

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

JENNIFER LYNN PLUMLEE,
Real Party in Interest.

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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Case No. 82236

Original Action for Writ to
Eighth Judicial District Court,
Clark County, Nevada,
Case No. C-20-346852-A

Case No. 82249

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

**NEVADA LEGISLATURE'S REPLY IN SUPPORT OF MOTION
TO EXCEED WORD LIMIT IN NRAP 21(d) FOR
AMICUS CURIAE BRIEF**

KEVIN C. POWERS, General Counsel

Nevada Bar No. 6781

LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

401 S. Carson St.

Carson City, NV 89701

Tel: (775) 684-6830; Fax: (775) 684-6761

Email: kpowers@lcb.state.nv.us

Attorneys for the Legislature of the State of Nevada

REPLY IN SUPPORT OF 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 reply in support of its motion to exceed the word limit in NRAP 21(d) for its amicus curiae brief. On Feb. 23, 2021, Real Parties in Interest (“defendants”) filed an opposition to the Legislature’s motion. This Court should grant the Legislature’s motion because, in light of the statewide importance of the issues presented by these cases, the Legislature’s extended amicus brief—which includes cogent argument and citation to relevant authority as required by this Court’s high standards of appellate practice—will facilitate a more comprehensive and thorough presentation of the controlling law and a better understanding of the issues and will ensure that the Legislature’s views are fairly and adequately represented and are not prejudiced by these cases.

The Legislature’s extended amicus brief serves “the classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.” Miller-Wohl Co. v. Comm’r of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). Nevertheless, the defendants contend that no good cause exists to justify the Legislature’s extended amicus brief given that LCB Legal’s 32-page legal opinion on the separation-of-powers issue was submitted to the district court and included

in the State's writ-petition appendix. However, because legal arguments in amicus briefs must meet the same appellate standards as party briefs, the Legislature would have contravened those appellate standards by omitting legal arguments from its extended amicus brief and instead referring this Court to the legal opinion submitted to the district court because "[p]arties shall not incorporate by reference briefs or memoranda of law submitted to the district court or refer [this Court] to such briefs or memoranda for the arguments on the merits of the appeal." NRAP 28(e)(2). Furthermore, the Legislature has shown diligence and good cause because its extended amicus brief will assist this Court in resolving these cases of general public interest, will supplement the efforts of counsel and will draw this Court's attention to law that may have otherwise escaped consideration.

The defendants also contend that the Legislature's extended amicus brief improperly raises constitutional issues that the State did not raise in its writ petition. Specifically, the Legislature argues that even if the defendants had proven that the prosecutor committed constitutional errors in prosecuting these cases, the defendants were not entitled to reversal of their convictions and new trials under the Due Process Clause because they did not make the required additional showing that the constitutional errors caused actual prejudice that resulted in unfair trials.

As a general rule, this Court usually will not consider new legal issues raised for the first time in an amicus brief. Select Portfolio Serv’g v. Dunmire, No. 77251, 2020 WL 466816 (Nev. Jan. 27, 2020) (unpublished disposition) (citing 3B C.J.S. Amicus Curiae § 17). However, “the rule is not absolute as an appellate court has discretion to consider new issues raised by an amicus.” 3B C.J.S. Amicus Curiae § 18. Thus, this Court may exercise its discretion to consider new legal issues not raised in the district court but raised for the first time in an amicus brief. Nev. Power Co. v. Haggerty, 115 Nev. 353, 365 n.9 (1999). Moreover, this Court “may raise sua sponte a constitutional issue not asserted in the district court.” Schwartz v. Lopez, 132 Nev. 732, 753 n.10 (2016). And this Court has “previously considered arguments that were not raised in the district court when the issue presents solely a question of law and the interests of judicial economy warrant resolving the issue.” JPMorgan Chase Bank v. SFR Invs. Pool 1, 136 Nev. Adv. Op. 68 n.1, 475 P.3d 52, 55 n.1 (2020).

In these cases, by considering the due-process issue raised in the Legislature’s extended amicus brief, this Court can resolve these cases based on well-established due-process principles, which provide “the narrower ground for adjudication of the constitutional questions.” Plaut v. Spendthrift Farm, 514 U.S. 211, 217 (1995). Thus, this Court would not need to resolve the more complex separation-of-powers issue, which is a constitutional issue of first impression in Nevada. See Spears v.

Spears, 95 Nev. 416, 418 (1979) (“This court will not consider constitutional issues which are not necessary to the determination of an appeal.”). Therefore, the Legislature’s extended amicus brief properly raises the due-process issue even though the State did not raise the due-process issue in its writ petition.

Finally, the defendants contend that, based on the plain language of Nevada’s separation-of-powers provision, the Legislature’s extended amicus brief unnecessarily includes discussions of historical evidence, case law from other states, reason and public policy, and the purpose and intent of the separation-of-powers provision. However, the defendants’ plain-language argument is defeated by the plain language of the separation-of-powers provision.

First, the plain language states that “[t]he powers of the Government of the **State of Nevada** shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial.” Nev. Const. art. 3, § 1 (emphasis added). By using the term “State” in the plain language of the provision, the Framers of the Nevada Constitution expressed a clear intent to have the provision apply only to the three departments of state government, not to local governments. See State ex rel. Mason v. Bd. of Cnty. Comm’rs, 7 Nev. 392, 396-97 (1872); City of Fernley v. State Dep’t of Tax’n, 132 Nev. 32, 43 n.6 (2016). Therefore, the Legislature’s extended amicus brief properly discusses that Nevada’s provision does not prohibit legislators from holding positions of public employment with

local governments because local governments and their officers and employees are not part of one of the three departments of state government.

Second, the plain language of Nevada's provision was modeled on the same plain language of California's provision. The Legislature's extended amicus brief properly discusses that during California's first 67 years of statehood, it was a common and accepted practice for California Legislators to hold positions as state executive branch employees until 1916, when California's Constitution was amended to prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917).

Finally, the Legislature's extended amicus brief properly discusses other historical evidence, case law from other states, reason and public policy, and the purpose and intent of the separation-of-powers provision because "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989). Thus, all the legal discussions in the Legislature's extended amicus brief are necessary and essential to read the plain language of the separation-of-powers provision in its proper context in Nevada's overall constitutional scheme. Therefore, the Legislature asks this Court to grant its motion to exceed the word limit in NRAP 21(d) for its amicus brief.

DATED: This 2nd day of March, 2021.

By: /s/ Kevin C. Powers

KEVIN C. POWERS, General Counsel

Nevada Bar No. 6781

LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

401 S. Carson St.

Carson City, NV 89701

Tel: (775) 684-6830; Fax: (775) 684-6761

Email: kpowers@lcb.state.nv.us

Attorneys for the Legislature of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 2nd day of March, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of the Legislature's Reply in Support of Motion to Exceed the Word Limit in NRAP 21(d) for its Amicus Curiae Brief, by means of the Nevada Supreme Court's electronic filing system, directed to:

STEVEN B. WOLFSON
Clark County District Attorney
ALEXANDER CHEN
Chief Deputy District Attorney
OFFICE OF THE CLARK COUNTY
DISTRICT ATTORNEY
200 Lewis Ave.
Las Vegas, NV 89155
Alexander.Chen@clarkcountynvda.com
Attorneys for Petitioner
State of Nevada

CRAIG A. MUELLER, ESQ.
CRAIG MUELLER & ASSOCIATES
723 S. Seventh St.
Las Vegas, NV 89101
receptionist@craigmuellerlaw.com
Attorneys for Real Party in Interest
Matthew Haney Molen and Real Party
in Interest Jennifer Lynn Plumlee

AARON D. FORD
Attorney General
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 89701
Attorneys for Petitioner
State of Nevada

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