Legislature requests an extension of time to file an amicus brief until February 1, 2021, or 7 days after the date of the order granting the extension, whichever date is later, and the Legislature requests to file an amicus brief not exceed 14,000 words.

The Legislature’s motion is made under NRAP 21, 26, 27, 29 and 32 and is based upon the legal argument made herein and all pleadings, documents and exhibits included in Petitioner State of Nevada’s appendix that was filed in Case No. 82249 (Molen) on January 14, 2021. When the Legislature filed this motion on January 19, 2021, the State’s deadline for filing its appendix in Case No. 82236 (Plumlee) was January 22, 2021.

## **LEGAL ARGUMENT**

### **I. Background.**

In each of these cases on November 18, 2020, the Honorable Richard Scotti, Respondent District Judge, entered substantively similar orders concluding that a

member of the Legislature who also holds a position of *public employment* with a local government as a deputy district attorney violates the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution. (*Molen App. AA000232-36.*) Specifically, Respondent District Judge stated that Real Party in Interest Molen and Real Party in Interest Plumlee were:

deprived of [their] Constitutional rights of procedural due process because [their] prosecutor, Deputy District Attorney Scheible, also served as a Legislator at the time of the trial, in violation of the “Separation of Powers” doctrine—which doctrine exists as a fundamental feature of American government, and as an express clause in the Nevada Constitution. Nev. Const. Art III, §1. An individual may not serve simultaneously as the lawmaker and the law-enforcer of the laws of the State of Nevada.

(*Molen App. AA000233.*) Based on his conclusion of a separation-of-powers violation, Respondent District Judge reversed the convictions of Real Party in Interest Molen and Real Party in Interest Plumlee in their respective appeals from the Henderson Justice Court. (*Molen App. AA000236.*)

In reaching his conclusion of a separation-of-powers violation, Respondent District Judge rejected long-standing legal opinions provided to the Legislature by LCB Legal. (*Molen App. AA000234.*) In the most recent of those legal opinions issued on August 8, 2020, LCB Legal advised the Legislature as follows:

In the absence of any controlling Nevada case law directly on point, you have asked whether it remains the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. Given that there is no controlling Nevada

case law directly on point to resolve this question of constitutional law, we again have carefully considered: (1) historical evidence of the practices in the Federal Government and Congress immediately following the ratification of the Federal Constitution; (2) historical evidence of the practices in the California Legislature under similar state constitutional provisions which served as the model for the Nevada Constitution; (3) historical evidence of the practices in the Nevada Legislature since statehood; (4) legal treatises and other authorities on constitutional law; (5) case law from other jurisdictions interpreting similar state constitutional provisions; (6) common-law rules governing public officers and employees; and (7) the intent of the Framers and their underlying public policies supporting the concept of the “citizen-legislator” as the cornerstone of an effective, responsive and qualified part-time legislative body. Taking all these compelling historical factors, legal authorities and public policies into consideration—along with our prior legal opinions on this question of constitutional law—it remains the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments.

(*Molen App. AA000185-86.*)

In Case No. 82249 (Molen), on December 22, 2020, the State filed its petition for extraordinary writ relief under NRAP 21, but the State did not file an appendix with its petition. On December 31, 2020, the Court entered an order directing the State to file its appendix within 14 days from the date of the order and directing Real Party in Interest Molen to file an answer within 28 days from the date that the State serves its appendix. The State filed its appendix on January 14, 2021.

In Case No. 82236 (Plumlee), on December 21, 2020, the State filed its petition for extraordinary writ relief under NRAP 21, but the State did not file an appendix with its petition. On January 8, 2021, the Court entered an order

directing the State to file its appendix within 14 days of the order and directing Real Party in Interest Plumlee to file an answer within 28 days from the date that the State serves its appendix. When the Legislature filed this motion on January 19, 2021, the State’s deadline for filing its appendix in Case No. 82236 (Plumlee) was January 22, 2021.

## **II. Discussion.**

### **A. Motion for extension of time to file amicus brief.**

Under NRAP 21(b)(3), when a party files an extraordinary writ petition, “[t]he court may invite an amicus curiae to address the petition.” Additionally, under NRAP 29(a):

[T]he State of Nevada [or] an officer or agency of [the State] . . . may file an amicus curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court granted on motion or at the court’s request or if accompanied by written consent of all parties.

For an ordinary appeal, an amicus brief must be filed not later than 7 days after the brief of the party being supported is filed, unless the Court “grant[s] leave for later filing, specifying the time within which an opposing party may answer.” NRAP 29(f). By contrast, for an extraordinary writ petition, although NRAP 21 provides that “[t]he court may invite an amicus curiae to address the petition,” NRAP 21 does not specify a time for filing an amicus brief. Finally, NRAP 26(b)(1)(A) provides that “[f]or good cause, the court may extend the time

prescribed by these Rules or by its order to perform any act, or may permit an act to be done after that time expires.”

In these cases, when the State filed its extraordinary writ petition under NRAP 21, the State did not file its appendix at the same time. As a result, the Legislature did not receive a copy of the State’s appendix in Case No. 82249 (Molen) until January 14, 2021, and the State has not filed its appendix yet in Case No. 82236 (Plumlee), with the filing deadline currently set for January 22, 2021. After receiving a copy of the State’s appendix in Case No. 82249 (Molen) on January 14, 2021, the Legislature promptly filed this motion for an extension on January 19, 2021.

The Legislature is requesting an extension of time in order to properly address the complex issues of first impression and constitutional law presented by these cases. In particular, the Legislature has substantial interests in the interpretation of the separation-of-powers provision because that provision governs the powers of the legislative branch and the Legislature’s administration of its constitutional functions and the conduct of its members. See Heller v. Legislature, 120 Nev. 456, 466-72 (2004); Comm’n on Ethics v. Hardy, 125 Nev. 285, 291-93 (2009). The Legislature has established a public policy in this State that protects the concept of the “citizen-legislator” as the cornerstone of an effective, responsive and qualified

part-time legislative body. As expressed in NRS 281A.020, it is the public policy of this State that:

State Legislators serve as “**citizen Legislators**” who have other occupations and business interests, who are expected to have particular philosophies and perspectives that are necessarily influenced by the life experiences of the Legislator, including, without limitation, professional, family and business experiences, and who are expected to contribute those philosophies and perspectives to the debate over issues with which the Legislature is confronted.

NRS 281A.020(2)(c) (emphasis added).

Thus, the Legislature has substantial interests in ensuring that the broadest spectrum of the citizenry is represented in the Legislature’s membership in order to protect “the constituency concept of our legislature in this state, which can accurately be described as a citizens’ legislature.” State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1093 (N.M. Ct. App. 1991). As further explained by Justice Crockett of the Utah Supreme Court:

In our democratic system, the legislature is intended to represent the people: that is, to be made up from the general public representing a wide spectrum of the citizenry. It is not to be doubted that legislators from the ranks of education are affected by the interests of that calling. But all other legislators also have interests. No one lives in a vacuum.

Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring and explaining that Utah’s separation-of-powers provision would not prohibit state legislators from serving as public school teachers).

Accordingly, by granting the Legislature an extension of time to file its amicus brief, the Court would be facilitating a more comprehensive and thorough presentation of the controlling law and a better understanding of the issues, and the Court would be ensuring that the views of the Legislature are fairly and adequately represented and are not prejudiced by these cases. Moreover, because these cases are in their earliest stages, the extension will not unduly delay the proceedings or prejudice the rights of the existing parties.

**B. Motion to exceed word limit for amicus brief.**

For an ordinary appeal, the word limit for a party's brief is 14,000 words, and the word limit for an amicus brief is 7,000 words, unless the Court allows a longer brief. NRAP 29(e); NRAP 32(a)(7)(A). By contrast, for an extraordinary writ petition, the word limit for a party's brief and for an amicus brief is 7,000 words, unless the Court allows a longer brief. NRAP 21(d).

In these cases, LCB Legal is asking to file an amicus brief on behalf of the Legislature that does not exceed 14,000 words. In filing this motion to exceed the word limit, LCB Legal is respectful of this Court's admonition to appellate counsel to observe reasonable limitations on arguments filed with this Court. See Hernandez v. State, 117 Nev. 463 (2001). However, in order to properly address the complex issues of first impression and constitutional law presented by these cases, LCB Legal is asking to exceed the word limit to meet this Court's high



standards of appellate practice in which this Court “expects all appeals to be pursued with high standards of diligence, professionalism, and competence.” Barry v. Lindner, 119 Nev. 661, 671 (2003); Polk v. State, 126 Nev. 180, 184 (2010). This duty requires counsel to avoid inadequate appellate practices, such as discussing issues without including “cogent argument and citation to relevant authority.” Berkson v. Lepome, 126 Nev. 492, 501-02 (2010) (“It is well established that this court need not consider issues not supported by cogent argument and citation to relevant authority.”). Therefore, the additional words in the Legislature’s amicus brief are necessary to discuss the complex issues of first impression and constitutional law raised by these cases in a cogent manner that includes “adequate supporting law.” Barry, 119 Nev. at 672.

**C. Suggestion for consolidation and en banc consideration of cases.**

When extraordinary writ petitions challenge similar district court orders and present similar arguments, this Court may consolidate the cases for disposition. Levinson v. Second Jud. Dist. Ct., 103 Nev. 404, 406 (1987). This Court may find en banc consideration to be appropriate when “the proceeding involves a substantial precedential, constitutional or public policy issue.” NRAP 40A(a).

In each of these cases on November 18, 2020, Respondent District Judge entered substantively similar orders concluding that a member of the Legislature who also holds a position of *public employment* with a local government as a

deputy district attorney violates the separation-of-powers provision. (*Molen App. AA000232-36.*) The State has presented similar arguments on the separation-of-powers issues in these cases. Real Party in Interest Molen and Real Party in Interest Plumlee are represented by the same attorneys, and they likely will be presenting similar arguments on the separation-of-powers issues in these cases. Finally, these cases present substantial precedential, constitutional and public policy issues. Therefore, the Legislature suggests consolidation and en banc consideration of these cases.

### **CONCLUSION**

Based on the foregoing, the Legislature asks this Court to: (1) grant the Legislature an extension of time to file an amicus brief until February 1, 2021, or 7 days after the date of the order granting the extension, whichever date is later; (2) allow the Legislature to file an amicus brief not exceed 14,000 words; and (3) consider consolidation and en banc consideration of the cases.

DATED: This **19th** day of January, 2021.

By: /s/ Kevin C. Powers  
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## **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 19th day of January, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of the Legislature's Motion for Extension of Time to File Amicus Curiae Brief and to Exceed Word Limit for Such Brief in Cases Nos. 82236 and 82249 and Suggestion for Consolidation and En Banc Consideration of the Cases, by means of the Nevada Supreme Court's electronic filing system, directed to:

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