

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE,

Appellant,

vs.

NICOLE J. CANNIZZARO, an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; JASON FRIERSON, an individual engaging in dual employment with the Nevada State Assembly and Clark County Public Defender; HEIDI SEEVERS GANSERT, an individual engaging in dual employment with the Nevada State Senate and University of Nevada, Reno; GLEN LEAVITT, an individual engaging in dual employment with the Nevada State Assembly and Regional Transportation Commission; BRITTNEY MILLER, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; DINA NEAL, an individual engagement in dual employment with the Nevada State Senate and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defendant; MELANIE SCHEIBLE, an individual engagement in dual employment with the Nevada State Senate and Clark County District Attorney; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno;

Supreme Court Case No.: 82341

Electronically Filed
[District Court Case No. 2021-05-19 p.m.
A-20-817757-C] Elizabeth A. Brown
Clerk of Supreme Court

and SELENA TORRES, an individual
engaging in dual employment with the
Nevada State Assembly and Clark County
School District,

Respondents,

and Legislature of the State of Nevada,

Intervenor-Respondent.

JOINT APPENDIX VOLUME 1 of 7

Appeal from the Eighth Judicial District Court,
Orders Granting Motions to Dismiss and Joinders Thereto;
Order Granting Motion to Intervene; and Order Denying Motion to Disqualify
The Honorable Jim Crockett (Ret.), District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 2021, I caused the foregoing to be served on all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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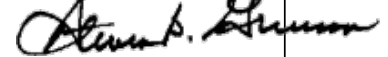
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CASE NO: A-20-817757-C
Department 2

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and Clark
County District Attorney; KASINA DOUGLASS-
BOONE, an individual engaging in dual employment with
the Nevada State Assembly and Clark County School
District; JASON FRIERSON, an individual engaging in
dual employment with the Nevada State Assembly and
Clark County Public Defender; HEIDI SEEVERS
GANSERT, an individual engaging in dual employment
with the Nevada State Senate and University of Nevada,
Reno; GLEN LEAVITT, an individual engaging in dual
employment with the Nevada State Assembly and
Regional Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual employment
with the Nevada State Assembly and Clark County
School District; JAMES OHRENSCHALL, an individual
engaging in dual employment with the Nevada State
Senate and Clark County Public Defender; MELANIE
SCHEIBLE, an individual engaging in dual employment
with the Nevada State Senate and Clark County District
Attorney; and SELENA TORRES, an individual engaging
in dual employment with the Nevada State Assembly and
Clark County School District,

Defendants.

Case No.:
Dept. No.:

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

[Exemption from Arbitration Based
on Equitable Relief Requested]

1 NEVADA POLICY RESEARCH INSTITUTE (“NPRI”), by and through its attorneys of
2 record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby
3 alleges and complains against NICOLE J. CANNIZZARO, KASINA DOUGLASS-BOONE,
4 JASON FRIERSON, HEIDI SEEVERS GANSERT, GLEN LEAVITT, BRITTNEY MILLER,
5 JAMES OHRENSCHALL, MELANIE SCHEIBLE, and SELENA TORRES (collectively herein
6 “Defendants”), as follows:

7 **FACTS COMMON TO ALL CLAIMS**

8 1. NPRI files this Complaint for Declaratory and Injunctive Relief in the public interest
9 to address the ongoing constitutional violations by Defendants, and each of them, for engaging in
10 dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid
11 positions with Nevada State or local governments.

12 2. The Nevada Constitution reads in relevant part:

13 The powers of the Government of the State of Nevada shall be divided
14 into three separate departments, the Legislature, the Executive and the
15 Judicial; and no person charged with the exercise of powers properly
16 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. Nevada Const. Art. 3, §1, ¶1.

17 3. The rationale underlying the Separation of Powers requirement of Nevada Const. Art.
18 3, §1, ¶1 can be traced to the desires of the constitutional framers to encourage and preserve the
19 independence and integrity of the actions and decisions of individual members of the Nevada State
20 Legislature and to guard against conflicts of interest, concentration of powers, and dilution of the
21 separation of powers.

22 4. Defendants’ dual employment by simultaneously holding elected offices in the
23 Nevada State Legislature and paid positions with Nevada State or local governments expressly
24 violates the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and undermines the
25 ethics of their legislative service by creating conflicts, concentrating power, and diluting the
26 separation of powers.

5. If allowed to proceed with the dual employment stated herein, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1. NPRI presents this action, pursuant to NRS 30.030, *et seq.*, and NRS 33.010, *et seq.*, respectively, and can and will fully advocate for: (1) the Court's declaration that it is unconstitutional for Defendants to engage in the dual employment stated herein, and (2) the Court's injunction to prevent Defendants from continuing to engage in the unconstitutional dual employment stated herein.

PARTIES

6. NPRI is a public interest nonprofit, nonpartisan corporation organized under the laws of the State of Nevada whose primary missions are to conduct public policy research and advocate for policies that promote transparency, accountability, and efficiency in government.

7. At all relevant times, Defendant Nicole J. Cannizzaro has simultaneously held the elected office of Nevada State Senator and the paid government position of Chief Deputy District Attorney for the County of Clark, State of Nevada.

8. At all relevant times, Defendant Kasina Douglass-Boone has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Social Worker Mental Health Specialist I for the Clark County School District.

9. At all relevant times, Defendant Jason Frierson has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Assistant Public Defender for the County of Clark, State of Nevada.

10. At all relevant times, Defendant Heidi Seevers Gansert has simultaneously held the elected office of Nevada State Senator and the paid government position of Executive Director, External Relations for the University of Nevada, Reno.

11. At all relevant times, Defendant Glen Leavitt has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Public Affairs Analyst for the Regional Transportation Commission.

12. At all relevant times, Defendant Brittney Miller has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Teacher for the Clark County School District.

13. At all relevant times, Defendant James Ohrenschall has simultaneously held the elected office of Nevada State Senator and the paid government position of Deputy Public Defender for the County of Clark, State of Nevada.

14. At all relevant times, Defendant Melanie Scheible has simultaneously held the elected office of Nevada State Senator and the paid government position of Deputy District Attorney for the County of Clark, State of Nevada.

15. At all relevant times, Defendant Selena Torres has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Teacher for the Clark County School District.

JURISDICTION AND VENUE

16. The Court has jurisdiction over all parties, where Plaintiff conducts business in the County of Clark, State of Nevada, and all Defendants either reside in or carry out the duties of their elected offices throughout the State of Nevada, including in the County of Clark.

17. Venue is appropriate because the events giving rise to Plaintiff's causes of action have occurred, and continue to occur, in the County of Clark, State of Nevada.

FIRST CAUSE OF ACTION

Violation of Separation of Powers (Declaratory Relief)

18. Plaintiff realleges and incorporates by reference herein each and every foregoing paragraph of this Complaint as if set forth in full.

19. There is an actual controversy between Plaintiff, acting in the public interest, and the Defendants and each of them, as to the meaning of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and its application to Defendants and their conduct. Plaintiff has taken the position that Defendants are persons simultaneously holding elected offices in the Nevada State

1 Legislature and paid positions with Nevada State or local governments in violation of the Separation
2 of Powers requirement of Nevada Const. Art. 3, §1, ¶1. Upon information and belief, Defendants
3 disagree with Plaintiff's position stated above.

4 20. Plaintiff seeks relief pursuant to NRS 30.010, *et seq.*, in the form of a declaration that
5 Defendants simultaneously holding elected offices in the Nevada State Legislature and paid
6 positions with Nevada State or local governments violates the Separation of Powers requirement of
7 Nevada Const. Art. 3, §1, ¶1. A declaration resolving the actual controversy between Plaintiff and
8 Defendants will serve a useful purpose in settling the legal issues in this action and offering relief
9 from uncertainty for all parties to this action.

10 21. It was necessary for Plaintiff to retain the services of an attorney to bring this cause
11 of action, and it should be properly compensated therefore.

12 **SECOND CAUSE OF ACTION**
13 **Violation of Separation of Powers**
14 **(Injunctive Relief)**

15 22. Plaintiff realleges and incorporates by reference herein each and every foregoing
16 paragraph of this Complaint as if set forth in full.

17 23. Defendants are persons simultaneously holding elected offices in the Nevada State
18 Legislature and paid positions with Nevada State or local governments in violation of the Separation
19 of Powers requirement of Nevada Const. Art. 3, §1, ¶1.

20 24. Without this Court's intervention, legislative expenditures or appropriations and
21 taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1, and
22 irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
23 Constitution.

24 25. There exists no adequate remedy at law to prevent the constitutional violation caused
25 by Defendants simultaneously holding elected offices in the Nevada State Legislature and paid
26 positions with Nevada State or local governments in violation of the Separation of Powers
27 requirement of Nevada Const. Art. 3, §1, ¶1.

26. Plaintiff, acting in the public interest, is entitled to injunctive relief to stop and prevent the Separation of Powers violations by Defendants stated herein. The Court has the power to grant such relief, pursuant to its inherent ability to grant equitable relief and the provisions of NRS 33.010, *et seq.*

27. It was necessary for Plaintiff to retain the services of an attorney to bring this cause of action, and it should be properly compensated therefore.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For a declaration that Defendants simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments violates the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1;

2. For an injunction against Defendants prohibiting each and every one of them from continuing to simultaneously hold elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments in violation of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1;

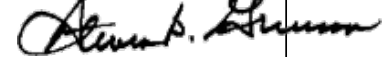
3. For reasonable attorneys' fees and costs; and

4. For such other and further relief as the Court may deem just and proper.

Dated this 9th day of July, 2020.

FOX ROTHSCILD LLP

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13 Attorneys for Plaintiff
14 Nevada Policy Research Institute

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 NEVADA POLICY RESEARCH INSTITUTE, a
13 Nevada domestic nonprofit corporation,

14 Plaintiff,

15 vs.

16 NICOLE J. CANNIZZARO, an individual engaging
17 in dual employment with the Nevada State Senate
18 and Clark County District Attorney; KASINA
19 DOUGLASS-BOONE, an individual engaging in
20 dual employment with the Nevada State Assembly
21 and Clark County School District; JASON
22 FRIERSON, an individual engaging in dual
23 employment with the Nevada State Assembly and
24 Clark County Public Defender; OSVALDO FUMO,
25 an individual engaging in dual employment with the
26 Nevada State Assembly and University of Nevada,
27 Las Vegas; HEIDI SEEVERS GANSERT, an
28 individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C
Dept. No.: II

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

[Exemption from Arbitration Based on
Equitable Relief Requested]

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

NEVADA POLICY RESEARCH INSTITUTE (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby alleges and complains against NICOLE J. CANNIZZARO, KASINA DOUGLASS-BOONE, JASON FRIERSON, OSVALDO FUMO, HEIDI SEEVERS GANSERT, GLEN LEAVITT, BRITTNEY MILLER, DINA NEAL, JAMES OHRENSCHALL, MELANIE SCHEIBLE, TERESA BENITEZ-THOMPSON, JILL TOLLES, and SELINA TORRES (collectively herein “Defendants”), as follows:

FACTS COMMON TO ALL CLAIMS

1. NPRI files this Complaint for Declaratory and Injunctive Relief in the public interest to address the ongoing constitutional violations by Defendants, and each of them, for engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments.

2. The Nevada Constitution reads in relevant part:

The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislature, the Executive and the Judicial; and no person 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. Nevada Const. Art. 3, §1, ¶1.

3. The rationale underlying the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 can be traced to the desires of the constitutional framers to encourage and preserve the independence and integrity of the actions and decisions of individual members of the Nevada State Legislature and to guard against conflicts of interest, concentration of powers, and dilution of the separation of powers.

4. Defendants' dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments expressly violates the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and undermines the ethics of their legislative service by creating conflicts, concentrating power, and diluting the separation of powers.

5. If allowed to proceed with the dual employment stated herein, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1. NPRI presents this action, pursuant to NRS 30.030, *et seq.*, and NRS 33.010, *et seq.*, respectively, and can and will fully advocate for: (1) the Court's declaration that it is unconstitutional for Defendants to engage in the dual employment stated herein, and (2) the Court's injunction to prevent Defendants from continuing to engage in the unconstitutional dual employment stated herein.

PARTIES

6. NPRI is a public interest nonprofit, nonpartisan corporation organized under the laws of the State of Nevada whose primary missions are to conduct public policy research and advocate for policies that promote transparency, accountability, and efficiency in government.

7. At all relevant times, Defendant Nicole J. Cannizzaro has simultaneously held the elected office of Nevada State Senator and the paid government position of Chief Deputy District Attorney for the County of Clark, State of Nevada.

8. At all relevant times, Defendant Kasina Douglass-Boone has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Social Worker Mental Health Specialist for the Clark County School District.

1 9. At all relevant times, Defendant Jason Frierson has simultaneously held the elected
2 office of Nevada State Assemblyperson and the paid government position of Assistant Public
3 Defender for the County of Clark, State of Nevada.

4 10. At all relevant times, Defendant Osvaldo Fumo has simultaneously held the elected
5 office of Nevada State Assemblyperson and the paid government position of Adjunct Instructor for
6 the University of Nevada, Las Vegas.

7 11. At all relevant times, Defendant Heidi Seevers Gansert has simultaneously held the
8 elected office of Nevada State Senator and the paid government position of Executive Director,
9 External Relations for the University of Nevada, Reno.

10 12. At all relevant times, Defendant Glen Leavitt has simultaneously held the elected
11 office of Nevada State Assemblyperson and the paid government position of Public Affairs Analyst
12 for the Regional Transportation Commission.

13 13. At all relevant times, Defendant Brittney Miller has simultaneously held the elected
14 office of Nevada State Assemblyperson and the paid government position of Teacher for the Clark
15 County School District.

16 14. At all relevant times, Defendant Dina Neal has simultaneously held the elected office
17 of Nevada State Assemblyperson and the paid government position of Adjunct Professor for the
18 Nevada State College.

19 15. At all relevant times, Defendant James Ohrenschall has simultaneously held the
20 elected office of Nevada State Senator and the paid government position of Deputy Public Defender
21 for the County of Clark, State of Nevada.

22 16. At all relevant times, Defendant Melanie Scheible has simultaneously held the elected
23 office of Nevada State Senator and the paid government position of Deputy District Attorney for the
24 County of Clark, State of Nevada.

25 17. At all relevant times, Defendant Teresa Benitez-Thompson has simultaneously held
26 the elected office of Nevada State Assemblyperson and the paid government position of Adjunct
27 Professor for the University of Nevada, Reno.

1 18. At all relevant times, Defendant Jill Tolles has simultaneously held the elected office
2 of Nevada State Assemblyperson and the paid government position of Adjunct Professor for the
3 University of Nevada, Reno.

4 19. At all relevant times, Defendant Selena Torres has simultaneously held the elected
5 office of Nevada State Assemblyperson and the paid government position of Teacher for the Clark
6 County School District.

7 **JURIDICTION AND VENUE**

8 20. The Court has jurisdiction over all parties, where Plaintiff conducts business in the
9 County of Clark, State of Nevada, and all Defendants either reside in or carry out the duties of their
10 elected offices throughout the State of Nevada, including in the County of Clark.

11 21. Venue is appropriate because the events giving rise to Plaintiff's causes of action
12 have occurred, and continue to occur, in the County of Clark, State of Nevada.

13 **FIRST CAUSE OF ACTION**
14 **Violation of Separation of Powers**
15 **(Declaratory Relief)**

16 22. Plaintiff realleges and incorporates by reference herein each and every foregoing
17 paragraph of this Complaint as if set forth in full.

18 23. There is an actual controversy between Plaintiff, acting in the public interest, and the
19 Defendants and each of them, as to the meaning of the Separation of Powers requirement of Nevada
20 Const. Art. 3, §1, ¶1 and its application to Defendants and their conduct. Plaintiff has taken the
21 position that Defendants are persons simultaneously holding elected offices in the Nevada State
22 Legislature and paid positions with Nevada State or local governments in violation of the Separation
23 of Powers requirement of Nevada Const. Art. 3, §1, ¶1. Upon information and belief, Defendants
24 disagree with Plaintiff's position stated above.

25 24. Plaintiff seeks relief pursuant to NRS 30.010, *et seq.*, in the form of a declaration that
26 Defendants simultaneously holding elected offices in the Nevada State Legislature and paid
27 positions with Nevada State or local governments violates the Separation of Powers requirement of
28 Nevada Const. Art. 3, §1, ¶1. A declaration resolving the actual controversy between Plaintiff and

1 Defendants will serve a useful purpose in settling the legal issues in this action and offering relief
2 from uncertainty for all parties to this action.

3 25. It was necessary for Plaintiff to retain the services of an attorney to bring this cause
4 of action, and it should be properly compensated therefore.

5 **SECOND CAUSE OF ACTION**
6 **Violation of Separation of Powers**
7 **(Injunctive Relief)**

8 26. Plaintiff realleges and incorporates by reference herein each and every foregoing
9 paragraph of this Complaint as if set forth in full.

10 27. Defendants are persons simultaneously holding elected offices in the Nevada State
11 Legislature and paid positions with Nevada State or local governments in violation of the Separation
12 of Powers requirement of Nevada Const. Art. 3, §1, ¶1.

13 28. Without this Court's intervention, legislative expenditures or appropriations and
14 taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1, and
15 irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
16 Constitution.

17 29. There exists no adequate remedy at law to prevent the constitutional violation caused
18 by Defendants simultaneously holding elected offices in the Nevada State Legislature and paid
19 positions with Nevada State or local governments in violation of the Separation of Powers
20 requirement of Nevada Const. Art. 3, §1, ¶1.

21 30. Plaintiff, acting in the public interest, is entitled to injunctive relief to stop and
22 prevent the Separation of Powers violations by Defendants stated herein. The Court has the power
23 to grant such relief, pursuant to its inherent ability to grant equitable relief and the provisions of
24 NRS 33.010, *et seq.*

25 31. It was necessary for Plaintiff to retain the services of an attorney to bring this cause
26 of action, and it should be properly compensated therefore.

27 ///

28 ///

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

3 1. For a declaration that Defendants simultaneously holding elected offices in the
4 Nevada State Legislature and paid positions with Nevada State or local governments violates the
5 Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1;

6 2. For an injunction against Defendants prohibiting each and every one of them from
7 continuing to simultaneously hold elected offices in the Nevada State Legislature and paid positions
8 with Nevada State or local governments in violation of the Separation of Powers requirement of
9 Nevada Const. Art. 3, §1, ¶1;

10 3. For reasonable attorneys' fees and costs; and

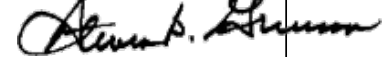
11 4. For such other and further relief as the Court may deem just and proper.

12 Dated this 28th day of July, 2020.

13 **FOX ROTHSCHILD LLP**

14
15 By: /s/ Deanna L. Forbush

16 DEANNA L. FORBUSH, ESQ.
17 Nevada Bar No. 6646
18 COLLEEN E. MCCARTY, ESQ.
19 Nevada Bar No. 13186
20 1980 Festival Plaza Dr., Suite 700
21 Las Vegas, Nevada 89135
22 Telephone: (702) 262-6899
23 Attorneys for Plaintiff
24 Nevada Policy Research Institute
25
26
27
28



1 **AOS**

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11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: II

AFFIDAVIT OF SERVICE

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

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AFFIDAVIT OF SERVICE

**DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Judith Mae All, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

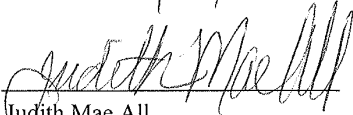
That on 9/1/2020 at 1:48 PM at 2200 S. Ft. Apache Road, Unit 2127, Las Vegas, NV 89117 I served Brittney Miller with the above-listed documents by personally delivering a true and correct copy of the documents by leaving with Brittney Miller.

That the description of the person actually served is as follows:

Gender: Female, Race: Caucasian/Mix, Age: 30's, Height: 5'5", Weight: 140 lbs., Hair: Black, Eyes:Brown

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/3/2020



Judith Mae All
Registered Work Card# R-040570
State of Nevada

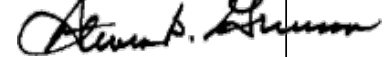
(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230883
Reference: 189864.00021

JA000016



1 **AOS**

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5 COLLEEN E. MCCARTY, ESQ.

6 Nevada Bar No. 13186

7 cmccarty@foxrothschild.com

8 **FOX ROTHSCHILD LLP**

9 1980 Festival Plaza Drive, Suite 700

10 Las Vegas, Nevada 89135

11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: II

AFFIDAVIT OF SERVICE

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

AFFIDAVIT OF SERVICE

DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Tyler Trewet, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That on 8/29/2020 at 2:14 PM at 7544 Fontera Court, Las Vegas, NV 89139 I served Jason Frierson with the above-listed documents by personally delivering a true and correct copy of the documents by leaving with Jason Frierson.

That the description of the person actually served is as follows:

Gender: Male, Race: African American, Age: 46 - 50 yrs., Height: 5'8", Weight: 250 lbs., Hair: Bald, Eyes:Brown

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/2/20


Tyler Trewet

Registered Work Card# R201904184
State of Nevada

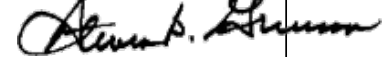
(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230881
Reference: 189864.00021

JA000019



1 **AOS**

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3 Nevada Bar No. 6646

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5 COLLEEN E. MCCARTY, ESQ.

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8 **FOX ROTHSCHILD LLP**

9 1980 Festival Plaza Drive, Suite 700

10 Las Vegas, Nevada 89135

11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: II

AFFIDAVIT OF SERVICE

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

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AFFIDAVIT OF SERVICE

**DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.: A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Judith Mae All, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That on 9/1/2020 at 3:46 PM at 436 W. Azure Avenue, North Las Vegas, NV 89031 I served Kasina Douglass-Boone with the above-listed documents by personally delivering a true and correct copy of the documents by leaving with "John Doe" - {confirmed subject resides/refused name/documents drop-served} whose relationship is Co-Resident, a person of suitable age and discretion residing at the defendants usual place of abode.

That the description of the person actually served is as follows:

Gender: Male, Race: African American, Age: 50's, Height: 5'10", Weight: 280 lbs., Hair: Black, Eyes: Brown

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/3/2020

Judith Mae All

Judith Mae All
Registered Work Card# R-040570
State of Nevada

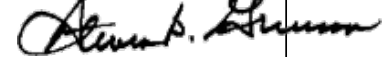
(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #: NV230855
Reference: 189864.00021

JA000022



1 **AOS**

2 DEANNA L. FORBUSH, ESQ.

3 Nevada Bar No. 6646

4 dforbush@foxrothschild.com

5 COLLEEN E. MCCARTY, ESQ.

6 Nevada Bar No. 13186

7 cmccarty@foxrothschild.com

8 **FOX ROTHSCHILD LLP**

9 1980 Festival Plaza Drive, Suite 700

10 Las Vegas, Nevada 89135

11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: II

AFFIDAVIT OF SERVICE

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

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AFFIDAVIT OF SERVICE

**DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Sean Keseday, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That on 9/4/2020 at 1:07 PM at 603 S. Las Vegas Blvd., Las Vegas, NV 89101 I served Osvaldo Fumo with the above-listed documents by personally delivering a true and correct copy of the documents by leaving with Osvaldo Fumo.

That the description of the person actually served is as follows:

Gender: Male, Race: Caucasian, Age: 56 - 60 yrs., Height: Seated, Weight: 161 - 180 lbs., Hair: Gray, Eyes:Gray/Glasses, Marks: Goatee

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/14/20

Sean Keseday
Registered Work Card# R-065975
State of Nevada

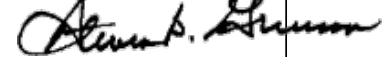
(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230842
Reference: 189864.00021

JA000025



1 **NVD**

2 DEANNA L. FORBUSH, ESQ.

3 Nevada Bar No. 6646

4 dforbush@foxrothschild.com

5 COLLEEN E. MCCARTY, ESQ.

6 Nevada Bar No. 13186

7 cmccarty@foxrothschild.com

8 **FOX ROTHSCHILD LLP**

9 1980 Festival Plaza Drive, Suite 700

10 Las Vegas, Nevada 89135

11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
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23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: II

**NOTICE OF VOLUNTARY
DISMISSAL OF DEFENDANT
TERESA BENITEZ-THOMPSON**

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Plaintiff Nevada Policy Research Institute (“NPRI”), by and through its counsel, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq. of the law firm of Fox Rothschild LLP, hereby voluntarily dismisses Defendant Teresa Benitez-Thompson without prejudice from the above-captioned litigation, pursuant to NRCP 41(a)(1).

Dated this 17th day of September, 2020.

FOX ROTHSCHILD LLP

By: /s/ Deanna L. Forbush

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Nevada Bar No. 6646

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Attorneys for Plaintiff

Nevada Policy Research Institute

CERTIFICATE OF SERVICE

I certify that I am an employee of Fox Rothschild LLP and that on this 17th day of September, 2020, I caused the above and foregoing document entitled **NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANT TERESA BENITEZ-THOMPSON** to be served as follows:

☒ Upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

☒ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or to the attorney(s) listed below at the address and/or facsimile number indicated below:

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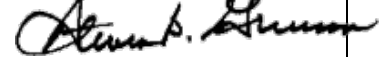
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DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,

vs.

Case No. A-20-817757-C

Dept. No.: II

HEARING REQUESTED

**DEFENDANT BRITTNEY MILLER'S
MOTION TO DISMISS COMPLAINT**

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA DOUGLASS-
BOONE, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA
NEAL, an individual engaging in dual
employment with the Nevada State Assembly
and Nevada State College; JAMES
OHRENSCHALL, an individual engaging in
dual employment with the Nevada State
Senate and Clark County Public Defender;

1 MELANIE SCHEIBLE an individual
engaging in dual employment with the
2 Nevada State Senate and Clark County
District Attorney; TERESA BENITEZ-
3 THOMPSON, an individual engaging in dual
employment with the Nevada State Assembly
4 and University of Nevada, Reno; JILL
TOLLES, an individual engaging in dual
5 employment with the Nevada State Assembly
and University of Nevada, Reno; and
6 SELENA TORRES, an individual engaging
in dual employment with the Nevada State
7 Assembly and Clark County School District,
8
9 Defendants.

10 Defendant Brittney Miller moves this Court to dismiss the Amended Complaint of Plaintiff
11 the Nevada Policy Research Institute (“NPRI”), pursuant to NRCP 12(b)(1) and NRCP 12(b)(5).
12 This motion is based on the points and authorities below, all papers and exhibits on file herein, and
13 any oral argument this Court sees fit to allow at hearing on this matter.

14 DATED this 18th day of September, 2020.

15 **WOLF, RIFKIN, SHAPIRO,**
16 **SCHULMAN & RABKIN, LLP**

17 By: /s/ Bradley Schrager
18 BRADLEY SCHRAGER, ESQ. (SBN 10217)
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19 3556 E. Russell Road, Second Floor
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20 (702) 341-5200/Fax: (702) 341-5300

21 *Attorneys for Defendant Brittney Miller*
22
23
24
25
26
27
28

1

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 Standing is the key that unlocks the courthouse doors to a litigant, in Nevada and every
5 other jurisdiction. Here, NPRI lacks standing to bring and prosecute its claim that Ms. Miller’s
6 service as a Clark County middle school teacher violates the Nevada Constitution, art. 3, sec. 1. It
7 has suffered, and can claim, no particular injury itself, and cannot meet the elements of the only—
8 and both recent and very narrow—exception to that specific-injury requirement to standing in
9 Nevada. Neither has NPRI named the parties its suit would require by statute, even if it could be
10 argued that it otherwise can establish standing to sue.

11 In Nevada, an organization, no matter how earnest or enthusiastic about the issue with
12 which it is concerned, cannot simply file a lawsuit to resolve that matter, absent legal standing to
13 bring the suit. To do so is not only to flaunt the rules of standing, but also to invite demands for
14 what are essentially advisory opinions from the Nevada judiciary. As such, NPRI’s suit must be
15 dismissed for lack of jurisdiction of the Court, and for failure to state a claim for which relief may
16 be granted.

17 **II. LEGAL STANDARDS**

18 Pursuant to NRCP 12(b)(5), “[a] complaint should only be dismissed for failure to state a
19 claim if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it
20 to relief.” *Kim v. Dickinson Wright, PLLC*, 135 Nev. 161, 164, 442 P.3d 1070, 1073 (2019)
21 (quoting *Szyborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641, 403 P.3d 1280, 1283
22 (2017)). The court should “presume that all alleged facts in the complaint are true and draw all
23 inferences in favor of the complainant.” *Benko v. Quality Loan Serv. Corp.*, 135 Nev. 483, 486,
24 454 P.3d 1263, 1266 (2019). Furthermore, the court is not required to assume the truth of legal
25 conclusions merely because they are cast in the form of factual allegations. *W. Min. Council v.*
26 *Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see also Sproul Homes of Nev. v. State*, 96 Nev. 441, 445,
27 611 P.2d 620, 622 (1980) (motion to dismiss not fairly surmountable where complaint is replete
28 with generalizations and conclusory matter).

1 Motions brought for lack of standing that the Court construes as jurisdictional in nature are
2 subject to NRCP 12(b)(1), but the standards for such determination are the same as those for a
3 12(b)(5) motion. Lack of standing is a defect in subject matter jurisdiction, and may be challenged
4 under Rule 12(b)(1). *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct.
5 1326 (1986).

6 The burden of demonstrating a particularized injury and thus establishing standing falls to
7 the parties bringing the suit. *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

8 **III. NPRI’S PREVIOUS CASES ON THIS ISSUE**

9 NPRI long has been involved in bringing a number of cases on the “dual service”
10 constitutional theory, usually acting as counsel for plaintiffs it secures in order to mount
11 challenges to the legislative service or public employment of targeted officials.

12 In 2011, its legal arm acted as counsel in *Pojunis v Denis*, First Judicial District Court Case
13 No. 11 OC 00394 (filed Nov. 30, 2011) (*see* Exhibit A, a true and accurate copy of the Complaint
14 in that action).¹ In *Pojunis*, plaintiff William Pojunis, secured by NPRI to undertake the suit,
15 argued that the employment as a computer technician with the Public Utilities Commission of
16 Nevada by Nevada State Senator Moises Denis violated Nev. Const. art 3, sec. 1. Pojunis argued
17 that he “is duly qualified, holds the job requirements established by the Public Utilities
18 Commission of Nevada, and earnestly seeks the position of Computer Technician currently held
19 by Defendant MOISES DENIS.” *See* Ex. A, at ¶ 3. The action was later dismissed as moot by the
20 district court, but there was no motion entertained that Mr. Pojunis lacked standing as plaintiff in
21 the lawsuit. Additionally, in that suit Mr. Pojunis and NPRI named both the State of Nevada and
22 the Public Utilities Commission of Nevada as defendants in the action, in keeping with NRS
23 41.0337.

24 In 2017, NPRI, again as plaintiff’s counsel, brought the case of *French v. Gansert*, First
25

26 ¹ Defendant requests the Court take judicial notice of Exhibit A pursuant to NRS 47.130(2)(b), as
27 a matter of fact capable of accurate and ready determination by resort to sources whose accuracy
28 cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.

Judicial District Court Case No. 17 OC 00231B (filed May 1, 2017) (*see* Exhibit B, a true and accurate copy of the Amended Complaint in that action).² There, the plaintiff challenged State Senator Heidi Seevers Gansert’s employment with the University of Nevada, Reno. Again, it was argued that Mr. French “is duly qualified, holds the job requirements for and earnestly seeks the position of Executive Director, External Relations at the University of Nevada, Reno, currently held by Defendant HEIDI GANSERT.” *See* Ex. B, at ¶ 4. The suit was dismissed but not for lack of standing on Mr. French’s part. Also again, Mr. French and NPRI named, as defendants, the State of Nevada, the University of Nevada, Reno, the Nevada System of Higher Education, and the Nevada Board of Regents, in keeping with NRS 41.0337.

Note that in both these previous actions, NPRI presented an individual plaintiff with arguable standing, and it named as party defendants the State and the political subdivisions—the employers—of the targeted public officials. Here it has done neither of those, opting instead to become the plaintiff itself and to sue only the individuals like Ms. Miller, in her capacity as an employee of a political subdivision, the Clark County School District. The Nevada Supreme Court, in *Heller v. Legislature*, 120 Nev. 456, 472-473, 93 P.3d 746, 757 (2004), made very clear, in dismissing that original writ proceeding, that the manner in which the kind of suit and relief NPRI is pursuing here “could be sought by someone with a legally protectible interest, such as a person seeking the executive branch position held by the legislator.” (internal quotation and citation omitted). Furthermore, NRS 41.0337 would require the naming as defendants of additional parties, even if standing existed otherwise. The failure to establish standing or to sue appropriate parties is fatal to NPRI’s case, and to this Court’s jurisdiction to hear the action, and this case should be dismissed.

IV. ARGUMENT

A. NPRI Lacks Standing To Bring Its Claims

Standing is the threshold inquiry in any lawsuit; without it, no suit may proceed.

² Defendant requests the Court take judicial notice of Exhibit B.

1 Standing "consists of both a case or controversy requirement stemming from Article III, Section 2
2 of the Constitution, and a subconstitutional prudential element." *In re AMERCO Derivative*
3 *Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011). While Nevada state courts do not have a
4 strict requirement of constitutional Article III standing, "Nevada has a long history of requiring an
5 actual justiciable controversy as a predicate to judicial relief." *Doe v. Bryan*, 102 Nev. 523, 525,
6 728 P.2d 443, 444 (1986). "The question of standing concerns whether the party seeking relief has
7 a sufficient interest in the litigation." *Schwartz*, 132 Nev. at 743 (citing *Szilagyi v. Testa*, 99 Nev.
8 834, 838, 673 P.2d 495, 498 (1983)). This applies, as well, to suits for declaratory or injunctive
9 relief, and in fact the gravamen of the present action demands a very exacting standing inquiry by
10 this Court. *Stockmeier v. Nev. Dep't of Corr. Psych. Rev. Panel* ("*Stockmeier I*"), 122 Nev. 385,
11 393-94, 135 P.3d 220, 225-26 (2006) (noting that while state courts are not required to comply
12 with federal "case or controversy" requirement, "[i]n cases for declaratory relief and where
13 constitutional matters arise, **this court has required plaintiffs to meet increased jurisdictional**
14 **standing requirements**" (footnotes omitted)), *abrogated on other grounds*, *Buzz Stew, LLC v.*
15 *City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (emphasis supplied). Standing in
16 Nevada is a jurisdictional determination, addressed either by a motion to dismiss under NRC
17 12(b)(1), NRC 12(b)(5), or—because it is jurisdictional—in a *sua sponte* order by the Court
18 itself.

19 **1. NPRI does not meet the basic standing requirements in Nevada**

20 For a controversy to exist sufficient to bring a lawsuit, parties "must show a personal
21 injury and not merely a general interest that is common to all members of the public." *Schwartz*,
22 132 Nev. at 732 (citing *Doe*, 102 Nev. at 525). The "injury-in-fact" analysis requires the claimant
23 to show that the action caused or threatened to cause the claimant's injury-in-fact, and that the
24 relief sought will remedy the injury. *See generally Simon v. E. Ky. Welfare Rights Org.*, 426 U.S.
25 26, 38-39, 96 S. Ct. 1917 (1976). As stated, the burden of demonstrating a particularized injury
26 and thus establishing standing falls to the parties bringing the suit. *Id.*, 132 Nev. at 743.

27 Here, unlike the individual plaintiffs it produced in its previous forays into this subject
28 matter in years past, NPRI does not and cannot show that it has or will suffer a direct injury,

1 separate from advancing a general interest common to the public at large. It concedes as much in
2 its Complaint: apart from stating no injury it has suffered or that can be alleviated by seeking relief
3 from this Court, it repeatedly claims it is acting “in the public interest” in bringing this lawsuit.
4 Compl., at ¶¶ 1, 6, 23, 30.

5 There is no generalized taxpayer standing in this state. In fact, the Nevada Supreme Court
6 has been at pains to decline, expressly, to establish such a doctrine in numerous cases over many
7 years. *See Katz v. Incline Village General Improvement District*, 414 P.3d 300, 2018 WL 1129140
8 (unpublished decision), Nev. S. Ct. Case No. 70440 (Feb. 26, 2018) (“This court recently
9 reaffirmed the general rule that a taxpayer lacks standing when he or she has not suffered a special
10 or peculiar injury different from that sustained by the general public.”) (citing *Schwartz*, 132 Nev.
11 at 743). *See also Blanding v. City of Las Vegas*, 52 Nev. 52, 74, 280 P. 644, 650 (1929) (“It is
12 contended that appellants as taxpayers may join and maintain this action without showing special
13 injury. This contention is untenable.”).

14 **2. The public-importance exception to the requirement of a particularized**
15 **injury**

16 In 2015, the Nevada Supreme Court did establish, in *Schwartz*, “an exception to [the]
17 injury requirement in certain cases involving issues of public importance.” *Id.*, 132 Nev. at 743.
18 Under its terms, courts *may* “grant standing to a Nevada citizen to raise constitutional
19 challenges to legislative expenditures or appropriations without a showing of a special or personal
20 injury.” *Id.* “We stress,” however, “that this public-importance exception is narrow and available
21 only if the following criteria are met:

22 First, the case must involve an issue of significant public importance. Second, the
23 case must involve a challenge to a legislative expenditure or appropriation on the
24 basis that it violates a specific provision of the Nevada Constitution. And third,
25 the plaintiff must be an ‘appropriate’ party, meaning that there is no one else in a
better position who will likely bring an action and that the plaintiff is capable of
fully advocating his or her position in court.

26 *Id.* (internal citations omitted). *See also Laborers’ Intl. Union of N. America, Local 169 v.*
27 *Douglas County*, 454 P.3d 1259, 2019 WL 6999885 (unpublished decision), Nev. S.Ct. Case No.
28 77062 (Dec. 19, 2019) (Reiterating the narrowness of the *Schwartz* exception to basic standing

requirements). All three elements of this exception must be met, and even in that event the court must be convinced to employ its prudential discretion to determine that a plaintiff has standing to maintain suit.

NPRI appears to rely entirely upon this “public-importance exception” articulated in *Schwartz*, in order to bring its lawsuit against Ms. Miller. But even if the suit is assumed to address an issue of “significant public importance,” NPRI clearly cannot meet the second and third prongs of the *Schwartz* test because it is not challenging a legislative appropriation and is not an appropriate party in the sense expressed by the Supreme Court in *Schwartz*.

(a) NPRI is not challenging a legislative expenditure or appropriation

NPRI does not—and cannot, given the manner in which it has framed its pleading—allege or challenge of *legislative appropriation or expenditure* in this action. The closest it comes to making such an allegation is its contention that “taxpayer monies will be paid to Defendants.” Compl., at ¶¶ 5, 28. Clearly, NPRI is here referring to Ms. Miller’s salary as a Clark County middle school teacher, but that cannot suffice to invoke the narrow *Schwartz* public-importance exception to the normal rules of standing. No legislature has made direct appropriation to Ms. Miller by official act, and NPRI does not allege that any legislature has, in fact, done so.

An appropriation is “the provision of funds, through an annual appropriations act or a permanent law, for federal agencies to make payments out of the Treasury for specified purposes.” https://www.senate.gov/reference/glossary_term/appropriation.htm (last visited Sept. 16, 2020). Here, the funds NPRI is alleging were “appropriated” or expended” when the Legislature enacted its budget, and funded the Distributive School Account or the myriad other accounts that go to fund education statewide under the Nevada Plan. The *Schwartz* exception requires not just an expenditure or an appropriation, but specifically a *legislative* expenditure or appropriation that a plaintiff plausibly alleges violates a specific provision of the Nevada Constitution. Nowhere in its Complaint does NPRI allege it is challenging a legislative appropriation.

In *Schwartz*—the only instance in which the narrow public-importance exception has been recognized and permitted by the Nevada Supreme Court thus far—the plaintiffs “allege[d] that

1 [the challenged enactment] allows millions of dollars of public funds to be diverted from public
2 school districts to private schools, in clear violation of specific provisions in the Nevada
3 Constitution.” 132 Nev. at 744, 382 P.3d at 895. The *Schwartz* plaintiffs sued the State, through
4 the State Treasurer, to challenge an act of the Nevada Legislature in appropriating and expending
5 public funds on an enormous scale budgeted for public and private education. *Id.*

6 In the only other instance in which the Supreme Court has considered a proposed
7 application of the public-importance exception, the Court reiterated the need for a discrete,
8 legislative expenditure or appropriation, and found that the plaintiffs in *Laborers’ Intl.* had not
9 alleged such an official, legislative act. *See Laborer’s Intl.*, 2019 WL 6999885, at *2 (noting that
10 public-importance exception applies “under certain, *specific* circumstances,” and concluding that
11 plaintiff “does not meet this narrow exception because it does not allege that Douglas County
12 violated a specific Nevada constitutional provision *via an expenditure or appropriation*”) (emphasis added). At least, however, although its case failed and standing was rejected, plaintiffs
13 in *Laborers’ Intl.* sued Douglas County, which is arguably a legislative body within the meaning
14 of the *Schwartz* standing exception; NPRI has failed to name anyone other than individuals like
15 Ms. Miller.
16

17 The simple payment by her employer to Ms. Miller of her salary for her employment
18 cannot activate the *Schwartz* exception. Such an interpretation would swallow the rule entirely,
19 turning a “narrow” exception into an expansive one. *Schwartz*, 132 Nev. at 743. It cannot be
20 seriously suggested that NPRI considers Ms. Miller’s actual salary to be an appropriation, or that
21 in her absence her middle school classroom will be empty and no other teacher will be hired to
22 replace her and paid the funds that were appropriated by the Nevada Legislature to provide
23 instruction at her school. Clearly, the Nevada Supreme Court had in mind a rare standing
24 exception for significantly-important public cases challenging, on constitutional grounds,
25 budgetary activities of legislative bodies in Nevada.

26 NPRI is claiming that Ms. Miller, by the very existence of her employment as a middle
27 school teacher, is violating the Nevada Constitution through what it terms “dual service” in
28 multiple government branches, not that a legislative body has appropriated or expended funds in

derogation of the Nevada Constitution. Only the latter would provide an opportunity to argue to this Court that NPRI may avail itself of the public-importance standing exception announced in *Schwartz*. Because NPRI has not challenged, and cannot challenge, a specific legislative appropriation, it cannot so avail itself, and it cannot establish standing to maintain its action. This is not to say that the case NPRI wants to make is utterly unavailable to an appropriate plaintiff, only that NPRI itself cannot invoke the jurisdiction of this Court to determine its action because it fails to establish its standing to do so here.

(b) NPRI is not an appropriate party

NPRI also fails to satisfy the third prong of the *Schwartz* exception, because it is not an “appropriate” party within the meaning of the Supreme Court’s opinion. To qualify, NPRI must show that “no one else is in a better position” to bring its suit. *Schwartz*, 132 Nev. at 743.

The Nevada Supreme Court has already spoken on the nature of truly “appropriate” parties to cases claiming dual service of legislators in violation of the state’s constitutional separation of powers clause: “someone with a legally protectible interest, such as a person seeking the executive branch position held by the legislator.” *Heller*, 120 Nev. at 472-73. NPRI has shown previously that it understands this issue; in both of its previous suits, *Pojunis* and *French*, it presented plaintiffs that fit this description. It cannot claim that such a task is difficult, or that plaintiffs are hard to find—it has found them before. NPRI was under no obligation to sue thirteen sitting legislators all at once, so it cannot claim that the rules of standing ought to be foregone simply because it framed its suit in this fashion. Each defendant, Ms. Miller included, is entitled to demand that NPRI demonstrate that it—instead of an individual “with a legally protectible interest, such as a person seeking the executive branch position held by the legislator”—is the appropriate party to prosecute this suit.

In *Schwartz*, the plaintiffs granted the newly-formulated standing exception were individuals, “citizens and taxpayers of Nevada, and most are also parents of children who attend public schools.” *Schwartz*, 132 Nev. at 744. They alleged that SB 302 (2015) “allows millions of dollars of public funds to be diverted from public schools districts to private schools, in clear violation of specific provisions in the Nevada Constitution, which will result in irreparable harm to

1 the public school system.” *Id.* These plaintiffs, the Court reasoned, “are appropriate parties to
2 litigate these claims.” *Id.* Compared to the particular and obvious interests the *Schwartz* plaintiffs
3 demonstrated in their case, NPRI alleges only that it acts “in the public interest,” generally and
4 without any specific contention beyond that regarding its appropriateness under the public
5 importance standing exception.

6 NPRI cannot demonstrate its appropriateness as a plaintiff here, beyond its general
7 political orientation, and so for reasons in addition to the failure to challenge a legislative
8 appropriation or expenditure, NPRI cannot satisfy the narrow terms and requirements of the
9 *Schwartz* public importance exception and the claim against Ms. Miller should be dismissed.

10 **B. NPRI Has Not Plead This Action In Conformance With NRS 41.0337(2)**

11 Even if NPRI could establish standing to maintain its claims here, this case cannot be
12 brought as plead because NPRI has not named the parties it is required to name by law.

13 NRS 41.0337(2) states that:

14 No tort action may be brought against a person who is named as a defendant in the action
15 solely because of an alleged act or omission relating to the public duties or employment of
any present or former:

- 16 (a) Local judicial officer or state judicial officer;
17 (b) Officer or employee of the State or of any political subdivision;
18 (c) Immune contractor; or
19 (d) State Legislator

20 unless the State or appropriate political subdivision is named a party defendant under NRS
41.031.

21 NRS 41.0337(2).

22 This suit is a tort action: NPRI is claiming “a wrongful act other than a breach of contract
23 for which relief may be obtained in the form of damages or an injunction.”
24 <https://www.merriam-webster.com/dictionary/tort> (last visited Sept. 15, 2020). *See also*
25 <https://dictionary.law.com/Default.aspx?selected=2137> (“tort, n., from French for “wrong,” a civil
26 wrong or wrongful act, whether intentional or accidental, from which injury occurs to another”)
27 (last visited Sept. 15, 2020). In fact, what NPRI is trying to allege is more specifically denoted as a
28 constitutional tort, “a violation of one's constitutional rights by a government servant.”
https://www.law.cornell.edu/wex/constitutional_tort (last visited Sept. 15, 2020). NPRI is alleging

1 a violation of the Nevada Constitution by Ms. Miller, whom it alleges is a government servant,
2 and that this violation has done NPRI—and, it seems, the public generally—harm to constitutional
3 rights to enforce the separation of governmental powers.

4 That this is a tort action under the terms of NRS 41.0337 is further confirmed by legislative
5 history. In the hearings at which SB 27 (2013), which enacted this particular provision of the NRS,
6 Deputy Attorney General Keith Munro, in presenting, explained that “When you talk about tort
7 claims, you are usually talking about employees. When you talk about employees, you are talking
8 about issues involving hiring, training, and supervision.” Minutes of the Assembly Committee on
9 Judiciary, at 6 (May 13, 2013). It makes perfect sense in both law and policy that NRS 41.0337
10 would apply to NPRI’s suit here. Stripped of its political veneer, this is essentially an employment
11 matter. In Ms. Miller’s instance, Clark County School District is paying her salary; it made the
12 decision to hire and retain her; it will be affected by the loss of a teacher, during a teacher shortage
13 and a public health crisis; its decision to hire and retain Ms. Miller is under assault by NPRI. If
14 indeed NPRI is going to argue that it is Clark County School District’s actions in paying Ms.
15 Miller’s salary that is the “appropriation or expenditure” at issue here, granting it standing, then it
16 is entirely understandable that the *expendor*—the District—would be necessary to the resolution
17 of this lawsuit.

18 NPRI has not named as a defendant either the State or the political subdivision that
19 employs Ms. Miller—the Clark County School District. As such, the suit cannot be maintained,
20 pursuant to NRS 41.0337. This is not simply a matter of not having named necessary parties under
21 NRCP 19; this is a statutory requirement that, when unfulfilled, removes the Court’s jurisdiction
22 to entertain the action entirely: “No tort action may be brought” in the absence of the State or the
23 appropriate political subdivision. Therefore, even assuming *arguendo* that NPRI can convince this
24 Court to grant it standing under the *Schwartz* exception, the suit cannot proceed in its current form
25 because NPRI has not plead in conformance with NRS 41.0337, and the claim against Ms. Miller
26 should be dismissed.

27 **V. CONCLUSION**

28 It boils down simply. NPRI sued more than a dozen legislators, including Ms. Miller but

1 also the Speaker of the State Assembly, the Majority Leader of the State Senate, and others—all at
2 once and in clear derogation of appropriate civil procedure and Supreme Court precedent—
3 because it valued a big splash of a case during an election season. But whatever its public relations
4 value, this was not a legally sound approach. NPRI has no standing to make its claim against Ms.
5 Miller under any doctrine recognized in Nevada, and even if one were to grant that it did, the
6 failure to name “the State or the appropriate subdivision as a party defendant,” per NRS 41.0337,
7 means this suit cannot be maintained against her.

8 Lacking any protectible interest in this litigation sufficient to generate an actual legal
9 controversy between itself and Ms. Miller, NPRI is essentially asking for an advisory opinion on a
10 public question about which it is concerned. The rules of procedure and standing, however, do not
11 bend to politics, and do not admit of any shortcuts. The Court should grant Ms. Miller’s motion to
12 dismiss in its entirety.

13 DATED this 18th day of September, 2020.

14 **WOLF, RIFKIN, SHAPIRO,**
15 **SCHULMAN & RABKIN, LLP**

16 By: /s/ Bradley Schrager
17 BRADLEY SCHRAGER, ESQ. (SBN 10217)
18 DANIEL BRAVO, ESQ. (SBN 13078)
19 3556 E. Russell Road, Second Floor
20 Las Vegas, Nevada 89120
21 (702) 341-5200/Fax: (702) 341-5300

22 *Attorneys for Defendant Brittney Miller*
23
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2020, a true and correct copy of the foregoing **DEFENDANT BRITTNEY MILLER’S MOTION TO DISMISS** was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an email address on record, pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

By: /s/ Dannielle Fresquez
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

EXHIBIT A

EXHIBIT A

1 JOSEPH F. BECKER, ESQ.
2 Nevada Bar No. 12178
3 NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION
4 7130 Placid Street
5 Las Vegas, NV 89119
6 Telephone: (702) 450-6256
7 Fax: (702) 549-3680
8 Attorney for Plaintiff

REC'D & FILED

2011 NOV 30 AM 10:35

ALAN GLOVER
BY **V. GUTIERREZ**
DEPUTY

6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7
8 IN AND FOR CARSON CITY

9 WILLIAM POJUNIS;

10
11 Plaintiff,

Case No. *110C00394*

Dept. No. *I*

12
13 vs.

14 MOISES DENIS; THE PUBLIC UTILITIES COMMISSION
15 OF NEVADA; and THE STATE OF NEVADA on
16 Relation of The Public Utilities Commission of Nevada,

17 Defendants

18 **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**
19

20 For his Complaint, Plaintiff alleges:

21 1. On or before February 7, 2011, Defendant MOISES DENIS, began service in the
22 Nevada Legislature despite concurrently holding a position in the Executive Branch of the State of
23 Nevada, contrary to The Constitution of Nevada Art. 3, §1, ¶1.

24 2. Plaintiff thus brings this action, pursuant to NRS §§ 30.030 and 33.010 to challenge
25 the validity of Defendant MOISES DENIS holding his Executive Branch employee position on the
26 basis the Nevada Constitution expressly prohibits said employment by members of the Nevada
27 Legislature.
28

1 **PARTIES**

2 3. Plaintiff WILLIAM POJUNIS (hereinafter "POJUNIS") is a resident of Las Vegas,
3 Nevada, a citizen of the United States, and not a debtor in bankruptcy. He is duly qualified, holds
4 the job requirements established by the Public Utilities Commission of Nevada, and earnestly
5 seeks the position of Computer Technician currently held by Defendant MOISES DENIS.

6 4. Defendant MOISES DENIS (hereinafter "DENIS") is a resident of Las Vegas,
7 Nevada and currently holds the Nevada Executive Branch position of Computer Technician for the
8 Public Utilities Commission of Nevada, despite serving concurrently as a Senator in the Seventy-
9 sixth Session of the Nevada State Legislature.

10 5. Defendant PUBLIC UTILITIES COMMISSION OF NEVADA (hereinafter "PUCN")
11 resides in Carson City, Nevada and the PUCN, pursuant to NRS § 12.105, is named as a
12 Defendant herein as the employer of Defendant DENIS, despite Defendant DENIS serving
13 concurrently as a Senator in the Seventy-sixth Session of the Nevada State Legislature.

14 6. Defendant STATE OF NEVADA (hereinafter "NEVADA") resides in Carson City,
15 Nevada and the NPUC, pursuant to NRS § 12.105, is named as a Defendant herein as the
16 employer of Defendant DENIS, despite Defendant DENIS serving concurrently as a Senator in the
17 Seventy-sixth Session of the Nevada State Legislature.

18 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

19 20 7. On or about February 7, 2011, Defendant DENIS was sworn-in to the Seventy-sixth
21 Session of the Nevada Legislature, despite holding a position as an employee of the Nevada
22 Executive Branch.

23 24 8. The Nevada Constitution reads, in relevant part: "The powers of the Government of
25 the State of Nevada shall be divided into three separate departments, the Legislative, the
26 Executive and the Judicial; and no persons charged with the exercise of powers properly belonging
27 to one of these departments shall exercise *any functions*, appertaining to either of the others. . ."
28 Nevada Const. Art. 3, §1, ¶1 (emphasis added).

1 9 The rationale underlying the Separation of Powers provision can be traced to the
2 desire of the constitutional framers to encourage and preserve independence and integrity of
3 action and decision on the part of individual members of the Nevada state government and to
4 guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of
5 separation of powers.

6 10. Defendant DENIS' employment in Nevada State Executive Branch position
7 expressly violates the Nevada Constitution and undermines liberty by diluting the separation of
8 powers, concentrating power, creating conflicts of interests and appearances thereof.

9
10 **FIRST CLAIM FOR RELIEF**

11 (Declaratory and Injunctive Relief – Violation of Nevada Constitution, Art. 3, §1, ¶1)

12 11. Plaintiff hereby incorporates Paragraphs 1 through 10 as though fully set out herein.

13 12. Defendant DENIS holds the Nevada executive branch position of Computer
14 Technician at the PUCN while concurrently sitting as a Senator in the Nevada Legislature, thus
15 directly violating Art. 3, §1, ¶1 of the Nevada Constitution.

16 13. This constitutional violation by Defendant harms Plaintiff POJUNIS' legally
17 protectable interests as he is earnestly seeking the executive branch position currently held by
18 Defendant DENIS.

19
20 **SECOND CLAIM FOR RELIEF**

21 (Declaratory and Injunctive Relief – Violation of U.S. Constitution 5th and 14th Amendments.)

22 14. Plaintiffs hereby incorporate Paragraphs 1 through 13 as though fully set out herein.

23 15. All Defendants, by failing to follow the clear language of the Constitution of the State
24 of Nevada, specifically, Nevada Constitution Art. 3, §1, ¶1, violate Plaintiff POJUNIS' right to due
25 process guaranteed to him under the 5th Amendment to the U.S. Constitution, and as applied to the
26 State of Nevada and its citizens under the 14th Amendment to the U.S. Constitution, §1.
27
28

16. This constitutional violation by Defendants harms Plaintiff POJUNIS' legally protectable interests as he is earnestly seeking the executive branch position currently held by Defendant DENIS.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that Defendant DENIS, who holds a Nevada executive branch position while concurrently sitting in the Seventy-sixth Session of the Nevada Legislature, violates the Nevada Constitution Art. 3, §1, ¶1 in holding said Executive Branch position.

2. Declare that Nevada's failure to follow the clear language of its own State Constitution, specifically, Nevada Constitution Art. 3, §1, ¶1, violates Plaintiff POJUNIS' right to due process guaranteed to Plaintiff under the 5th Amendment to the U.S. Constitution, as applied to the states under the 14th Amendment to the U.S. Constitution, §1.

3. Enjoin Defendant DENIS from continuing in his Nevada executive branch employment position and from retaining any monetary or employment benefits derived from said position from such time as he began serving in the Nevada Legislature.

4. Award Plaintiff his reasonable costs and attorney fees.

5. Grant such other relief as the Court deems appropriate and proper.

DATED this 30th day of November, 2011.

NPRI CENTER FOR JUSTICE AND
CONSTITUTIONAL LITIGATION

BY:

JOSEPH F. BECKER, ESQ.
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CONSTITUTIONAL LITIGATION**
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Fax: (702) 549-3680

Attorney for Plaintiff

EXHIBIT B

EXHIBIT B

1 JOSEPH F. BECKER, ESQ.
2 Nevada State Bar No.12178
3 NPRI CENTER FOR JUSTICE AND
4 CONSTITUTIONAL LITIGATION
5 75 Caliente Street
6 Reno, Nevada 89509-2807
7 Tel: (775) 636-7703
8 Fax: (775) 201-0225
9 cjcl@npri.org

10 Attorney for Petitioner

11 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR CARSON CITY**

13 DOUGLAS E. FRENCH,

14 Plaintiff,

15 vs.

16 HEIDI GANSERT in her official capacity as Executive Director,
17 External Relations for the University of Nevada, Reno;
18 UNIVERSITY OF NEVADA, RENO; NEVADA SYSTEM OF
19 HIGHER EDUCATION; NEVADA BOARD OF REGENTS;
20 and the STATE OF NEVADA on Relation to The Nevada
21 System of Higher Education, The Nevada Board of Regents, and
22 the University of Nevada, Reno;

23 Defendants.

Case No.: 1700000231B

Dept. No. I

24 **FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE**
25 **RELIEF**

26 For his Complaint, Plaintiff alleges:

27 1. On or about February 6, 2017, Defendant, HEIDI GANSERT, began service in the
28 Nevada Legislature, as a Nevada State Senator, despite concurrently holding a position in the Executive
Branch of the State of Nevada, contrary to The Constitution of Nevada Art. 3, §1, ¶1.

///

///

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SUSAN MERRIN LUTHER
CLERK
J. HARKLER ROAD

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1 7. Defendant NEVADA SYSTEM OF HIGHER EDUCATION, (hereinafter "NSHE") is
2 named as a Defendant herein as a governing body of the University of Nevada, Reno, a sub-unit of the
3 Nevada System of Higher Education, and as an employer of Defendant GANSERT, despite Defendant
4 GANSERT's concurrent service as a Senator in the Seventy-ninth Session of the Nevada State
5 Legislature.
6

7 8. Defendant NEVADA BOARD OF REGENTS, (hereinafter "NBOR"), is named as a
8 Defendant herein as a governing body of the Nevada System of Higher Education and the University of
9 Nevada, Reno, a sub-unit of the Nevada System of Higher Education, and as an employer of Defendant
10 GANSERT, despite Defendant GANSERT's concurrent service as a Senator in the Seventy-ninth
11 Session of the Nevada State Legislature.
12

13 9. Defendant STATE OF NEVADA on relation to The Nevada System of Higher
14 Education, The Nevada Board of Regents, and the University of Nevada, Reno (hereinafter
15 "NEVADA") resides in Carson City, Nevada and, pursuant to NRS § 12.105, is named as a Defendant
16 herein as an employer of Defendant GANSERT, despite Defendant GANSERT's concurrent service as a
17 Senator in the Seventy-ninth Session of the Nevada State Legislature.
18

19 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

20 10. On or about February 6, 2017, Defendant GANSERT was sworn-in to the Seventy-ninth
21 Session of the Nevada Legislature, despite holding a position as an employee of the Nevada Executive
22 Branch.
23

24 11. The Nevada Constitution reads, in relevant part: "The powers of the Government of the
25 State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the
26 Judicial; and no persons charged with the exercise of powers properly belonging to one of these
27
28

1 departments shall exercise *any functions*, appertaining to either of the others. . .” Nevada Const. Art. 3,
2 §1, ¶1 (emphasis added).

3 12. The rationale underlying the Separation of Powers provision can be traced to the desire of
4 the constitutional framers to encourage and preserve independence and integrity of action and decision
5 on the part of individual members of the Nevada state government and to guard against conflicts of
6 interest, self-aggrandizement, concentration of power, and dilution of separation of powers.

7
8 13. Defendant GANSERT’s employment in a Nevada State Executive Branch position
9 expressly violates the Nevada Constitution and undermines the public interest and liberty by diluting the
10 separation of powers, concentrating power, creating conflicts of interests and appearances thereof.

11
12 **FIRST CLAIM FOR RELIEF**

13 (Declaratory and Injunctive Relief – Violation of Nevada Constitution, Art. 3, §1, ¶1)

14 14. Plaintiff hereby incorporates Paragraphs 1 through 13 as though fully set out herein.

15 15. Defendant GANSERT holds the Nevada executive branch position of Executive Director
16 of External Relations for the University of Nevada, Reno while concurrently serving as a Senator in the
17 Nevada Legislature, thus directly violating Art. 3, §1, ¶1 of the Nevada Constitution.

18
19 16. This constitutional violation by Defendants harms the public interest of all Nevadans
20 including Plaintiff FRENCH as well as Plaintiff FRENCH’s legally protectable interests both as he is
21 earnestly seeking and is qualified for the executive branch position currently held by Defendant
22 GANSERT and as a Nevada taxpayer whose taxes are being expended unconstitutionally.

23
24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff prays that this Court:

26 1. Declare that Defendant GANSERT, by holding a Nevada executive branch position while
27 concurrently serving in the Seventy-ninth Session of the Nevada Legislature, and/or the UNIVERSITY
28

1 OF NEVADA, RENO; NEVADA SYSTEM OF HIGHER EDUCATION; NEVADA BOARD OF
2 REGENTS; and the STATE OF NEVADA on Relation to The Nevada System of Higher Education, The
3 Nevada Board of Regents, and/or the University of Nevada, Reno, by employing Defendant GANSERT
4 while she concurrently serves in the Nevada Legislature, violate the Nevada Constitution, Art. 3, §1, ¶1.
5

6 2. Enjoin Defendant GANSERT from continuing in her Nevada executive branch
7 employment position and from retaining any monetary or employment benefits derived from said
8 position from such time as she began serving in the Nevada Legislature and/or enjoin the UNIVERSITY
9 OF NEVADA, RENO; NEVADA SYSTEM OF HIGHER EDUCATION; NEVADA BOARD OF
10 REGENTS; and the STATE OF NEVADA on Relation to The Nevada System of Higher Education, The
11 Nevada Board of Regents, and the University of Nevada, Reno, from employing Defendant GANSERT
12 during such time she serves in another branch of the Nevada government.
13

14 3. Award Plaintiff his reasonable costs and attorney fees.

15 4. Grant such other relief as the Court deems appropriate and proper.

16 DATED this 1st day of May, 2017.
17

18 NPRI CENTER FOR JUSTICE
19 AND CONSTITUTIONAL LITIGATION

20 BY: 

21 JOSEPH F. BECKER, ESQ.
22 Nevada Bar No. 12178
23 NPRI CENTER FOR JUSTICE
24 AND CONSTITUTIONAL LITIGATION
25 75 Caliente Street
26 Reno, NV 89502
27 Telephone: (775) 636-7703
28 Fax: (775) 201-0225

Attorney for Plaintiff

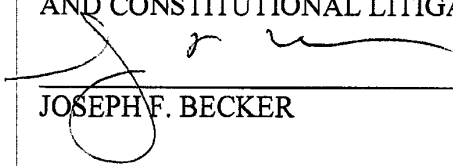
CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2017, I caused a true and correct copy of the foregoing First Amended Complaint for Declaratory Judgment and Injunctive Relief to be served via U.S. Mail, postage pre-paid addressed as follows:

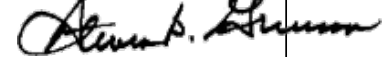
Melissa Pagni Bernard
Assistant General Counsel
University of Nevada, Reno
1664 N. Virginia St. MS 0550
Reno, NV 89557-0550

Adam Laxalt
Attorney General
Nevada Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

NPRI CENTER FOR JUSTICE
AND CONSTITUTIONAL LITIGATION



JOSEPH F. BECKER



1 **AOS**

2 DEANNA L. FORBUSH, ESQ.

3 Nevada Bar No. 6646

4 dforbush@foxrothschild.com

5 COLLEEN E. MCCARTY, ESQ.

6 Nevada Bar No. 13186

7 cmccarty@foxrothschild.com

8 **FOX ROTHSCHILD LLP**

9 1980 Festival Plaza Drive, Suite 700

10 Las Vegas, Nevada 89135

11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: II

AFFIDAVIT OF SERVICE

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

AFFIDAVIT OF SERVICE

**DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Daniel LaMotte, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That on 8/31/2020 at 3:20 PM at 4315 Water Hole Road, Reno, NV 89519 I served Jill Tolles with the above-listed documents by personally delivering a true and correct copy of the documents by leaving with Jill Tolles.

That the description of the person actually served is as follows:

Gender: Female, Race: Caucasian, Age: 46 - 50 yrs., Height: 5'7 - 6'0, Weight: 141 - 160 lbs., Hair: Blonde,
Eyes:Blue/Glasses

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/2/2020



Daniel LaMotte
Registered Work Card# R-2020-01425
State of Nevada

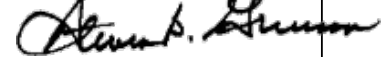
(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230886
Reference: 189864.00021

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JMOT

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gcardinal@unr.edu

*Attorneys for Defendants
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the Nevada
State Senate and Clark County District Attorney;
KASINA DOUGLAS-BOONE, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County School
District; JASON FRIERSON, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County Public
Defender; OSVALDO FUMO, an individual
engaging in dual employment with the Nevada
State Assembly and University of Nevada, Las

Case No.: A-20-817757-C

Dept. No.: 18

**NSHE DEFENDANTS
FUMO, GANSERT, AND
NEAL'S JOINDER IN
DEFENDANT BRITTNEY
MILLER'S MOTION TO DISMISS
COMPLAINT**

1 Vegas; HEIDI SEEVERS GANSERT, an
2 individual engaging in dual employment with
3 the Nevada State Senate and University of
4 Nevada Reno; GLEN LEAVITT, an individual
5 engaging in dual employment with the Nevada
6 State Assembly and Regional Transportation
7 Commission; BRITTNEY MILLER, an
8 individual engaging in dual employment with
9 the Nevada State Assembly and Clark County
10 School District; DINA NEAL, an individual
11 engaging in dual employment with the Nevada
12 State Assembly and Nevada State College;
13 JAMES OHRENSCHALL, an individual
14 engaging in dual employment with the Nevada
15 State Senate and Clark County Public Defender;
16 MELANIE SCHEIBLE, an individual engaging
17 in dual employment with the Nevada State
18 Senate and Clark County District Attorney;
19 TERESA BENITEZ-THOMPSON, an
20 individual engaging in dual employment with
21 the Nevada State Assembly and University of
22 Nevada, Reno; JILL TOLLES, an individual
23 engaging in dual employment with the Nevada
24 State Assembly and University of Nevada,
25 Reno; and SELENA TORRES, an individual
26 engaging in dual employment with the Nevada
27 State Assembly and Clark County School
28 District,

Defendants.

NSHE Defendants Heidi Seevers Gansert, Dina Neal and Osvaldo Fumo hereby join in Defendant Brittney Miller's Motion to Dismiss Complaint filed herein on September 18, 2020, and adopt by reference and incorporate herein Defendant Miller's Motion, Memorandum of Points and

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1 Authorities and Exhibits as if set forth in full at this point.

2

3 DATED this 24th day of September, 2020.

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/s/ Berna L. Rhodes-Ford

BERNA L. RHODES-FORD

Nevada Bar No. 7879

General Counsel

Nevada State College

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/s/ Gary A. Cardinal

GARY A. CARDINAL

Nevada Bar No. 76

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Fax: (775) 327-2202

gcardinal@unr.edu

Attorneys for Defendants

Oswaldo Fumo, Heidi Seevers Gansert,

and Dina Neal

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State College,
3 located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party to the
4 within cause. Pursuant to NRCP 5, I further certify that on September 24, 2020, I caused the following
5 document, **NSHE DEFENDANTS FUMO, GANSERT AND NEAL'S JOINDER IN**
6 **DEFENDANT BRITTNEY MILLER'S MOTION TO DISMISS COMPLAINT**, to be served as
7 follows:

8 ☒

9 **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to
10 be electronically served through the Eighth Judicial District Court's electronic filing system, with
11 the date and time of the electronic service substituted for the date and place of deposit in the mail
12 to the attorneys listed below at the address indicated below.

13 Deanna L. Forbush, Esq.
14 **FOX ROTHSCHILD LLP**
15 Email: dforbush@foxrothschild.com
Attorneys for Plaintiff

Colleen E. McCarty, Esq.
FOX ROTHSCHILD LLP
Email: cmccarty@foxrothschild.com
Attorneys for Plaintiff

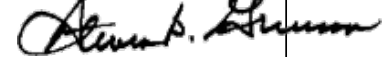
16 Bradley Schrager, Esq.
17 **WOLF, RIFKIN, SHAPIRO,**
18 **SCHULMAN & RABKIN, LLP**
19 Email: bschrager@wrslawyers.com
Attorneys for Defendant Brittney Miller

Daniel Bravo, Esq.
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP
Email: dbravo@wrslawyers.com
Attorneys for Defendant Brittney Miller

20 ☐

21 **BY MAIL** I caused such envelope(s) with first class postage thereon fully prepaid to be
22 placed in the U.S. Mail in Henderson, Nevada.

23 -
24 Nita Armendariz
25 An employee of the Office of General Counsel
26 Nevada State College
27
28



CONFILE

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Facsimile: (702) 597-5503

Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: I

HEARING REQUESTED

**PLAINTIFF'S MOTION TO
DISQUALIFY THE OFFICIAL
ATTORNEYS FROM
REPRESENTING DEFENDANTS
OSVALDO FUMO, HEIDI SEEVERS
GANSERT AND DINA NEAL**

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

NEVADA POLICY RESEARCH INSTITUTE (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of the law firm of Fox Rothschild LLP, respectfully files this Motion to Disqualify the Official Attorneys from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal (“Motion to Disqualify”).

Defendants Fumo, Gansert and Neal are currently represented by in-house counsel with the Nevada System of Higher Education (“NSHE”), who are seeking to serve as “Official Attorneys,” pursuant to NRS 41.0338(2)(b). These Defendants, however, were sued solely as a result of their alleged individual actions to engage in dual employment in violation of Article 3 of the Nevada Constitution, and not in any official capacity that would constitute a circumstance under which an official government attorney is permitted to provide their defense at the State’s expense. Accordingly, NSHE counsel should be immediately disqualified, and the Defendants should be required to secure their representation, if not seeking to represent themselves, at their own expense.

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1 This Motion to Disqualify is made and based on the following Memorandum of Points and
2 Authorities; the Declaration of Deanna L. Forbush, Esq. included therein; the papers and pleadings
3 already on file; and any oral argument the Court may permit at the hearing of this matter.

4 Dated this 29th day of September, 2020.

5 **FOX ROTHSCHILD LLP**

6
7 By: /s/ Deanna L. Forbush

8 DEANNA L. FORBUSH

9 Nevada Bar No. 6646

10 COLLEEN E. MCCARTY

11 Nevada Bar No. 13186

12 1980 Festival Plaza Drive, Suite 700

13 Las Vegas, Nevada 89135

14 Telephone: (702) 262-6899

15 Attorneys for Plaintiff

16 Nevada Policy Research Institute
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1 **DECLARATION OF DEANNA L. FORBUSH ESQ. IN SUPPORT OF**
2 **MOTION TO DISQUALIFY THE OFFICIAL ATTORNEYS**

3 I, Deanna L. Forbush, hereby declare as follows:

4 1. I am an attorney licensed to practice law in the State of Nevada, and I am a partner of
5 the law firm of Fox Rothschild LLP, attorneys for Plaintiff, Nevada Policy Research Institute
6 (“NPRI”).

7 2. I have personal knowledge of the facts stated in this Declaration. If called upon to
8 testify to the same, I am competent to do so.

9 3. The instant litigation seeks injunctive and declaratory relief in the public interest to
10 address the alleged ongoing constitutional violations of the Separation of Powers requirement of the
11 Nevada Constitution by 13 individually named Defendants, each of whom are engaging in dual
12 employment by simultaneously holding elected offices in the Nevada State Legislature and paid
13 positions with Nevada State or local government.

14 4. On September 24, 2020, the General Counsel for Nevada State College, Berna
15 Rhodes-Ford, Esq., and the Assistant General Counsel for the University of Nevada, Reno, Gary A.
16 Cardinal, Esq., caused to be filed a Motion to Dismiss Pursuant to NRCP 12(b)(5) and NRCP
17 12(b)(6) (“Motion to Dismiss”) on behalf of Defendants Osvaldo Fumo, Heidi Seevers Gansert and
18 Dina Neal.

19 5. As asserted in an email I received from Mr. Cardinal on September 4, 2020, he and
20 Ms. Rhodes-Ford believe their representation of the Defendants is permitted under NRS Chapter 41.
21 Specifically, in his introductory email, Mr. Cardinal invoked NRS 41.0341, which permits a state
22 employee “for whom the official attorney is required to provide a defense pursuant to NRS 41.0339”
23 to file their responsive pleading in 45 days, as opposed to the standard 21 days. *See* NRS 41.0341(1)
24 (emphasis added). NRS 41.0339, in turn, sets forth the circumstance in which the official attorney is
25 to provide a defense to a state employee, and it plainly requires that the defendant be named in the
26 civil action “solely because of an alleged act or omission relating to the public duties or
27 employment” of the employee and that “the act or omission on which the action is based appears to
28

1 be within the course and scope of public duty or employment and appears to have been performed or
2 omitted in good faith.” See NRS 41.0339(1)(b).

3 6. NPRI respectfully asserts the threshold issue of whether the NSHE counsel are not
4 authorized to represent the Defendants and must be disqualified should be decided prior to NPRI’s
5 obligation to defend against any responsive pleading filed by said counsel. Based on the filing date
6 of the Motion to Dismiss, NPRI’s opposition thereto is due on or before October 8, 2020, and NPRI
7 respectfully requests that the instant Motion to Disqualify be heard as soon as possible..

8 7. This Declaration is made in good faith and without dilatory motive.

9 I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045)¹ that
10 the foregoing is true and correct.

11 Dated this 29th day of September, 2020.

12 /s/ Deanna L. Forbush
13 DEANNA L. FORBUSH

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I.**

16 **INTRODUCTION**

17 NPRI’s challenge to the Defendants’ continued dual employment as elected officials serving
18 in the Nevada State Legislature and employees of State or local government, as a violation of the
19 Nevada Constitution and specifically the Separation of Powers, is a matter of significant public
20 importance. At its heart, too, is the challenge to the loss of legislative appropriations and/or taxpayer
21 monies to fund those engaging in these alleged violations. For public attorneys to come in and seek
22 to provide free representation to Defendants in these circumstances, contrary to the plain language of
23 the statutory provisions upon which they rely, is something NPRI respectfully requests the Court
24 resolve at its very earliest opportunity.

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26
27 ¹ NRS 53.045. Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence
28 or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an
unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially
the prescribed form.

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II.

STATEMENT OF RELEVANT FACTS

The facts relevant to the instant Motion to Disqualify are contained within the Declaration of Deanna L. Forbush, Esq., supra, and are incorporated by reference herein.

III.

ARGUMENT

The Supreme Court has given district courts “broad discretion to determine whether disqualification of counsel is required.” *Willmes v. Reno Mun. Ct.*, 118 Nev. 831, 836, 59 P.3d 1197, 1200 (2002). Specifically, district courts “are responsible for controlling the conduct of attorney’s practicing before them, and have broad discretion in determining whether disqualification is required in a particular case.” *Brown v. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000). Such decisions involve “the delicate and sometimes difficult task of balancing competing interests,” which include “the public’s interest in the scrupulous administration of justice.” *Id.*, 116 Nev. at 1205, 14 P.3d at 1269-70. And, doubts should generally be resolved in favor of disqualification, absent some misuse of the motion for harassment or delay. *Id.*

NPRI wishes the instant litigation to move forward as expeditiously as possible obviously, but it also wants to avoid any perception of impropriety or public suspicion of the proceedings. Indeed, as the Supreme Court has stated, the party seeking to prevail on a motion to disqualify must establish “at least a reasonable possibility that some specifically identifiable impropriety did in fact occur,” as well as that “the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer’s continued participation in the case.” *Brown v. Dist. Ct.*, 116 Nev. at 1205, 14 P.3d 1270 (quoting *Shelton v. Hess*, 599 F.Supp 905, 909 (S.D. Tex. 1984) (clarifying no proof of actual wrongdoing is needed)).

In the instant case, there can be no doubt disqualification of the NSHE counsel is appropriate, if not imperative, to avoid the appearance of impropriety and public suspicion. First, the statutory definition of an “official attorney” who may provide a defense to a State employee at the State’s expense, limits that representation only to cases where the employee “is named as a defendant solely

1 because of an alleged act or omission relating to the public duties or employment” of the employee.
2 See NRS 41.0338(2)(b). On the contrary, in the instant case the Defendants were named solely
3 because of their individual decisions to serve in the Nevada State Legislature while also being
4 employed by a State or local government. Nothing about the controversy at issue involves any
5 actual act or omission relating to the carrying out of their public duties.

6 Indeed, in a deeply analogous situation, the Supreme Court ruled as recently as June 2020
7 that certain State Legislators were not entitled to representation by Legislative Counsel Bureau
8 attorneys, and thus there was no conflict of interest in their lawsuit against other State Legislators,
9 because their action in challenging a piece of legislation could not be considered acting on the
10 Legislature’s behalf. *Cf. State of Nevada ex rel. Cannizzaro v. First Jud. Dist. Ct.*, 136 Nev. Adv.
11 Op. 34 (June 26, 2020). As the decision makes clear, the official attorney’s client is the entity he or
12 she represents, and representation of individuals can only occur where they are alleged to have been
13 acting in their official capacities when sued. *Id.* at *3. Applying the Supreme Court’s reasoning in
14 the instant litigation, the NSHE attorney represents the NSHE institution and may only represent an
15 employee of the institution if that employee is being sued for an action taken on behalf of the
16 institution. Such is not the case in NPRI’s lawsuit.

17 Second, and similarly preclusive to the NSHE counsels’ representation is the statute that
18 specifically authorizes an official attorney to provide a defense to a State employee. Under that
19 statute, representation is limited to a defendant named in the civil action “solely because of an
20 alleged act or omission relating to the public duties or employment” of the employee and where the
21 “act or omission on which the action is based appears to be within the course and scope of public
22 duty or employment and appears to have been performed or omitted in good faith.” See NRS
23 41.0339(1)(b). Again, the instant litigation seeks only to challenge the fact of Defendants’ State
24 employment, not any actions taken as a result of such employment. As such, Defendants may not
25 properly be considered clients of NSHE counsel, and any actions taken by NSHE counsel on their
26 behalf must be stayed until each has the opportunity to retain appropriate counsel.

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IV.

CONCLUSION

For all of the foregoing reasons, NPRI respectfully requests this Court enter an order disqualifying NSHE counsel from their representation of Defendants Fumo, Gansert and Neal. NPRI further requests the Court include in the order the requirement that Defendants Fumo, Gansert and Neal, to the extent they do not wish to engage in self-representation, retain new counsel at their own expense within a reasonable time certain, and that NPRI's obligation to respond to the Motion to Dismiss filed on Defendants' behalf be stayed until 10 days from the date the new counsel(s) filed an amended motion or a substitution of counsel indicating they are resubmitting former counsels' motion as drafted.

Dated this 29th day of September, 2020.

FOX ROTHSCHILD LLP

By: /s/ Deanna L. Forbush
DEANNA L. FORBUSH, ESQ.
Nevada Bar No. 6646
COLLEEN E. MCCARTY, ESQ.
Nevada Bar No. 13186
1980 Festival Plaza Dr., Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Attorneys for Plaintiff
Nevada Policy Research Institute

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 29th day of September, 2020, I caused the foregoing document entitled **PLAINTIFF'S MOTION TO DISQUALIFY OFFICIAL ATTORNEYS FROM REPRESENTING DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu

Gary A. Cardinal, Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street/MS 0550
Reno, Nevada 89557-0550
Email: gcardinal@unr.edu

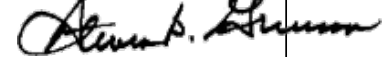
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

Bradley Schrager, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP
3556 E. Russell Road
Las Vegas, NV 89102
(702) 639-5102
Email: bschrager@wrslawyers.com
Email: dbravo@wrslawyers.com

*Attorneys for Defendants Brittney Miller,
Kasina Douglas-Boone, and Selena Torres*

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP



NVD
DEANNA L. FORBUSH, ESQ.
Nevada Bar No. 6646
dforbush@foxrothschild.com
COLLEEN E. MCCARTY, ESQ.
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cmccarty@foxrothschild.com
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Facsimile: (702) 597-5503
Attorneys for Plaintiff
Nevada Policy Research Institute

DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C
Dept. No.: II

**NOTICE OF VOLUNTARY
DISMISSAL OF DEFENDANT
KASINA DOUGLASS-BOONE**

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Plaintiff Nevada Policy Research Institute (“NPRI”), by and through its counsel, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq. of the law firm of Fox Rothschild LLP, hereby voluntarily dismisses Defendant Kasina Douglass-Boone without prejudice from the above-captioned litigation, pursuant to NRCP 41(a)(1).

Dated this 28th day of September, 2020.

FOX ROTHSCHILD LLP

By: /s/ Deanna L. Forbush

DEANNA L. FORBUSH, ESQ.

Nevada Bar No. 6646

COLLEEN E. MCCARTY, ESQ.

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1980 Festival Plaza Dr., Suite 700

Las Vegas, Nevada 89135

Telephone: (702) 262-6899

Attorneys for Plaintiff

Nevada Policy Research Institute

CERTIFICATE OF SERVICE

I certify that I am an employee of Fox Rothschild LLP and that on this 28th day of September, 2020, I caused the above and foregoing document entitled **NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANT KASINA DOUGLASS-BOONE** to be served as follows:

☒ Upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

☒ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or to the attorney(s) listed below at the address and/or facsimile number indicated below:

Berna L. Rhodes-Ford, General Counsel
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu

Gary A. Cardinal, Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street/MS 0550
Reno, Nevada 89557-0550
Email: gcardinal@unr.edu

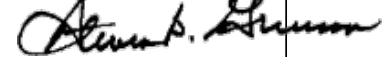
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

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Email: bschrager@wrslawyers.com
Email: dbravo@wrslawyers.com

*Attorneys for Defendants Brittney Miller,
Kasina Douglas-Boone, and Selena Torres*

/s/ Natasha Martinez
An employee of Fox Rothschild LLP



MODR

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Telephone: (702) 262-6899

Facsimile: (702) 597-5503

Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: I

HEARING REQUESTED

**PLAINTIFF'S MOTION FOR ORDER
TO SERVE BY PUBLICATION
DEFENDANTS GLEN LEAVITT,
JAMES OHRENSCHALL, AND
MELANIE SCHEIBLE**

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Nevada Policy Research Institute ("NPRI"), through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby submits its Motion for Order to Serve by Publication Defendants Glen Leavitt, James Ohrenschall and Melanie Scheible. Plaintiff seeks an Order for service by publication on the grounds that, after due diligence, it has been unable to effectuate service on the said Defendants, and it is believed they are evading service.

This Motion is made and based on the following Memorandum of Points and Authorities; the Declaration of Deanna L. Forbush, Esq. attached hereto and the exhibits thereto; the papers and pleadings already on file herein; and any oral argument permitted at the hearing of this matter.

Dated this 29th day of September, 2020.

FOX ROTHSCHILD LLP

By: /s/ Deanna L. Forbush

DEANNA L. FORBUSH

Nevada Bar No. 6646

COLLEEN E. MCCARTY

Nevada Bar No. 13186

1980 Festival Plaza Drive, Suite 700

Las Vegas, Nevada 89135

Telephone: (702) 262-6899

Attorneys for Plaintiff

Nevada Policy Research Institute

**DECLARATION OF DEANNA L. FORBUSH, ESQ. IN SUPPORT OF
MOTION FOR ORDER TO SERVE BY PUBLICATION**

I, Deanna L. Forbush, hereby declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada, and I am a partner of the law firm of Fox Rothschild LLP, attorneys for Plaintiff, Nevada Policy Research Institute ("NPRI").

2. I have personal knowledge of the facts stated in this Declaration. If called upon to testify to the same, I am competent to do so.

3. NPRI filed its operative Amended Complaint for Declaratory and Injunctive Relief on July 28, 2020. By way of the instant litigation, NPRI seeks injunctive and declaratory relief in the public interest to address the alleged ongoing constitutional violations of the Separation of Powers requirement of the Nevada Constitution by 13 individually named Defendants, each of whom are engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local government.

4. Over the two-month period preceding the instant filing, NPRI has been successful in personally serving 10 of the 13 Defendants, with the most recent personal service taking place on September 27, 2020. Despite its due diligence, however, NPRI has been unable to effectuate service on 3 of the Defendants: Glen Leavitt, James Ohrenschall and Melanie Scheible.

5. In addition to repeated service attempts made at each Defendant's last known address, Plaintiff's process server made repeated telephone calls to arrange for a convenient time for service, leaving messages for both Glen Leavitt and James Ohrenschall and speaking directly to Melanie Scheible, but these efforts were ultimately unsuccessful.

6. Attached hereto as **Exhibit 1** are true and correct copies of three (3) Affidavits of Due Diligence executed by licensed process server Sean Keseday with Nationwide Legal Nevada, LLC, which attest to a total of thirteen (13) personal service and/or call attempts made at the last known address of Defendant Glen Leavitt. These personal service and/or call attempts were made between the dates of August 28, 2020 and September 15, 2020 and undertaken at varying times.

7. Attached hereto as **Exhibit 2** are true and correct copies of two (2) Affidavits of Due

1 Diligence executed by licensed process server Judith Mae All with Nationwide Legal Nevada, LLC,
2 which attest to a total of seven (7) personal service and/or call attempts made at the last known
3 address of Defendant James Ohrenschall. These personal service and/or call attempts were made
4 between the dates of September 1, 2020 and September 22, 2020 and undertaken at varying times.

5 8. Attached hereto as **Exhibit 3** are true and correct copies of two (2) Affidavits of Due
6 Diligence executed by licensed process server Tyler Trewet with Nationwide Legal Nevada, LLC,
7 which attest to a total of nine (9) personal service and/or call attempts made at the last known
8 address of Defendant Melanie Scheible. These personal service and/or call attempts were made
9 between the dates of August 29, 2020 and September 23, 2020 at differing times throughout the day.

10 I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045)¹ that
11 the foregoing is true and correct.

12 Dated this 29th day of September, 2020.

13
14 /s/ Deanna L. Forbush
15 DEANNA L. FORBUSH
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27 ¹ NRS 53.045. Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence
28 or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an
unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially
the prescribed form.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **STATEMENT OF RELEVANT FACTS**

4 The facts relevant to the instant Motion for Order to Serve by Publication are contained
5 within the Declaration of Deanna L. Forbush, Esq., supra, and are incorporated by reference herein.

6 **II.**

7 **ARGUMENT**

8 **A. Service by Publication is Warranted Where Defendants Cannot, After Due**
9 **Diligence, Be Personally Served and Are Likely Evading Service.**

10 Under NRCP 4, parties are required to personally serve summons and complaint upon a
11 defendant. When personal service proves impossible, however, NRCP 4.4(c) provides that service
12 by publication may be ordered when the defendant cannot, after due diligence, be found or when by
13 concealment defendant seeks to avoid service of the summons and complaint. *See* NRCP
14 4.4(c)(1)(A) and (B). A party moving for service by publication must, among other requirements,
15 support the request by filing an affidavit demonstrating it diligently attempted to serve the defendant.
16 NRCP 4.4(c)(2).

17 There are several factors courts consider to evaluate a party's due diligence, including the
18 number of attempts made to serve the defendant at his or her residence. *See Abreu v. Gilmer*, 115
19 Nev. 308, 713, 985 P.2d 746, 749 (1999) ("due diligence measured by the qualitative efforts of a
20 specific plaintiff seeking to locate and serve a specific defendant); *McNair v. Rivera*, 110 Nev. 463,
21 464, 874 P.2d 1240, 1241 (1994); *Price v. Dunn*, 106 Nev. 100, 103, 787 P.2d 785, 786-87 (1990).

22 Here, NPRI has provided the Court with a Declaration of its attorney of record, Deanna L.
23 Forbush, Esq., demonstrating a cause of action exists against Defendants Glen Leavitt, James
24 Ohrenschall, and Melanie Scheible, said Defendants are necessary and proper parties to the action,
25 and specific facts showing the diligent efforts it made to locate and serve said Defendants. As
26 detailed above, NPRI engaged three (3) different process servers, each of whom attempted to serve
27 Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible, respectively, on numerous
28 occasions. This matter has been well publicized, and so far, two (2) motions to dismiss have been

1 filed by one or more colleagues of these Defendants and are pending, all of which are strong
2 indicators Defendants are aware of the instant litigation.

3 As a result, this Court has authority to grant NPRI's motion and enter an Order directing that
4 service by publication may be made against Defendants Glen Leavitt, James Ohrenschall, and
5 Melanie Scheible according to the procedures set forth in NRCP 4.4(c)(4), namely that publication
6 "be made in one or more newspapers or other periodicals published in Nevada....at least once a
7 week for a period of four weeks." NRCP 4.4(c)(4)(A). Further, where the individual Defendant's
8 last known addresses are known, a copy of the summons and complaint must also be mailed. NRCP
9 4.4(c)(4)(B). Finally, "[s]ervice by publication is complete four weeks from the later of: (i) the date
10 of the first publication; or the mailing of the summons of complaint, if mailing is ordered." NRCP
11 4.4(c)(4)(C).

12 III.

13 CONCLUSION

14 For the reasons stated above, NPRI respectfully requests that the Court enter an Order
15 directing that Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible may be served by
16 publication, according to the requirements of NRCP 4.4.

17 Dated this 29th day of September, 2020.

FOX ROTHSCHILD LLP

19 By: /s/ Deanna L. Forbush
20 DEANNA L. FORBUSH, ESQ.
21 Nevada Bar No. 6646
22 COLLEEN E. MCCARTY, ESQ.
23 Nevada Bar No. 13186
24 1980 Festival Plaza Dr., Suite 700
25 Las Vegas, Nevada 89135
26 Telephone: (702) 262-6899
27 Attorneys for Plaintiff
28 Nevada Policy Research Institute

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 29th day of September, 2020, I caused the foregoing document entitled **PLAINTIFF'S MOTION FOR ORDER TO SERVE BY PUBLICATION DEFENDANTS GLEN LEAVITT, JAMES OHRENSCHALL, AND MELANIE SCHEIBLE** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu

Gary A. Cardinal, Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street/MS 0550
Reno, Nevada 89557-0550
Email: gcardinal@unr.edu

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

Bradley Schrager, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP
3556 E. Russell Road
Las Vegas, NV 89102
(702) 639-5102
Email: bschrager@wrslawyers.com
Email: dbravo@wrslawyers.com

*Attorneys for Defendants Brittney Miller,
Kasina Douglas-Boone, and Selena Torres*

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP

Exhibit 1

1 **AFFIDAVIT OF DUE DILIGENCE**

2 **CLARK COUNTY DISTRICT COURT**
3 **CLARK COUNTY, STATE OF NEVADA**

4 Nevada Policy Research Institute, a Nevada domestic
nonprofit corporation,

5 Plaintiff(s)

6 v.

7 Nicole Cannizzaro, an individual enging in dual
employment with the Nevada State Senate and Clark
County District Attorney; et al.,

8 Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

9
10 I, Sean Keseday, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint for Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

11 That attempts were made to serve Glen Leavitt with Summons-Civil; Amended Complaint for Declaratory And Injunctive
12 Relief, at:

13 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 8/28/2020 at 5:42 PM
Results: No answer, quiet, 1 car in driveway

14 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 8/29/2020 at 8:23 AM
Results: No answer, No activity, No cars parked in driveway


15 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 8/29/2020 at 7:41 PM
Results: No answer, No activity

16 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/3/2020 at 1:00 PM
Results: Called subject left voicemail

17 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/4/2020 at 9:00 AM
Results: Called subject left voicemail

18
19 I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

20 Date: 9/28/2020

21 
22 _____
23 Sean Keseday
24 Registered Work Card# R-065975
25 State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



27 Control #:NV230874
28 Reference: 189864.00021

1 AFFIDAVIT OF DUE DILIGENCE

2 CLARK COUNTY DISTRICT COURT
3 CLARK COUNTY, STATE OF NEVADA

4 Nevada Policy Research Institute, a Nevada domestic
nonprofit corporation,

5 Plaintiff(s)

6 v.

7 Nicole Cannizzaro, an individual enging in dual
employment with the Nevada State Senate and Clark
County District Attorney; et al.,

8 Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
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1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

9
10 I, Sean Keseday, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint for Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

11 That attempts were made to serve Glen Leavitt with Summons-Civil; Amended Complaint for Declaratory And Injunctive
12 Relief, at:

13 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/5/2020 at 10:00 AM
Results: Called subject left voicemail

14 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/6/2020 at 2:00 PM
Results: Called subject left voicemail


15 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/11/2020 at 1:32 PM
Results: Called work number subject not available

16 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/15/2020 at 9:30 AM
Results: Called work number subject not available

17 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/15/2020 at 5:04 PM
Results: Called to schedule time to meet. no answer from subject

18
19 I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

20 Date: 9/28/2020

21
22 
23 Sean Keseday
Registered Work Card# R-065975
24 State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
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626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230874
Reference: 189864.00021

1 AFFIDAVIT OF DUE DILIGENCE

2 CLARK COUNTY DISTRICT COURT
3 CLARK COUNTY, STATE OF NEVADA

4 Nevada Policy Research Institute, a Nevada domestic
nonprofit corporation,

5 Plaintiff(s)

6 v.

7 Nicole Cannizzaro, an individual enging in dual
employment with the Nevada State Senate and Clark
County District Attorney; et al.,

8 Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

9
10 I, Sean Keseday, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint for Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

11 That attempts were made to serve Glen Leavitt with Summons-Civil; Amended Complaint for Declaratory And Injunctive
12 Relief, at:

13 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/15/2020 at 5:10 PM
Results: Called work number and subject left for day

14 Attempted at 101 E. Bonneville Las Vegas, NV 89101 On 9/17/2020 at 3:05 PM
Results: Attempted service at business address. was told by security, you need to schedule an appointment to meet with
15 office personal. called 702 875 9288, phone went unanswered.

16 Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/18/2020 at 2:33 PM
Results: Tried subject on phone says call cannot be completed as dialed.

17
18
19 I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

20 Date: 9/28/2020

21
22
23 Sean Keseday
Registered Work Card# R-065975
24 State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230874
Reference: 189864.00021

Exhibit 2

1 AFFIDAVIT OF DUE DILIGENCE

2 DISTRICT COURT CLARK COUNTY
3 CLARK COUNTY, STATE OF NEVADA

4 NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

5 Plaintiff(s)

6 v.

7 NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

8 Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

9
10 I, Judith Mae All, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

11 That attempts were made to serve James Ohrenschall with Summons-Civil; Amended Complaint For Declaratory And
12 Injunctive Relief, at:

13 Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/1/2020 at 5:48 PM

Results: Property fenced all the way around, walk-thru gate is locked. No access to front. Banged on gate, no activity. No
cars in driveway.

14 Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/3/2020 at 7:48 PM

15 Results: No access. Two large dogs in yard barking. No response. No cars parked in driveway.

16 Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/4/2020 at 9:06 AM

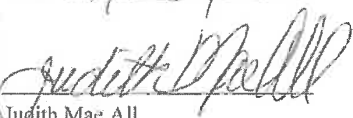
Results: No access. Banged on gate, no response. Dogs not in yard. No cars parked in the driveway.

17 Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/8/2020 at 6:03 PM

Results: Called number and it went to voicemail. Unable to leave message, mailbox full.

18
19 I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

20 Date: 9/25/2020

21
22 
23 Judith Mae All
Registered Work Card# R-040570
24 State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230856
Reference: 189864.00021

1 AFFIDAVIT OF DUE DILIGENCE

2 DISTRICT COURT CLARK COUNTY
3 CLARK COUNTY, STATE OF NEVADA

4 NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

5 Plaintiff(s)

6 v.

7 NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

8 Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

9
10 I, Judith Mae All, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

11 That attempts were made to serve James Ohrenschall with Summons-Civil; Amended Complaint For Declaratory And
12 Injunctive Relief, at:

13 Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/15/2020 at 4:42 PM

Results: Called number 702-277-3378 received voicemail for a Lois but I was unable to leave a message as mailbox is
14 full. Called work number 702-455-4685 and spoke with Devon in Clark County Public Defender's Office who states
subject does not work here.

15 Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/18/2020 at 10:48 AM


Results: Called corrected work number, the juvenile public defender's office for subject at 702-455-5475 and was told he
16 was not in. Transferred to his voicemail, left message and number.

17 Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/22/2020 at 11:31 AM

Results: I called number 702-523-4766 received voicemail, unable to leave a message as mailbox is full. Called work
18 number 702-455-5475 and call went to voicemail, left message.

19 I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

20 Date: 9/25/2020

21
22 
23 Judith Mae All
Registered Work Card# R-040570
24 State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230856
Reference: 189864.00021

Exhibit 3

1 AFFIDAVIT OF DUE DILIGENCE

2 DISTRICT COURT CLARK COUNTY
3 CLARK COUNTY, STATE OF NEVADA

4 NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

5 Plaintiff(s)

6 v.

7 NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

8 Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

9
10 I, Tyler Trewet, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

11 That attempts were made to serve Melanie Scheible with Summons-Civil; Amended Complaint For Declaratory And
12 Injunctive Relief, at:

13 Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 8/29/2020 at 5:10 PM
Results: No response or activity. Leasing shut down.

14 Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 8/30/2020 at 3:44 PM
Results: No response. No activity. No answer with neighbor.

15 Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/3/2020 at 11:00 AM
Results: No response. Leasing confirmed subject is a resident.

16 Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/6/2020 at 9:22 AM
Results: No response. No change.

17 Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/7/2020 at 4:10 PM
18 Results: No response. No activity. No change from prior attempt. Called phone number provided, no answer, left voicemail.

19 I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

20 Date: 9/25

21
22
23 Tyler Trewet
Registered Work Card# R201904184
24 State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230853
Reference: 189864.00021

AFFIDAVIT OF DUE DILIGENCE

DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-8899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Tyler Trewet, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That attempts were made to serve Melanie Scheible with Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, at:

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/9/2020 at 7:04 PM
Results: No response. No answer with neighbor below.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/10/2020 at 3:40 PM
Results: Spoke with subject at number provided. Subject was unwilling to arrange delivery of documents or coordinate with server a convenient time to return to her address. Subject stated she would confer with her counsel and get back to me if she was willing to accept documents.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/15/2020 at 3:45 PM
Results: The phone number given is for the District Attorney's office, generic voicemail with information of who to call, does not lists names.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/23/2020 at 11:32 AM
Results: Called number went to generic voicemail, no names provided.

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/25/20

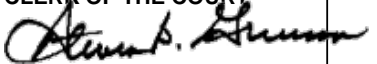
Tyler Trewet
Registered Work Card# R201904184
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230853
Reference: 189864.00021



1 **MINV**
2 KEVIN C. POWERS, General Counsel
3 Nevada Bar No. 6781
4 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
5 401 S. Carson St.
6 Carson City, NV 89701
7 Tel: (775) 684-6830; Fax: (775) 684-6761
8 Email: kpowers@lcb.state.nv.us
9 *Attorneys for the Legislature of the State of Nevada*

6 **DISTRICT COURT**
7 **CLARK COUNTY, NEVADA**

8 NEVADA POLICY RESEARCH INSTITUTE, a
9 Nevada domestic nonprofit corporation,

10 Plaintiff,

11 vs.

12 NICOLE J. CANNIZZARO, an individual engaging
13 in dual employment with the Nevada State Senate
14 and Clark County District Attorney; KASINA
15 DOUGLASS-BOONE, an individual engaging in
16 dual employment with the Nevada State Assembly
17 and Clark County School District; JASON
18 FRIERSON, an individual engaging in dual
19 employment with the Nevada State Assembly and
20 Clark County Public Defender; OSVALDO FUMO,
21 an individual engaging in dual employment with the
22 Nevada State Assembly and University of Nevada,
23 Las Vegas; HEIDI SEEVERS GANSERT, an
24 individual engaging in dual employment with the
Nevada State Senate and University of Nevada,
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an
individual engaging in dual employment with the
Nevada State Assembly and Nevada State College;
JAMES OHRENSCHALL, an individual engaging
in dual employment with the Nevada State Senate
and Clark County Public Defender; MELANIE
SCHEIBLE, an individual engaging in dual
employment with the Nevada State Senate and Clark
County District Attorney; TERESA BENITEZ-

Case No. A-20-817757-C
Dept. No. 1

HEARING REQUESTED

**NEVADA LEGISLATURE'S
MOTION TO INTERVENE
AS DEFENDANT**

1 THOMPSON, an individual engaging in dual
2 employment with the Nevada State Assembly and
3 University of Nevada, Reno; JILL TOLLES, an
4 individual engaging in dual employment with the
5 Nevada State Assembly and University of Nevada,
6 Reno; and SELENA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,
Defendants.

7 **MOTION TO INTERVENE AS DEFENDANT**

8 The Legislature of the State of Nevada (Legislature), by and through its counsel the Legal
9 Division of the Legislative Counsel Bureau (LCB Legal) under NRS 218F.720, hereby moves the Court
10 for an order granting the Legislature's Motion to Intervene as Defendant pursuant to NRCP 24 and
11 NRS 218F.720.¹ This Motion is made under EDCR 2.20 and is based upon the attached Memorandum
12 of Points and Authorities, all pleadings, documents and exhibits on file in this case and any oral
13 arguments the Court may allow. Pursuant to NRCP 24(c), this Motion is accompanied by the
14 Legislature's proposed Answer to Plaintiff's Amended Complaint for Declaratory and Injunctive Relief.
15 (*Leg.'s Ex. A.*)

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. Background.**

18 On July 9, 2020, Plaintiff Nevada Policy Research Institute (NPRI) filed the original complaint in
19 this action against several individuals who are members of the Legislature and named as the Defendants
20 in the original complaint. (*Compl. ¶¶ 7-15.*) However, NPRI did not serve the summons and a copy of
21 the original complaint on any of the Defendants named in the original complaint.

22
23 ¹ NRCP 24 and NRS 218F.720 are reproduced in the Addendum following the Memorandum of Points
24 and Authorities. All references to NRS 218F.720 are to the most recent version of the statute as
amended by section 23 of Assembly Bill No. 2, 2020 Nev. Stat., 32nd Spec. Sess., ch. 2, § 23, at 16
(effective Aug. 2, 2020).

1 On July 28, 2020, NPRI filed an amended complaint in this action against several individuals who
2 are members of the Legislature and named as the Defendants. (*Am. Compl.* ¶¶ 7-19.) In the amended
3 complaint, NPRI has alleged that the “Defendants are persons simultaneously holding elected offices in
4 the Nevada State Legislature and paid positions with Nevada State or local governments in violation of
5 the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1.” (*Am. Compl.* ¶¶ 23, 27.)
6 Additionally, NPRI has alleged that “[t]here is an actual controversy between [NPRI], acting in the
7 public interest, and the Defendants and each of them, as to the meaning of the Separation of Powers
8 requirement of Nevada Const. Art. 3, §1, ¶1 and its application to Defendants and their conduct.” (*Am.*
9 *Compl.* ¶ 23.) Finally, NPRI has alleged that “legislative expenditures or appropriations and taxpayer
10 monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1, and irrevocable and
11 irreparable harm will occur to the rights provided under this provision of the Nevada Constitution.”
12 (*Am. Compl.* ¶ 28.)

13 On August 29, 2020, NPRI first served the summons and a copy of the amended complaint on one
14 of the Defendants named in the amended complaint. As of September 29, 2020, NPRI had not served
15 the summons and a copy of the amended complaint on all of the Defendants named in the amended
16 complaint.

17 At its meeting on September 18, 2020, the Legislative Commission approved and adopted a
18 resolution pursuant to NRS 218F.720 directing the General Counsel and LCB Legal to “take any and all
19 actions on behalf of the Legislature that they deem to be necessary or advisable for the Legislature to
20 appear in, commence, prosecute, defend or intervene in the NPRI action.” (*Leg.’s Ex. B at 4.*) In the
21 resolution, the Legislative Commission found that on several occasions since 2002, LCB Legal has
22 provided written legal opinions to members of the Legislature concluding that the separation-of-powers
23 provision in Article 3, Section 1 of the Nevada Constitution (separation-of-powers provision) does not
24 prohibit state legislators from holding positions of public employment with the state executive branch or

1 with local governments. (*Leg.’s Ex. B at 1; Ex. C at 1-3.*)

2 Additionally, the Legislative Commission found that in *Heller v. Legislature*, 120 Nev. 456
3 (2004), LCB Legal argued on behalf of the Legislature that the separation-of-powers provision does not
4 prohibit state legislators from holding positions of public employment with the state executive branch or
5 with local governments. (*Leg.’s Ex. B at 1.*) The Legislative Commission also found that on August 8,
6 2020, LCB Legal again provided a written legal opinion concluding that it remains the opinion of LCB
7 Legal that the separation-of-powers provision does not prohibit state legislators from holding positions
8 of public employment with the state executive branch or with local governments. (*Leg.’s Ex. B at 2;*
9 *Ex. C at 1-33.*) Finally, the Legislative Commission found that the question of constitutional law of
10 whether the separation-of-powers provision prohibits state legislators from holding positions of public
11 employment with the state executive branch or with local governments implicates the official interests of
12 the Legislature. (*Leg.’s Ex. B at 2.*)

13 Therefore, the Legislative Commission concluded that “based on the allegations and claims in the
14 NPRI action, the Legislative Commission hereby finds and deems that it is necessary and advisable to
15 protect the official interests of the Legislature in the NPRI action.” (*Leg.’s Ex. B at 4.*) Consequently,
16 the Legislative Commission ordered that “to protect the official interests of the Legislature in the NPRI
17 action, the Legislative Commission hereby directs the General Counsel and the [LCB] Legal Division to
18 take any and all actions on behalf of the Legislature that they deem to be necessary or advisable for the
19 Legislature to appear in, commence, prosecute, defend or intervene in the NPRI action.” (*Leg.’s Ex. B*
20 *at 4.*)

21 On September 21, 2020, in the interests of promoting judicial efficiency and economy, LCB Legal
22 contacted NPRI’s counsel by email correspondence and asked counsel whether NPRI would be
23 agreeable to entering into a stipulation and order regarding the intervention of the Legislature as a
24 Defendant. (*Leg.’s Ex. D.*) On September 23, 2020, NPRI’s counsel responded by email and mail

1 correspondence that NPRI was not amenable to the proposed stipulation and order. (*Leg.’s Ex. E.*) On
2 September 30, 2020, LCB Legal filed the Legislature’s Motion to Intervene as a Defendant pursuant to
3 NRCP 24 and NRS 218F.720.

4 **II. Summary of the Argument.**

5 In the amended complaint, NPRI has alleged that “**legislative expenditures or appropriations**
6 **and taxpayer monies** will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1, and
7 irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
8 Constitution.” (*Am. Compl.* ¶ 28) (emphasis added). Under the Nevada Constitution, the Legislature is
9 given the constitutional power of appropriation, and “[n]o money shall be drawn from the treasury but in
10 consequence of appropriations made by law.” Nev. Const. art. 4, § 19; State ex rel. Davis v. Eggers, 29
11 Nev. 469, 484-85 (1907) (explaining that “all appropriations must be within the legislative will.”). As a
12 result, “it is well established that the power of controlling the public purse lies within legislative, not
13 executive authority.” State of Nev. Employees Ass’n v. Daines, 108 Nev. 15, 21 (1992).

14 Thus, by alleging that legislative expenditures or appropriations and taxpayer monies will be paid
15 to the Defendants in violation of the separation-of-powers provision, NPRI has challenged the
16 Legislature’s constitutional power of appropriation. In other words, NPRI has alleged that the
17 Legislature has violated the Nevada Constitution by authorizing legislative expenditures or
18 appropriations and the payment taxpayer monies to the Defendants in violation of the separation-of-
19 powers provision. Consequently, under NRS 218F.720, the Legislature has an unconditional right and
20 standing to intervene in this action because NPRI “[a]lleges that the Legislature, by its actions or failure
21 to act, has violated . . . the Constitution or laws of this State.” NRS 218F.720(2)(a).

22 Furthermore, NPRI also has alleged that “[t]here is an actual controversy between [NPRI], acting
23 in the public interest, and the Defendants and each of them, as to the **meaning** of the Separation of
24 Powers requirement of Nevada Const. Art. 3, §1, ¶1 and its **application** to Defendants and their

1 conduct.” (*Am. Compl.* ¶ 23) (emphasis added). Consequently, under NRS 218F.720, the Legislature
2 has an unconditional right and standing to intervene in this action because NPRI “[c]hallenges, contests
3 or raises as an issue, either in law or in equity, in whole or in part, or facially or as applied, the **meaning,**
4 **intent, purpose, scope, applicability,** validity, **enforceability** or constitutionality of any law,
5 resolution, initiative, referendum or other legislative or **constitutional measure.**” NRS 218F.720(2)(b)
6 (emphasis added).

7 For these reasons, the Legislature has an unconditional right and standing to intervene in this
8 action under NRCP 24(a)(1) and NRS 218F.720, and the Legislature is entitled to “present its
9 arguments, claims, objections or defenses, in law or fact, whether or not the Legislature’s interests are
10 adequately represented by existing parties and whether or not the State or any agency, officer or
11 employee of the State is an existing party.” NRS 218F.720(3).

12 In addition, the Legislature also qualifies for intervention as of right under NRCP 24(a)(2) because
13 the Legislature has substantial interests in the subject matter of this case which may be impaired if the
14 Legislature is not permitted to intervene and which may not be adequately represented by existing
15 parties. The Legislature also qualifies for permissive intervention under NRCP 24(b) because NPRI’s
16 separation-of-powers claims are based on a state constitutional provision that governs the powers of the
17 legislative branch and the Legislature’s administration of its constitutional functions.

18 Finally, the Legislature has acted with appropriate haste and diligence to intervene in order to
19 protect its official interests, and the Legislature’s participation will not delay the proceedings or
20 complicate the management of the case and will not cause any prejudice to existing parties. If permitted
21 to intervene, the Legislature would be in a position to protect its official interests by providing a more
22 comprehensive and thorough presentation of the controlling law and a better understanding of the issues,
23 and the Court would be ensuring that the views of the Legislature are fairly and adequately represented.
24 Therefore, because the Legislature has acted with appropriate haste and diligence to intervene in this

1 case in order to protect its official interests, the Legislature’s Motion to Intervene as Defendant should
2 be granted.

3 **III. Argument.**

4 **A. Intervention as of right.**

5 Under NRCP 24(a), a movant qualifies for intervention as of right under two circumstances. Am.
6 Home Assurance Co. v. Dist. Ct., 122 Nev. 1229, 1235 (2006). First, under subsection (a)(1), on timely
7 motion, the court must permit a movant to intervene who “is given an unconditional right to intervene by
8 a state or federal statute.” Second, under subsection (a)(2), on timely motion, the court must permit a
9 movant to intervene who:

10 claims an interest relating to the property or transaction that is the subject of the action, and
11 is so situated that disposing of the action may as a practical matter impair or impede the
12 movant’s ability to protect its interest, unless existing parties adequately represent that
interest.

13 NRCP 24(a)(2). In this case, the Legislature qualifies for intervention as of right under both subsections
14 of NRCP 24(a).

15 **(1) The Legislature qualifies for intervention as of right under NRCP 24(a)(1).**

16 To qualify for intervention as of right under NRCP 24(a)(1), the movant must prove that: (1) a
17 statute confers an unconditional right to intervene; and (2) the motion to intervene is timely. See EEOC
18 v. GMRI, Inc., 221 F.R.D. 562, 563 (D. Kan. 2004); EEOC v. Taylor Elec. Co., 155 F.R.D. 180, 182
19 (N.D. Ill. 1994).²

21 ² When interpreting the provisions of NRCP 24 regarding intervention, the Nevada Supreme Court
22 looks to federal cases interpreting the analogous provisions of the Federal Rules of Civil Procedure.
23 Am. Home Assurance, 122 Nev. at 1238-39; Lawler v. Ginochio, 94 Nev. 623, 626 (1978). Thus, in
24 determining whether intervention is appropriate under NRCP 24, such federal cases “are strong
persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their
federal counterparts.” Exec. Mgmt., Ltd. v. Tigor Title Ins. Co., 118 Nev. 46, 53 (2002) (quoting Las
Vegas Novelty, Inc. v. Fernandez, 106 Nev. 113, 119 (1990)).

1 In determining whether a statute confers an unconditional right to intervene for purposes of
2 NRCP 24(a)(1), the issue before the court is one of statutory construction, and the court must limit its
3 inquiry to the terms of the statute and must not consider any of the factors listed in NRCP 24(a)(2). See
4 Bhd. of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 525-31 (1947); Ruiz v. Estelle, 161 F.3d
5 814, 828 (5th Cir. 1998). Consequently, the movant is not required to prove that existing parties may be
6 inadequately representing its interests or that its interests may be impaired if it is not allowed to
7 intervene. Ruiz, 161 F.3d at 828. Instead, the movant is required to prove only that it qualifies for
8 intervention under the terms of the statute. Bhd. of R.R. Trainmen, 331 U.S. at 531. Upon meeting the
9 statutory requirements for intervention, “there is no room for the operation of a court’s discretion” and
10 “the right to intervene is absolute and unconditional.” Id.; see also United States v. Presidio Invs., Ltd.,
11 4 F.3d 805, 808 n.1 (9th Cir. 1993).

12 Under NRS 218F.720, the Legislature may elect to intervene in any action or proceeding when a
13 party alleges that the Legislature, by its actions or failure to act, has violated the Nevada Constitution or
14 when a party contests or raises as an issue the meaning, intent, purpose, scope, applicability or
15 enforceability of any constitutional measure. To intervene in the action or proceeding, the Legislature
16 must file “a motion or request to intervene in the form required by the rules, laws or regulations
17 applicable to the action or proceeding.” NRS 218F.720(2). If the Legislature files such a motion or
18 request to intervene:

19 the Legislature has an *unconditional right and standing to intervene* in the action or
20 proceeding and to present its arguments, claims, objections or defenses, in law or fact,
21 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.

22 NRS 218F.720(3) (emphasis added).

23 In this case, NPRI has alleged that “**legislative expenditures or appropriations and taxpayer**
24 **monies** will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1, and irrevocable and

1 irreparable harm will occur to the rights provided under this provision of the Nevada Constitution.”
2 (*Am. Compl.* ¶ 28) (emphasis added). Under the Nevada Constitution, the Legislature is given the
3 constitutional power of appropriation, and “[n]o money shall be drawn from the treasury but in
4 consequence of appropriations made by law.” Nev. Const. art. 4, § 19; State ex rel. Davis v. Eggers, 29
5 Nev. 469, 484-85 (1907) (explaining that “all appropriations must be within the legislative will.”). As a
6 result, “it is well established that the power of controlling the public purse lies within legislative, not
7 executive authority.” State of Nev. Employees Ass’n v. Daines, 108 Nev. 15, 21 (1992).

8 Thus, by alleging that legislative expenditures or appropriations and taxpayer monies will be paid
9 to the Defendants in violation of the separation-of-powers provision, NPRI has challenged the
10 Legislature’s constitutional power of appropriation. In other words, NPRI has alleged that the
11 Legislature has violated the Nevada Constitution by authorizing legislative expenditures or
12 appropriations and the payment taxpayer monies to the Defendants in violation of the separation-of-
13 powers provision. Consequently, under NRS 218F.720, the Legislature has an unconditional right and
14 standing to intervene in this action because NPRI “[a]lleges that the Legislature, by its actions or failure
15 to act, has violated . . . the Constitution or laws of this State.” NRS 218F.720(2)(a).

16 Furthermore, NPRI also has alleged that “[t]here is an actual controversy between [NPRI], acting
17 in the public interest, and the Defendants and each of them, as to the **meaning** of the Separation of
18 Powers requirement of Nevada Const. Art. 3, §1, ¶1 and its **application** to Defendants and their
19 conduct.” (*Am. Compl.* ¶ 23) (emphasis added). Consequently, under NRS 218F.720, the Legislature
20 has an unconditional right and standing to intervene in this action because NPRI “[c]hallenges, contests
21 or raises as an issue, either in law or in equity, in whole or in part, or facially or as applied, the **meaning,**
22 **intent, purpose, scope, applicability,** validity, **enforceability** or constitutionality of any law,
23 resolution, initiative, referendum or other legislative or **constitutional measure.**” NRS 218F.720(2)(b)
24 (emphasis added).

1 Therefore, based on the allegations in the amended complaint, the Legislature has an
2 unconditional right and standing to intervene in this action under NRS 218F.720. See People’s
3 Legislature v. Miller, No. 2:12-cv-00272-MMD-VCF, 2012 WL 3536767, at *5 (D. Nev. Aug. 15,
4 2012) (holding that because the plaintiff in the proceeding was challenging the constitutionality of
5 legislative actions, “NRS 218F.720 therefore grants the Legislature an unconditional right to intervene
6 in this proceeding.”).

7 Accordingly, because NRS 218F.720 confers an unconditional right to intervene, the Legislature’s
8 motion to intervene must be granted so long as the motion is timely. The timeliness of a motion to
9 intervene is a determination that lies within the discretion of the district court. Lawler, 94 Nev. at 626;
10 Cleland v. Dist. Ct., 92 Nev. 454, 456 (1976). In determining whether a motion to intervene is timely,
11 the court must consider the age of the lawsuit, the length of the movant’s delay in seeking intervention
12 after learning of the need to intervene, and the extent of any prejudice to the rights of existing parties
13 resulting from the delay. Am. Home Assurance, 122 Nev. at 1244; Dangberg Holdings Nev. v. Douglas
14 County, 115 Nev. 129, 141 (1999). If the movant’s intervention would cause prejudice to the rights of
15 existing parties, the court must weigh that prejudice against any prejudice resulting to the movant if the
16 motion to intervene is denied. Am. Home Assurance, 122 Nev. at 1244.

17 In this case, NPRI filed the original complaint on July 9, 2020, but NPRI did not serve the
18 summons and a copy of the original complaint on any of the Defendants named in the original
19 complaint. NPRI then filed an amended complaint on July 28, 2020, but NPRI did not start serving the
20 summons and a copy of the amended complaint on the Defendants until August 29, 2020. After NPRI
21 started serving the summons and a copy of the amended complaint on the Defendants, the Legislative
22 Commission—at its next scheduled meeting on September 18, 2020—directed LCB Legal to “take any
23 and all actions on behalf of the Legislature that they deem to be necessary or advisable for the
24 Legislature to appear in, commence, prosecute, defend or intervene in the NPRI action.” (*Leg.’s Ex. B*

1 at 4.) On the next business day, September 21, 2020, LCB Legal contacted NPRI's counsel by email
2 correspondence and asked counsel whether NPRI would be agreeable to entering into a stipulation and
3 order regarding the intervention of the Legislature as a Defendant. (*Leg.'s Ex. D.*) On September 23,
4 2020, NPRI's counsel responded by email and mail correspondence that NPRI was not amenable to the
5 proposed stipulation and order. (*Leg.'s Ex. E.*) On September 30, 2020, LCB Legal filed the
6 Legislature's Motion to Intervene. At that time, NPRI had not completed serving the summons and a
7 copy of the amended complaint on all of the Defendants named in the amended complaint.

8 Thus, when the Legislature filed its Motion to Intervene on September 30, 2020, this case had not
9 progressed beyond its initial and preliminary stages. Accordingly, because the Legislature sought
10 intervention during the earliest stages of this case, the Legislature has acted with appropriate haste and
11 diligence to intervene, and the Legislature's intervention will not delay the proceedings, complicate
12 management of the case or cause any prejudice to existing parties. Therefore, the Legislature's motion
13 to intervene is timely. See EEOC v. Taylor Elec. Co., 155 F.R.D. 180, 182 (N.D. Ill. 1994) (finding that
14 a motion to intervene filed four months after the plaintiff commenced the action was timely where no
15 discovery had been conducted in the case).

16 In sum, because the Legislature has an unconditional right to intervene under NRS 218F.720 and
17 because the Legislature's motion to intervene is timely, the Legislature meets the standards for
18 intervention as of right under NRCP 24(a)(1). Therefore, the Legislature's motion to intervene should
19 be granted.

20 **(2) The Legislature qualifies for intervention as of right under NRCP 24(a)(2).**

21 As a general rule, courts give NRCP 24(a)(2) a broad and liberal construction in favor of
22 intervention as of right. State Indus. Ins. Sys. v. Dist. Ct., 111 Nev. 28, 32 (1995), *overruled in part on*
23 *other grounds by* Am. Home Assurance Co. v. Dist. Ct., 122 Nev. 1229 (2006); Arakaki v. Cayetano,
24 324 F.3d 1078, 1083 (9th Cir. 2003) ("Rule 24 traditionally receives liberal construction in favor of

1 applicants for intervention.”); Scotts Valley Band of Pomo Indians v. United States, 921 F.2d 924, 926
2 (9th Cir. 1990) (“Rule 24(a) is construed broadly, in favor of the applicants for intervention.”).

3 To qualify for intervention as of right under NRCP 24(a)(2), the movant must establish that:
4 (1) the movant has sufficient interests in the subject matter of the litigation; (2) the movant’s ability to
5 protect those interests could be impaired if the movant is not permitted to intervene; (3) the movant’s
6 interests may not be adequately represented by the existing parties; and (4) the motion to intervene is
7 timely. Am. Home Assurance, 122 Nev. at 1238. The determination of whether the movant has met the
8 four requirements is within the discretion of the district court. Id.

9 As discussed previously, the Legislature’s motion to intervene is timely. Because the Legislature
10 also meets the remaining requirements for intervention as of right under NRCP 24(a)(2), the
11 Legislature’s motion to intervene should be granted.

12 **(a) Because the Legislature has a right to defend its constitutional power of**
13 **appropriation and the meaning, intent, purpose, scope, applicability and enforceability of**
14 **the separation-of-powers provision, the Legislature has significantly protectable interests**
in the subject matter of this action which will be impaired if NPRI succeeds on its claims.

15 For purposes of intervention as of right under NRCP 24(a)(2), the movant must have significantly
16 protectable interests in the subject matter of the action, and the movant must be situated such that the
17 disposition of the action may impair or impede the movant’s ability to protect those interests. PEST
18 Comm. v. Miller, 648 F.Supp.2d 1202, 1211-12 (D. Nev. 2009). The movant satisfies these
19 requirements if: (1) the movant asserts any interests that are protected under federal or state law; and
20 (2) there is a relationship between the movant’s protected interests and the plaintiffs’ claims such that
21 the movant will suffer a practical impairment of its interests if the plaintiffs succeed on their claims. Id.
22 at 1212. When the plaintiffs seek declaratory relief that actions are unconstitutional, the movant is
23 entitled to intervene to defend the validity of the actions if the movant’s protected interests would be
24 impaired, as a practical matter, by a declaration that the actions are unconstitutional. Cal. ex rel.

1 Lockyer v. United States, 450 F.3d 436, 441-45 (9th Cir. 2006). Furthermore, when the constitutionality
2 of legislative actions are implicated, courts have recognized that a state legislature may have
3 independent legal interests in defending the constitutionality of its actions that are separate and distinct
4 from the interests of the public officials who are named as the defendants in the case. See Ne. Ohio
5 Coal. for Homeless v. Blackwell, 467 F.3d 999, 1007-08 (6th Cir. 2006).

6 As discussed previously, because NPRI has alleged that legislative expenditures or appropriations
7 and taxpayer monies will be paid to the Defendants in violation of the separation-of-powers provision,
8 NPRI has challenged the Legislature's constitutional power of appropriation. In other words, NPRI has
9 alleged that the Legislature has violated the Nevada Constitution by authorizing legislative expenditures
10 or appropriations and the payment taxpayer monies to the Defendants in violation of the separation-of-
11 powers provision. As a result, the Legislature has independent legal interests in defending the validity
12 of its legislative actions in exercising the constitutional power of appropriation, and the Legislature's
13 independent legal interests are separate and distinct from the individual interests of the Defendants. As
14 a consequence, this case strikes at the heart of one of the most vital components of the legislative
15 function—the constitutional power of appropriation. Because the Legislature has a right to defend its
16 exercise of the constitutional power of appropriation, the Legislature has substantial interests in the
17 subject matter of this action which will be impaired if the Legislature is not permitted to intervene.

18 Moreover, the Legislature has substantial interests in the meaning, intent, purpose, scope,
19 applicability and enforceability of the separation-of-powers provision because that constitutional
20 provision governs the powers of the legislative branch and the Legislature's administration of its
21 constitutional functions and the conduct of its members. See Heller v. Legislature, 120 Nev. 456, 466-
22 72 (2004); Comm'n on Ethics v. Hardy, 125 Nev. 285, 291-93 (2009). The Legislature has established a
23 public policy in this State that protects the concept of the "citizen-legislator" as the cornerstone of an
24 effective, responsive and qualified part-time legislative body. For example, as expressed in

1 NRS 281A.020, it is the public policy of this State that:

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

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

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

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

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

18 Accordingly, because the Legislature has substantial interests in the meaning, intent, purpose,
19 scope, applicability and enforceability of the separation-of-powers provision, the Legislature has
20 significantly protectable interests in the subject matter of this action which will be impaired if NPRI
21 succeeds on its claims.

22 **(b) The Legislature’s interests are not adequately represented by existing parties.**

23 When the movant has sufficient interests to support intervention as of right under NRCP 24(a)(2),
24 the movant must be permitted to intervene unless the movant’s interests are adequately represented by

existing parties. Am. Home Assurance, 122 Nev. at 1241; Lundberg v. Koontz, 82 Nev. 360, 362-63 (1966). The movant must satisfy only a minimal burden to demonstrate that existing parties do not adequately represent its interests. Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 823 (9th Cir. 2001). The movant need only show that representation by existing parties may be inadequate, not that it will be inadequate. Id. Courts typically consider three factors when determining whether existing parties adequately represent the interests of the movant: (1) whether the interests of existing parties are such that they will undoubtedly make all of the movant's arguments; (2) whether existing parties are capable and willing to make such arguments; and (3) whether the movant would offer any necessary elements to the proceeding that existing parties would neglect. PEST Comm., 648 F.Supp.2d at 1212.

As discussed previously, the Legislature has independent legal interests in this action that are separate and distinct from the individual interests of the Defendants because the Legislature has a right to defend its constitutional power of appropriation and the meaning, intent, purpose, scope, applicability and enforceability of the separation-of-powers provision which governs the powers of the legislative branch and the Legislature's administration of its constitutional functions and the conduct of its members. Because these separate institutional interests are unique to the Legislature as a constitutional body, the Defendants are not in a position to adequately represent the separate institutional interests of the Legislature that are at stake in this case. Under such circumstances, the Legislature's interests are not adequately represented by existing parties, and the Legislature is entitled to intervention as of right under NRCP 24(a)(2).

B. Permissive intervention.

As recently amended by the Nevada Supreme Court, effective March 1, 2019, the provisions of NRCP 24(b) were revised to conform to the federal rule. NRCP 24 Advisory Committee Note—2019 Amendment. The provisions of NRCP 24(b) provide that permissive intervention may be granted under the following circumstances:

1 **(b) Permissive Intervention.**

2 (1) **In General.** On timely motion, the court may permit anyone to intervene who:

3 (A) is given a conditional right to intervene by a state or federal statute; or

4 (B) has a claim or defense that shares with the main action a common question of
5 law or fact.

6 (2) **By a Government Officer or Agency.** On timely motion, the court may permit
7 a state or federal governmental officer or agency to intervene if a party's claim or defense is
8 based on:

9 (A) a statute or executive order administered by the officer or agency; or

10 (B) any regulation, order, requirement, or agreement issued or made under the
11 statute or executive order.

12 Permissive intervention lies within the discretion of the district court. 7C Wright & Miller,
13 Federal Practice & Procedure-Civil § 1913 (3d ed. & Westlaw 2019) ("If there is no right to intervene
14 under Rule 24(a), it is wholly discretionary with the court whether to allow intervention under
15 Rule 24(b)."). However, "[a] finding by the court that the presence of the intervenor will not prejudice
16 the original parties serves to encourage the court to exercise its discretion to allow intervention." Id.

17 Furthermore, when the intervenor is a governmental agency, permissive intervention ordinarily
18 should be granted to the agency where the legal issues in the case may have a substantial impact on "the
19 maintenance of its statutory authority and the performance of its public duties." SEC v. U.S. Realty &
20 Impr. Co., 310 U.S. 434, 460 (1940). Thus, where the governmental agency's interest in the case "is a
21 public one" and it intends to raise claims or defenses concerning questions of law involved in the case,
22 permissive intervention should be granted, especially when the agency's intervention "might be helpful
23 in [a] difficult and delicate area." United States v. Local 638, Enter. Ass'n of Pipefitters, 347 F. Supp.
24 164, 166 (S.D.N.Y. 1972) (quoting SEC v. U.S. Realty & Impr. Co., 310 U.S. 434, 460 (1940)).

 In this case, even assuming the Legislature does not qualify for intervention as of right under
NRCP 24(a)(1) and 24(a)(2), the Court should exercise its discretion and grant the Legislature
permissive intervention under NRCP 24(b). As discussed previously, this case involves extremely
important questions of constitutional law whose resolution will have a substantial impact on the
Legislature's constitutional power of appropriation and the meaning, intent, purpose, scope, applicability

1 and enforceability of the separation-of-powers provision which governs the powers of the legislative
2 branch and the Legislature's administration of its constitutional functions and the conduct of its
3 members. By permitting the Legislature to intervene, the Court would be facilitating a more
4 comprehensive and thorough presentation of the controlling law and a better understanding of the issues,
5 and the Court would be ensuring that the views of the Legislature are fairly and adequately represented
6 and are not prejudiced by this case. Moreover, because this case is in its earliest stages, intervention will
7 not unduly delay the proceedings or prejudice the rights of existing parties. Therefore, even assuming
8 the Legislature does not qualify for intervention as of right under NRCP 24(a)(1) and 24(a)(2), the Court
9 should exercise its discretion and grant the Legislature permissive intervention under NRCP 24(b).

10 **CONCLUSION AND AFFIRMATION**

11 Based upon the foregoing, the Legislature respectfully requests that the Court enter an order
12 granting the Legislature's Motion to Intervene as Defendant.

13 The undersigned hereby affirm that this document does not contain "personal information about
14 any person" as defined in NRS 239B.030 and 603A.040.

15 DATED: This 30th day of September, 2020.

16 Respectfully submitted,

17 By: /s/ Kevin C. Powers

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ADDENDUM

NRCP 24. Intervention

(a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a state or federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) **Permissive Intervention.**

(1) **In General.** On timely motion, the court may permit anyone to intervene who:
(A) is given a conditional right to intervene by a state or federal statute; or
(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) **By a Government Officer or Agency.** On timely motion, the court may permit a state or federal governmental officer or agency to intervene if a party's claim or defense is based on:

- (A) a statute or executive order administered by the officer or agency; or
- (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) **Delay or Prejudice.** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

[Amended; effective March 1, 2019.]

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 or the General 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,

1 imprecise, indefinite or vague, is preempted by federal law or is otherwise inapplicable, invalid,
unenforceable or unconstitutional,

2 ➡ 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
3 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
4 defenses, in law or fact, or by a motion or request to file such a pleading, brief or dispositive
motion at a later time.

5 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
6 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
7 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
8 a party.

9 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
10 Legislature as a party based on the provisions of this section.

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

12 6. As used in this section:

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

14 (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.

15 (c) "Legislature" means:

16 (1) The Legislature or either House; or

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

18 (Added to NRS by 1965, 1461; A 1971, 1546; 1995, 1108; 1999, 2203; 2007, 3305; 2009,
1565; 2011, 3244; 2020, 32nd Special Session, 16)

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division,
3 and that on the 30th day of September, 2020, pursuant to NRCP 5(b) and NEFCR 9, I served a true
4 and correct copy of the Nevada Legislature's Motion to Intervene as Defendant, by means of the Eighth
5 Judicial District Court's electronic filing system, directed to:

6 **DEANNA L. FORBUSH, ESQ.**
7 **COLLEEN E. MCCARTY, ESQ.**
8 FOX ROTHSCHILD LLP
9 1980 Festival Plaza Dr., Ste. 700
10 Las Vegas, NV 89135
11 dforbush@foxrothschild.com
12 cmccarty@foxrothschild.com
13 *Attorneys for Plaintiff Nevada Policy*
14 *Research Institute*

11 **BRADLEY SCHRAGER, ESQ.**
12 **DANIEL BRAVO, ESQ.**
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15 3556 E. Russell Rd.
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17 bschrager@wrslawyers.com
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19 *Attorneys for Defendants Brittney Miller,*
20 *Kasina Douglas-Boone, and Selena Torres*

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Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal

17 /s/ Kevin C. Powers
18 An Employee of the Legislative Counsel Bureau
19
20
21
22
23
24

Nevada Legislature's

Exhibit A

1 **ANS**
2 KEVIN C. POWERS, General Counsel
3 Nevada Bar No. 6781
4 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
5 401 S. Carson St.
6 Carson City, NV 89701
7 Tel: (775) 684-6830; Fax: (775) 684-6761
8 Email: kpowers@lcb.state.nv.us
9 *Attorneys for the Legislature of the State of Nevada*

6 **DISTRICT COURT**
7 **CLARK COUNTY, NEVADA**

8 NEVADA POLICY RESEARCH INSTITUTE, a
9 Nevada domestic nonprofit corporation,

10 Plaintiff,

11 vs.

12 NICOLE J. CANNIZZARO, an individual engaging
13 in dual employment with the Nevada State Senate
14 and Clark County District Attorney; KASINA
15 DOUGLASS-BOONE, an individual engaging in
16 dual employment with the Nevada State Assembly
17 and Clark County School District; JASON
18 FRIERSON, an individual engaging in dual
19 employment with the Nevada State Assembly and
20 Clark County Public Defender; OSVALDO FUMO,
21 an individual engaging in dual employment with the
22 Nevada State Assembly and University of Nevada,
23 Las Vegas; HEIDI SEEVERS GANSERT, an
24 individual engaging in dual employment with the
Nevada State Senate and University of Nevada,
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an
individual engaging in dual employment with the
Nevada State Assembly and Nevada State College;
JAMES OHRENSCHALL, an individual engaging
in dual employment with the Nevada State Senate
and Clark County Public Defender; MELANIE
SCHEIBLE, an individual engaging in dual
employment with the Nevada State Senate and Clark
County District Attorney; TERESA BENITEZ-

Case No. A-20-817757-C
Dept. No. 1

**NEVADA LEGISLATURE'S PROPOSED
ANSWER TO PLAINTIFF'S AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 THOMPSON, an individual engaging in dual
2 employment with the Nevada State Assembly and
3 University of Nevada, Reno; JILL TOLLES, an
4 individual engaging in dual employment with the
5 Nevada State Assembly and University of Nevada,
6 Reno; and SELINA TORRES, an individual
7 engaging in dual employment with the Nevada State
8 Assembly and Clark County School District,
9
10 Defendants.

11
12 **PROPOSED ANSWER**

13
14 Proposed Intervenor-Defendant Legislature of the State of Nevada (Legislature), by and through
15 its counsel the Legal Division of the Legislative Counsel Bureau (LCB Legal) under NRS 218F.720,
16 hereby submits, pursuant to NRCP 24(c), the Legislature's proposed Answer to Plaintiff's Amended
17 Complaint for Declaratory and Injunctive Relief, which was filed on July 28, 2020.

18 **ADMISSIONS AND DENIALS OF THE ALLEGATIONS**

19 **FACTS COMMON TO ALL CLAIMS**

20 ¶ 1. The Legislature denies the allegations in paragraph 1 of the Amended Complaint.

21 ¶ 2. The Legislature admits the allegations in paragraph 2 of the Amended Complaint only to
22 the extent the allegations accurately state the text of Article 3, Section 1(1) of the Nevada Constitution.
23 The Legislature denies all other allegations in paragraph 2 of the Amended Complaint.

24 ¶ 3. The Legislature denies the allegations in paragraph 3 of the Amended Complaint.

¶ 4. The Legislature denies the allegations in paragraph 4 of the Amended Complaint.

¶ 5. The Legislature denies the allegations in paragraph 5 of the Amended Complaint.

PARTIES

¶ 6. The Legislature lacks knowledge or information sufficient to form a belief about the truth
of the allegations in paragraph 6 of the Amended Complaint and denies them.

//

¶ 7. The Legislature admits that Defendant Nicole J. Cannizzaro holds the elected office of Nevada State Senator. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 7 of the Amended Complaint and denies them.

¶ 8. The Legislature admits that Defendant Kasina Douglass-Boone holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 8 of the Amended Complaint and denies them.

¶ 9. The Legislature admits that Defendant Jason Frierson holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 9 of the Amended Complaint and denies them.

¶ 10. The Legislature admits that Defendant Osvaldo Fumo holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 10 of the Amended Complaint and denies them.

¶ 11. The Legislature admits that Defendant Heidi Seevers Gansert holds the elected office of Nevada State Senator. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 11 of the Amended Complaint and denies them.

¶ 12. The Legislature admits that Defendant Glen Leavitt holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 12 of the Amended Complaint and denies them.

¶ 13. The Legislature admits that Defendant Brittney Miller holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 13 of the Amended Complaint and denies them.

¶ 14. The Legislature admits that Defendant Dina Neal holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 14 of the Amended Complaint and denies them.

¶ 15. The Legislature admits that Defendant James Ohrenschall holds the elected office of Nevada State Senator. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 15 of the Amended Complaint and denies them.

¶ 16. The Legislature admits that Defendant Melanie Scheible holds the elected office of Nevada State Senator. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 16 of the Amended Complaint and denies them.

¶ 17. The Legislature admits that Defendant Teresa Benitez-Thompson holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 17 of the Amended Complaint and denies them.

¶ 18. The Legislature admits that Defendant Jill Tolles holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 18 of the Amended Complaint and denies them.

¶ 19. The Legislature admits that Defendant Selena Torres holds the elected office of Nevada State Assemblyperson. The Legislature lacks knowledge or information sufficient to form a belief about the truth of all other allegations in paragraph 19 of the Amended Complaint and denies them.

JURISDICTION AND VENUE

¶ 20. The Legislature lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 20 of the Amended Complaint and denies them.

¶ 21. The Legislature lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 21 of the Amended Complaint and denies them.

//

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FIRST CAUSE OF ACTION
Violation of Separation of Powers
(Declaratory Relief)

¶ 22. The Legislature admits and denies the allegations incorporated by reference in paragraph 22 of the Amended Complaint in the same manner expressly stated by the Legislature in paragraphs 1 to 21, inclusive, of this Answer.

¶ 23. The Legislature denies the allegations in paragraph 23 of the Amended Complaint.

¶ 24. The Legislature denies the allegations in paragraph 24 of the Amended Complaint.

¶ 25. The Legislature denies the allegations in paragraph 25 of the Amended Complaint.

SECOND CAUSE OF ACTION
Violation of Separation of Powers
(Injunctive Relief)

¶ 26. The Legislature admits and denies the allegations incorporated by reference in paragraph 26 of the Amended Complaint in the same manner expressly stated by the Legislature in paragraphs 1 to 25, inclusive, of this Answer.

¶ 27. The Legislature denies the allegations in paragraph 27 of the Amended Complaint.

¶ 28. The Legislature denies the allegations in paragraph 28 of the Amended Complaint.

¶ 29. The Legislature denies the allegations in paragraph 29 of the Amended Complaint.

¶ 30. The Legislature denies the allegations in paragraph 30 of the Amended Complaint.

¶ 31. The Legislature denies the allegations in paragraph 31 of the Amended Complaint.

AFFIRMATIVE DEFENSES

1. The Legislature pleads as an affirmative defense that the Amended Complaint fails to state a claim upon which relief can be granted.

2. The Legislature pleads as an affirmative defense that the Amended Complaint fails to join all necessary parties who are needed for a just adjudication.

//

1 3. The Legislature pleads as affirmative defenses that Plaintiff lacks capacity to sue and
2 standing; that Plaintiff's claims do not present a justiciable case or controversy; that Plaintiff's claims
3 are not ripe for adjudication; and that the Court lacks jurisdiction of the subject matter.

4 4. The Legislature pleads as an affirmative defense that Plaintiff's claims are barred by the
5 doctrine of immunity, including, without limitation, sovereign immunity, official immunity, legislative
6 immunity, discretionary-function immunity, absolute immunity and qualified immunity.

7 5. The Legislature pleads as affirmative defenses that Plaintiff's claims are barred by the statute
8 of limitations, laches, estoppel and waiver.

9 6. The Legislature pleads as an affirmative defense that, pursuant to NRS 218F.720, the
10 Legislature may not be assessed or held liable for any filing or other court fees or the attorney's fees or
11 other fees, costs or expenses of any other parties.

12 7. The Legislature reserves its right to plead, raise or assert any additional affirmative defenses
13 which are not presently known to the Legislature, following its reasonable inquiry under the
14 circumstances, but which may become known to the Legislature as a result of discovery, further
15 pleadings or the acquisition of information from any other source during the course of this litigation.

16 **PRAYER FOR RELIEF**

17 The Legislature prays for the following relief:

18 1. That the Court enter judgment in favor of Defendants and against Plaintiff on all claims and
19 prayers for relief directly or indirectly pled in the Amended Complaint;

20 2. That the Court enter judgment in favor of Defendants and against Plaintiff for Defendants'
21 costs and attorney's fees as determined by law; and

22 3. That the Court grant such other relief in favor of Defendants and against Plaintiff as the Court
23 may deem just and proper.

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DATED: This 30th day of September, 2020.

By: /s/ Kevin C. Powers
KEVIN C. POWERS
 General Counsel
 Nevada Bar No. 6781
 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
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 Carson City, NV 89701
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Attorneys for the Legislature of the State of Nevada

Nevada Legislature's

Exhibit B



**THE LEGISLATIVE COMMISSION
OF THE STATE OF NEVADA**

In the Matter of Litigation in the Case of *Nevada
Policy Research Institute v. Cannizzaro, et al.*,
Case No. A-20-817757-C, Eighth Judicial
District Court, Clark County.

**RESOLUTION OF THE
LEGISLATIVE COMMISSION**

WHEREAS, On several occasions since 2002, the Legal Division of the Legislative Counsel Bureau (Legal Division), after receiving requests for a legal opinion under NRS 218F.710, has provided written legal opinions to members of the Legislature, who have elected to release the written legal opinions to the public, concluding that the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution (separation-of-powers provision) does not prohibit state legislators from holding positions of public employment with the state executive branch or with local governments; and

WHEREAS, In litigation before the Nevada Supreme Court in 2004, which involved a separation-of-powers challenge to state legislators holding positions of public employment with the state executive branch or with local governments, the Legal Division argued that the separation-of-powers provision does not prohibit state legislators from holding positions of public employment with the state executive branch or with local governments. (*Heller v. Legislature*, 120 Nev. 456 (2004)); and

WHEREAS, In the litigation before the Nevada Supreme Court in 2004, the Court decided the case on different legal grounds, and the Court did not decide the merits of the separation-of-powers challenge to state legislators holding positions of public employment with the state executive branch or with local

1 governments. (*Heller v. Legislature*, 120 Nev. 456 (2004)); and

2 WHEREAS, On August 8, 2020, after receiving a request for a written legal opinion under
3 NRS 218F.710, the Legal Division provided a written legal opinion—which the requester has elected to
4 release to the public—concluding that it remains the opinion of the Legal Division that the separation-
5 of-powers provision does not prohibit state legislators from holding positions of public employment
6 with the state executive branch or with local governments; and

7 WHEREAS, The question of constitutional law of whether the separation-of-powers provision
8 prohibits state legislators from holding positions of public employment with the state executive branch
9 or with local governments implicates the official interests of the Legislature; and

10 WHEREAS, Pursuant to NRS 281A.020, it is the public policy of this State that “State Legislators
11 serve as ‘citizen Legislators’ who have other occupations and business interests, who are expected to
12 have particular philosophies and perspectives that are necessarily influenced by the life experiences of
13 the Legislator, including, without limitation, professional, family and business experiences, and who are
14 expected to contribute those philosophies and perspectives to the debate over issues with which the
15 Legislature is confronted.”; and

16 WHEREAS, On July 9, 2020, a civil action was filed in the case of *Nevada Policy Research*
17 *Institute v. Cannizzaro, et al.*, Case No. A-20-817757-C, Eighth Judicial District Court, Clark County
18 (NPRI action); and

19 WHEREAS, On July 28, 2020, in the NPRI action, the plaintiff filed an amended complaint; and

20 WHEREAS, In the amended complaint in the NPRI action, the plaintiff named the following
21 members of the Legislature as defendants: Nicole J. Cannizzaro; Kasina Douglass-Boone; Jason
22 Frierson; Osvaldo Fumo; Heidi Seevers Gansert; Glen Leavitt; Brittney Miller; Dina Neal; James
23 Ohrenschall; Melanie Scheible; Teresa Benitez-Thompson; Jill Tolles; and Selena Torres; and

24 WHEREAS, On August 29, 2020, in the NPRI action, the plaintiff first served the summons and a

1 copy of the amended complaint on one of the defendants; and

2 WHEREAS, In the amended complaint in the NPRI action, the plaintiff alleges and pleads several
3 claims for declaratory and injunctive relief against the defendants; and

4 WHEREAS, In the amended complaint in the NPRI action, the claims for declaratory and injunctive
5 relief include allegations that the defendants are persons simultaneously holding elected offices in the
6 Legislature and paid positions with the state executive branch or with local governments in violation of
7 the separation-of-powers provision; and

8 WHEREAS, Pursuant to NRS 218F.720, when deemed necessary or advisable to protect the official
9 interests of the Legislature in any action or proceeding before any court, the Legislative Commission
10 may direct the General Counsel and the Legal Division to appear in, commence, prosecute, defend or
11 intervene in the action or proceeding; and

12 WHEREAS, Pursuant to NRS 218F.720, when a party to any action or proceeding before any court:
13 (1) alleges that the Legislature, by its actions or failure to act, has violated the Constitution, treaties or
14 laws of the United States or the Constitution or laws of this State; or (2) challenges, contests or raises as
15 an issue, either in law or in equity, in whole or in part, or facially or as applied, the meaning, intent,
16 purpose, scope, applicability, validity, enforceability or constitutionality of any law, resolution,
17 initiative, referendum or other legislative or constitutional measure, the Legislature may elect to
18 intervene in the action or proceeding; and

19 WHEREAS, Pursuant to NRS 218F.720, the Legislature has an unconditional right and standing to
20 intervene in the action or proceeding and to present its arguments, claims, objections or defenses, in law
21 or fact, whether or not the Legislature's interests are adequately represented by existing parties and
22 whether or not the State or any agency, officer or employee of the State is an existing party; and

23 WHEREAS, Pursuant to NRS 218F.720, when the Legislature intervenes in the action or
24 proceeding, the Legislature has all the rights of a party; now, therefore, be it

1 RESOLVED BY THE LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, That based on the
2 allegations and claims in the NPRI action, the Legislative Commission hereby finds and deems that it is
3 necessary and advisable to protect the official interests of the Legislature in the NPRI action and in any
4 related, associated or similar actions or proceedings, including, without limitation, any appeals, any
5 petitions or applications for extraordinary writs or any other appellate review or relief of any kind; and
6 be it further

7 RESOLVED, That to protect the official interests of the Legislature in the NPRI action, the
8 Legislative Commission hereby directs the General Counsel and the Legal Division to take any and all
9 actions on behalf of the Legislature that they deem to be necessary or advisable for the Legislature to
10 appear in, commence, prosecute, defend or intervene in the NPRI action and in any related, associated or
11 similar actions or proceedings, including, without limitation, any appeals, any petitions or applications
12 for extraordinary writs or any other appellate review or relief of any kind.

Nevada Legislature's

Exhibit C

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU

LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
Fax No.: (775) 684-6600



BRENDA J. ERDOES, *Director*
(775) 684-6800

LEGISLATIVE COMMISSION (775) 684-6800
NICOLE J. CANNIZZARO, *Senator, Chair*
Brenda J. Erdoes, *Director, Secretary*

INTERIM FINANCE COMMITTEE (775) 684-6821
MAGGIE CARLTON, *Assemblywoman, Chair*
Cindy Jones, *Fiscal Analyst*
Mark Krmpotic, *Fiscal Analyst*

LEGAL DIVISION (775) 684-6830
KEVIN C. POWERS, *General Counsel*
BRYAN J. FERNLEY, *Legislative Counsel*

August 8, 2020

Brenda J. Erdoes, Esq.
Director
Legislative Counsel Bureau
401 S. Carson St.
Carson City, NV 89701

Dear Director Erdoes:

Pursuant to NRS 218F.710(2), you have asked the General Counsel of the Legal Division of the Legislative Counsel Bureau (LCB Legal) to address a question of constitutional law relating to the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution.¹

In particular, you have asked whether the separation-of-powers provision prohibits state legislators from holding positions of *public employment* with the Executive Department of the Nevada State Government (hereafter "the state executive branch") or with local governments. In asking this question, you note that LCB Legal has addressed this question of constitutional law in: (1) prior legal opinions issued by LCB Legal in 2002 and 2003 which were disclosed to the public; and (2) prior legal arguments made by LCB Legal in 2004 before the Nevada Supreme Court in the case of Heller, Secretary of State v. Legislature of the State of Nevada, 120 Nev. 456 (2004).

In the Heller case, former Secretary of State Dean Heller brought a lawsuit against the Legislature claiming that the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution prohibits state legislators from holding positions of *public employment* with the state executive branch or with local governments. 120 Nev. at 458-60. As a remedy for the alleged separation-of-powers violations, the former Secretary of State asked the Nevada Supreme Court to oust or exclude state and local government employees from their seats in the Legislature. Id.

¹ NRS 218F.710(2), as amended by section 22 of Assembly Bill No. 2 (AB 2) of the 32nd Special Session of the Legislature, provides that upon the request of the Director, the General Counsel may give a legal opinion in writing upon any question of law.

Leg.'s Ex. C—001

In response to the lawsuit, LCB Legal, which represented the Legislature in the litigation, argued in line with our prior legal opinions 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. Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus, at 42-75 (May 4, 2004). In particular, LCB Legal argued that the Framers of the Nevada Constitution did not intend the separation-of-powers provision to prohibit legislators from holding positions of *public employment* with the state executive branch because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. Id. at 42-68. By contrast, LCB Legal argued that the Framers intended the separation-of-powers provision to prohibit legislators from holding only *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. Id. Finally, LCB Legal argued that the Framers did not intend the separation-of-powers provision to prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision applies only to the three departments of state government, and local governments and their officers and employees are not part of one of the three departments of state government. Id. at 68-76.

On July 14, 2004, the Nevada Supreme Court decided the Heller case in favor of the Legislature, but the court decided the case on different legal grounds from the separation-of-powers challenge raised by the former Secretary of State. Consequently, the Nevada Supreme Court did not decide the merits of the separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. Since the Heller case in 2004, neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided the merits of such a separation-of-powers challenge in a reported case.

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

Leg.’s Ex. C—002

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.

BACKGROUND

The Heller case is the primary Nevada case discussing the proper procedure for raising a separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. Therefore, in discussing this question of constitutional law, we must begin by analyzing the Heller case in some detail.

On April 2, 2004, former Secretary of State Dean Heller, who was represented in the litigation by former Attorney General Brian Sandoval, filed an original action in the Nevada Supreme Court in the form of a petition for writ of mandamus (mandamus petition) which asked the court to oust or exclude state and local government employees from their seats in the Legislature. 120 Nev. at 458-60. In the mandamus petition, the former Secretary of State argued that the separation-of-powers provision prohibits legislators from holding positions of *public employment* as state executive branch employees and also “question[ed] whether local government employees may serve as legislators without violating separation of powers.” Id. With regard to state executive branch employees, the former Secretary of State asked the Nevada Supreme Court to “declare state executive branch employees unqualified to serve as legislators, and then direct the Legislature to comply with [that] declaration and either remove or exclude those employees from the Legislature.” Id. at 460.

As part of the mandamus petition, the former Secretary of State attached as exhibits two legal opinions from LCB Legal—one issued to former Assemblyman Lynn Hettrick on January 11, 2002, and one issued to former Assemblyman Jason Geddes on January 23, 2003. Heller v. Legislature, Case No. 43079, Doc. No. 04-06157, Petition for Writ of Mandamus (Apr. 2, 2004) (Exhibits B-1 and B-2). In the two opinions, LCB Legal found that the separation-of-powers provision only prohibits legislators from holding *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. However, LCB Legal also found that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. Based on our interpretation of the separation-of-powers provision, LCB Legal determined that certain positions of *public employment* with, respectively, the Nevada Department of Transportation and the University and Community College System of Nevada (now the Nevada System of Higher Education), were not *public offices* in the state executive branch because the positions did not involve the exercise of any sovereign functions appertaining to the state executive branch. Therefore, LCB Legal concluded that legislators could hold the respective positions of *public employment* without violating the separation-of-powers provision.

Also as part of the mandamus petition, the former Secretary of State attached as an exhibit a legal opinion issued by former Attorney General Sandoval—AGO 2004-03 (Mar. 1, 2004)—which disagreed with the two legal opinions issued by LCB Legal. Heller v. Legislature, Case No. 43079, Doc. No. 04-06157, Petition for Writ of Mandamus (Apr. 2, 2004) (Exhibit A). In AGO 2004-03, the former Attorney General concluded that the separation-of-powers provision prohibits legislators from holding both *public offices* and positions of *public employment* with the state executive branch, whether or not such positions exercise any sovereign functions appertaining to the state executive branch. AGO 2004-03, at 23-25. However, with regard to local government employees, the former Attorney General concluded that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision is not applicable to local governments. Id. at 26.

In the Legislature's answer to the mandamus petition, LCB Legal responded comprehensively and thoroughly in opposition to the legal conclusion in AGO 2004-03 that the separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch. Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus, at 42-68 (May 4, 2004). Specifically, LCB Legal demonstrated through extensive citation to historical evidence and well-established legal authorities that the legal conclusion in AGO 2004-03 is not entitled to any persuasive weight for the following reasons: (1) it used incompletely researched and therefore inaccurate historical evidence; (2) it relied on inapt and inapplicable case law; (3) it failed to properly apply the rules of constitutional construction; and (4) it was not supported by relevant and persuasive legal authorities.²

For example, because the Nevada Constitution was modeled on the California Constitution of 1849, AGO 2004-03 attempts to use historical evidence and case law from California to support its legal conclusion that Nevada's legislators are prohibited from holding positions as state executive branch employees. AGO 2004-03, at 9-10. However, the historical evidence and case law from California actually proves the exact opposite. 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 the California Constitution was amended to expressly prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917) (explaining that the constitutional amendment "was intended to reach a practice in state administration of many

² We note that the legal opinions of the Attorney General and LCB Legal do not constitute binding legal authority or precedent. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 203 (2001); Lorton v. Jones, 130 Nev. 51, 62 n.7 (2014). Instead, such legal opinions are entitled only to such persuasive weight as the courts think proper based on the legal reasoning and citation to relevant legal authorities that support the opinion. See Tahoe Reg'l Planning Agency v. McKay, 590 F. Supp. 1071, 1074 (D. Nev. 1984), *aff'd*, 769 F.2d 534 (9th Cir. 1985); Santa Clara Cnty. Local Transp. Auth. v. Guardino, 902 P.2d 225, 238 (Cal. 1995).

years' standing.”). As more fully addressed in the legal discussion below, this is but one example of many historical and legal flaws that undermine the persuasive weight of AGO 2004-03.

However, in the Heller case, because the Nevada Supreme Court decided the case in favor of the Legislature on different legal grounds from the separation-of-powers challenge raised by the former Secretary of State, the court did not resolve the conflicting legal conclusions expressed in AGO 2004-03 and the two legal opinions issued by LCB Legal. 120 Nev. at 466-72. Nevertheless, the court's decision in the Heller case established some important legal principles governing separation-of-powers challenges and the exclusive constitutional power of each House of the Legislature to judge the qualifications of its members under Article 4, Section 6 of the Nevada Constitution. Id.

In the Heller case, as a remedy for the alleged separation-of-powers violations, the former Secretary of State asked the Nevada Supreme Court to oust or exclude state and local government employees from their seats in the Legislature. Id. at 458-60. However, in light of the requested remedy, the court declined to decide the merits of the separation-of-powers challenge because each House is invested with the exclusive constitutional power to judge the qualifications of its members under Article 4, Section 6, which provides in relevant part that “[e]ach House shall judge of the qualifications, elections and returns of its own members.” Id. at 466. Based on the exclusive constitutional power in Article 4, Section 6, and guided by cases from other states interpreting similar constitutional provisions, the court found that Article 4, Section 6 “insulates a legislator’s qualifications to hold office from judicial review,” which means that “a legislative body’s decision to admit or expel a member is almost unreviewable in the courts.” Id. at 466-67.

As a result, the court determined that the judicial branch does not have the constitutional power to oust or exclude legislators from their *legislative seats* based on separation-of-powers challenges. Id. at 466-72. In other words, the court concluded that such separation-of-powers challenges to legislators’ qualifications to hold their *legislative seats* are not “justiciable” in the courts. Id. at 472 (“[T]he Secretary asks this court to judge legislators’ qualifications based on their executive branch employment. This request runs afoul of the separation of powers and is not justiciable.”). As further explained by court:

Ironically, the Secretary’s attempt to have state executive branch employees ousted or excluded from the Legislature is barred by the same doctrine he relies on—separation of powers. The Nevada Constitution expressly reserves to the Senate and Assembly the authority to judge their members’ qualifications. Nearly every state court to have confronted the issue of dual service in the legislature has found the issue unreachable because a constitutional reservation similar to Nevada’s created an insurmountable separation-of-powers barrier. Thus, by asking us to declare that dual service violates separation of powers, the Secretary urges our own violation of separation of powers. We necessarily decline this invitation.

Id. at 458-59.

However, because neither the state executive branch nor local governments possess any constitutionally-based powers that are similar to the exclusive constitutional powers of the legislative branch under Article 4, Section 6, the Nevada Supreme Court determined that the judicial branch has the constitutional power to consider—in a properly brought lawsuit against a legislator—a separation-of-powers challenge to the legislator’s qualifications to hold his or her position of *public employment* with the state executive branch or with a local government. Id. at 472-73. As explained by the court:

[A]lthough a court may not review a state employee’s qualifications to sit as a legislator, a court may review a legislator’s employment in the executive branch. This dichotomy exists because no state constitutional provision gives the executive branch the exclusive authority to judge its employees’ qualifications. Often then, cases discussing and resolving the dual service issue arise when a legislator seeks remuneration for working in the executive branch or when a party seeks to remove a legislator from executive branch employment.

Id. at 467-68.

With this background in mind, we turn now to a comprehensive and thorough legal discussion to address the question of constitutional law of whether the separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch or with local governments. For the reasons set forth in the discussion below, 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.

DISCUSSION

I. Overview of state constitutional provisions.

Many state constitutions contain provisions that directly address the issue of a person holding more than one position in government. Scott M. Matheson, Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics and Constitutional Policy, 1988 Utah L. Rev. 295, 355-69 (1988). For example, the state constitution of Texas contains a broad provision that prohibits any public officer in any branch of government from accepting or occupying another public office. See, e.g., Powell v. State, 898 S.W.2d 821 (Tex. Crim. App. 1994); State ex rel. Hill v. Pirtle, 887 S.W.2d 921 (Tex. Crim. App. 1994). Some state constitutions contain more limited provisions that prohibit members of the state legislature from accepting or occupying another public office. See, e.g., Hudson v. Annear, 75 P.2d 587 (Colo. 1938); McCutcheon v. City of St. Paul, 216 N.W.2d 137 (Minn. 1974). Finally, some state constitutions contain provisions that prohibit members of the state legislature from accepting or occupying any position of employment in state government,

whether or not the position is considered to be a public office. See, e.g., Begich v. Jefferson, 441 P.2d 27 (Alaska 1968); Parker v. Riley, 113 P.2d 873 (Cal. 1941); Stolberg v. Caldwell, 402 A.2d 763 (Conn. 1978).

The Nevada Constitution does not contain any broad provisions with regard to incompatible public offices. See State ex rel. Davenport v. Laughton, 19 Nev. 202, 206 (1885) (holding that “[t]here is nothing in the constitution of this state prohibiting respondent from holding the office of lieutenant-governor and the office of state librarian.”); Crosman v. Nightingill, 1 Nev. 323, 326 (1865) (holding that there is nothing in the constitution prohibiting a person from holding the offices of Lieutenant Governor and warden of the state prison at the same time). Rather, the Nevada Constitution contains only a few specific provisions concerning incompatible public offices. See Nev. Const. art. 4, §§ 8 and 9; art. 5, § 12; art. 6, § 11. However, for the purposes of this opinion, those specific provisions are not relevant to answering your question.

Thus, the Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. As a result, in the absence of any specific constitutional provisions that are applicable to this matter, any challenge to the constitutionality of legislators holding positions of *public employment* with the state executive branch or with local governments must be based on the general separation-of-powers provision in Article 3, Section 1. That provision provides in full:

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.

Nev. Const. art. 3, § 1 (emphasis added).

As discussed previously, neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided the merits of a separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. In one case, the Nevada Supreme Court considered the constitutionality of a statute that made the Secretary of State the ex officio Clerk of the Supreme Court, but the court declined to rule on the separation-of-powers issue. State ex rel. Josephs v. Douglass, 33 Nev. 82, 92 (1910), *overruled in part on other grounds*, State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 765-66 (2001). The petitioner in Douglass argued that the statute violated the separation-of-powers provision in the Nevada Constitution, and although the court found that the statute was unconstitutional, it based its decision on other constitutional grounds. 33 Nev. at 91-92. Specifically, the court stated:

It has been urged that as these two offices appertain to separate and distinct coordinate departments of the state government, it would be in violation of article 3 of the constitution to combine them, but as this contention is not clearly manifest, both offices being mainly ministerial in character, and as the question can be determined upon another view of the case, we give this point no consideration further than to observe that it emphasizes the fact that the two offices are distinct, and that the duties of one do not pertain to the duties of the other.

Id. at 92.

In State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), former Attorney General W. T. Mathews raised a separation-of-powers challenge against former State Senator John H. Murray who, while a member of the Legislature, accepted the position of Director of the Drivers License Division of the Public Service Commission of Nevada. Id. at 119-20. However, as will be discussed in greater detail below in the section dealing with the common-law differences between public officers and public employees, the Nevada Supreme Court decided the case on different legal grounds, and it did not address or decide the merits of the separation-of-powers challenge raised by the Attorney General. Id. at 120-24.

At least one state court in New Hampshire has held that the separation-of-powers provision in its state constitution does not apply to the issue of incompatible public offices because that issue is addressed in other, more specific provisions of the constitution. Attorney-General v. Meader, 116 A. 433, 434 (N.H. 1922). Considering that the issue of incompatible public offices is specifically addressed in the Nevada Constitution in Article 4, Sections 8 and 9, Article 5, Section 12, and Article 6, Section 11, it could be argued that the Framers intended those provisions to be the exclusive constitutional basis for determining whether a person is holding incompatible public offices. However, such an interpretation of the Nevada Constitution is unlikely given the numerous court decisions holding that the separation-of-powers doctrine applies to the issue of incompatible public offices.

Consequently, to address your question fully, we must determine whether Nevada's separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch or with local governments. Under Nevada's separation-of-powers provision, because legislators hold elective offices that are expressly created by Article 4 of the Nevada Constitution governing the Legislative Department, legislators are "charged with the exercise of *powers* properly belonging to one of these departments"—the Legislative Department. Nev. Const. art. 3, § 1 (emphasis added). As a result, legislators are not allowed by the separation-of-powers provision to "exercise any *functions*, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Id. (emphasis added).

Thus, the critical issue under the separation-of-powers provision is whether legislators who hold positions of *public employment* with the state executive branch or with local governments "exercise any *functions*" appertaining to the state executive branch which cause

their public employment to be constitutionally incompatible with their service as legislators in the state legislative branch. In resolving this issue, because there is no controlling Nevada case law directly on point, we must consider historical evidence, legal treatises and other authorities on constitutional law, case law from other jurisdictions interpreting similar state constitutional provisions, common-law rules governing public officers and employees and, most importantly, 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. We begin by examining historical evidence of the practices in the Federal Government and Congress immediately following the ratification of the Federal Constitution, historical evidence of the practices in the California Legislature under similar state constitutional provisions which served as the model for the Nevada Constitution, and historical evidence of the practices in the Nevada Legislature since statehood.

II. Historical evidence.

A. Federal Government and Congress.

In AGO 2004-03, the former Attorney General relies heavily on statements made by the Founders of the United States Constitution in the Federalist Papers. Specifically, AGO 2004-03 states that “[t]he the Federalist Papers are quite instructive in the instant analysis. The concerns raised by the founders with regard to the separation of powers are as relevant to the question presented in this opinion as they were 216 years ago.” AGO 2004-03, at 8. However, upon a careful examination of the Federalist Papers, federal judicial precedent and long-accepted historical practices under the United States Constitution, it is clear the Founders did not believe that the doctrine of separation of powers absolutely prohibited an officer of one department from performing functions in another department.

On many occasions, the United States Supreme Court has discussed how the Founders adopted a pragmatic, flexible view of the separation of powers in the Federalist Papers. See, e.g., Mistretta v. United States, 488 U.S. 361, 380-82 (1989); Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 441-43 (1977). Relying on the Federalist Papers, the Supreme Court has consistently adhered to “Madison’s flexible approach to separation of powers.” Mistretta, 488 U.S. at 380. In particular, Madison stated in the Federalist Papers that the separation of powers “‘[d]oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other.’” Id. at 380-81 (quoting The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961)).

In light of Madison’s statements and other writings in the Federalist Papers, the Supreme Court has found that “the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.” Mistretta, 488 U.S. at 380. Thus, as understood by the Framers in the Federalist Papers, the doctrine of separation of powers did not impose a hermetic, airtight seal around each department of government. See Loving v. United States, 517 U.S. 748, 756-57 (1996). Rather, the doctrine created a pragmatic, flexible template of overlapping functions and responsibilities so that three coordinate departments

could be fused into a workable government. See Mistretta, 488 U.S. at 380-81. Therefore, contrary to the inflexible and impractical interpretation of the doctrine of separation of powers advocated in AGO 2004-03, the Founders believed in a “pragmatic, flexible view of differentiated governmental power.” Id. at 381.

Moreover, in the years immediately following the adoption of the United States Constitution, it was a common and accepted practice for judicial officers of the United States to serve simultaneously as executive officers of the United States. See Mistretta, 488 U.S. at 397-99. For example, the first Chief Justice, John Jay, served simultaneously as Chief Justice and Ambassador to England. Similarly, Oliver Ellsworth served simultaneously as Chief Justice and Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt. Id. at 398-99. Such long-accepted historical practices support the conclusion that the doctrine of separation of powers does not absolutely prohibit an officer of one department from performing functions in another department.

Finally, the Founders did not believe that, on its own, the doctrine of separation of powers would prohibit an executive officer from serving as a member of Congress. See 2 The Founders’ Constitution 346-57 (Philip B. Kurland & Ralph Lerner eds., 1987). Therefore, the Founders added the Incompatibility Clause to the United States Constitution. Id. The Incompatibility Clause provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” U.S. Const. art. I, § 6, cl. 2. The history surrounding the Incompatibility Clause supports the conclusion that the doctrine of separation of powers does not prohibit a legislator from holding a position of *public employment* in the executive branch.

In 1806, Congressman J. Randolph introduced a resolution into the House of Representatives which provided that “a contractor under the Government of the United States is an officer within the purview and meaning of the [Incompatibility Clause of the] Constitution, and, as such, is incapable of holding a seat in this House.” 2 The Founders’ Constitution 357. Congressman Randolph introduced the resolution because the Postmaster General had entered into a contract of *employment* with a person to be a mail carrier and, at the time, the person was also a member of the Senate. Id. at 357-62.

In debating the resolution, many Congressmen indicated that the Incompatibility Clause was the only provision in the Constitution which prohibited dual officeholding and that, based on the long-accepted meaning of the term “office,” a person who held a contract of *employment* with the executive branch was not an officer of the United States and was not prohibited from serving simultaneously as a member of Congress. Id. After the debate, the House soundly rejected the resolution because many members believed the resolution banning members of Congress from *employment* with the executive branch contained an interpretation of the Incompatibility Clause which expanded the meaning of the provision well beyond its plain terms. Id.

Shortly thereafter, in 1808, Congress passed a federal law which prohibited an executive officer of the United States from entering into a contract of *employment* with a member of Congress. Id. at 371. A version of that federal law remains in effect. 18 U.S.C. § 431; 2 Op. U.S. Att’y Gen. 38 (1826) (explaining that the federal law prohibited all contracts of *employment* between officers of the executive branch and members of Congress).

Based on this historical evidence, it is quite instructive that, a mere 19 years after the United States Constitution was drafted, many members of the House of Representatives expressed the opinion that the Federal Constitution did not prohibit a person who held a contract of *employment* with the executive branch from serving simultaneously as a member of Congress. At the very least, this historical evidence casts significant doubt on the legal conclusion in AGO 2004-03 that the doctrine of separation of powers prohibits an officer of one department from being employed in another department.

B. California Legislature.

In AGO 2004-03, the former Attorney General correctly notes that because the Framers of the Nevada Constitution modeled its provisions on the California Constitution of 1849, it is appropriate to consider historical evidence and case law from California when interpreting analogous provisions of the Nevada Constitution. AGO 2004-03, at 9-10; State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 763 (2001).

No California court has ever held that the separation-of-powers provision in the California Constitution prohibits a legislator from being a state executive branch employee. Nevertheless, AGO 2004-03 incorrectly claims that in Staudé v. Bd. of Election Comm’rs, 61 Cal. 313 (1882), the California Supreme Court found that Senators and Assemblymen could not simultaneously serve in the executive and judicial departments as defined in Article V and Article VI of the California Constitution. AGO 2004-03, at 9. However, that specific issue was never raised before the court, and the court never decided such an issue. It is a fundamental rule of law that a case cannot be cited for authority on an issue that was never raised or decided. See Jackson v. Harris, 64 Nev. 339, 351 (1947); Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 172-73 (1931); Jensen v. Pradere, 39 Nev. 466, 471 (1916).

Moreover, when a court makes statements of a general nature in an opinion and those statements are unnecessary to the determination of the questions involved in the case, those statements are mere dictum and have no precedential value. See Stanley v. A. Levy & J. Zentner Co., 60 Nev. 432, 448 (1941); Dellamonica v. Lyon Cnty. Bank Mort. Corp., 58 Nev. 307, 316 (1938). Based on general statements or dictum used by the California Supreme Court in Staudé, it appears that the court believed the separation-of-powers provision only prohibited a legislator from being an *officer* in the executive branch. The legal distinction between a state officer and a state employee was well established in the law when the California Supreme Court decided Staudé. It is reasonable to assume that the court meant what it said:

So of each *officer* of the Executive Department—he cannot belong to the Judicial or Legislative Department. That is to say, he can hold no judicial *office*, nor the *office* of Senator or member of the Assembly. And so of Senators and members of the Assembly—they can hold no judicial or executive *offices* comprised within the Executive and Judicial Departments, as defined in Articles V and VI.

Staudé, 61 Cal. at 323 (quoting People ex rel. Att’y Gen. v. Provines, 34 Cal. 520, 534 (1868)) (emphasis added).

Thus, if the California case of Staudé stands for anything on this issue, it is the principle that the separation-of-powers provision prohibits a legislator from being a state *officer* in the executive branch. Neither the facts nor dictum in the case support the proposition that the separation-of-powers provision prohibits a legislator from being a state *employee*.

Finally, AGO 2004-03 also incorrectly claims that in Elliott v. Van Delinder, 247 P. 523 (Cal. Dist. Ct. App. 1926), the court found that the separation-of-powers provision in the California Constitution means that no person shall hold positions under different departments of the government at the same time, and that a person cannot be an employee of the state department of engineering and a township justice of the peace at the same time. AGO 2004-03, at 9. However, in the Heller case, the Nevada Supreme Court rejected the former Attorney General’s incorrect reading of Elliott v. Van Delinder because the California court never reached the merits of the separation-of-powers issue. 120 Nev. at 470.

In sum, the reliance in AGO 2004-03 on California case law is misplaced because the California cases cited by the former Attorney General do not support the legal reasoning or conclusions contained in AGO 2004-03, and because no California court has ever held that the separation-of-powers provision in the California Constitution prohibits a legislator from being a state executive branch employee.

Furthermore, the historical evidence from California establishes 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 the California Constitution was amended to expressly prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917) (explaining that the constitutional amendment “was intended to reach a practice in state administration of many years’ standing.”).

At the general election held in California on November 7, 1916, one of the ballot questions was Amendment No. 6, which was an initiative measure to amend Cal. Const. art. 4, § 19, to read as follows:

No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state;

provided, that this provision shall not apply to any office filled by election by the people.

1916 Cal. Stat. 54 (As a result of subsequent constitutional amendments, the substance of the 1916 constitutional amendment is now found in Cal. Const. art. 4, § 13, which provides: “A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office.”).

In the weeks leading up to the 1916 general election, the proposed constitutional amendment was described in several California newspapers. In an article dated October 28, 1916, the San Francisco Chronicle reported that:

Some thirty-five or forty legislators in the employ of the State in various capacities are anxiously awaiting the result of the November election, for if the electorate should adopt amendment six on the ballot, known as the ineligibility to office measure, State Controller John S. Chambers probably will refuse to draw warrants in favor of legislators then in the employ of the State.

Measure Alarms Legislators on ‘Side’ Payroll, S.F. Chron., Oct. 28, 1916, at 5, *submitted as exhibit in Heller v. Legislature*, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 9).

In another article dated October 28, 1916, the Sacramento Bee reported that many California Legislators were employed at that time by executive branch agencies, including the State Lunacy Commission, State Motor Vehicles Department, State Labor Commissioner, State Pharmacy Commission, State Pharmacy Board, State Railroad Commission, Folsom State Prison and State Inheritance Tax Commission. Chambers Studies Amendment No. 6: Proposal to Make Legislature Members Ineligible to State Jobs is Perplexing, Sacramento Bee, Oct. 28, 1916, at 9, *submitted as exhibit in Heller v. Legislature*, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 11).

On the ballot at the 1916 general election, the ballot arguments relating to the proposed constitutional amendment stated that “some of our most efficient officials have been men holding appointments under the state, [while] at the same time being members of the legislature.” Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same to be Submitted to the Electors of the State of California at the General Election on Tuesday, November 7, 1916 (Cal. State Archives 1916), *submitted as exhibit in Heller v. Legislature*, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 13). Those arguments also stated that:

Here and there the state, by reason of such a law, will actually suffer, as it frequently happens that the most highly specialized man for work in connection

with a certain department of state is a member of the legislature. There are instances of that sort today, where, by the enactment of such a law, the state will lose the services of especially qualified and conscientious officials.

* * *

Another argument advanced by the proponents of this measure is that members of the legislature who are appointed to state offices receive two salaries, but the records will show that leaves of absence are invariably obtained by such appointees during sessions of the legislature and the actual time of the legislative session is generally about eighty days every two years.

Id.

Shortly after the constitutional amendment was adopted, the California Court of Appeal was called upon to interpret whether the amendment applied to legislators whose terms began before the effective date of the amendment. Chenoweth v. Chambers, 164 P. 428 (Cal. Dist. Ct. App. 1917). The court held that the amendment was intended to apply to those legislators. Id. at 434. In reaching its holding, the court noted that the constitutional amendment “was intended to reach a practice in state administration of many years’ standing and which the people believed should be presently eradicated.” Id. at 430.

Taken together, these historical accounts establish that before the California Constitution was amended in 1916, California Legislators routinely held positions as state executive branch employees. This is notable because, at that time, the separation-of-powers provision in the California Constitution was nearly identical to the separation-of-powers provision in the Nevada Constitution. Thus, the historical evidence in California supports the conclusion that, in the absence of a specific constitutional amendment expressly banning legislators from public employment, the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee.

C. Nevada Legislature.

For many decades, state and local government employees have served simultaneously as members of the Nevada Legislature. Affidavit of Guy L. Rocha, Former Assistant Administrator for Archives and Records of the Division of State Library and Archives of the Department of Cultural Affairs of the State of Nevada (Apr. 29, 2004), *submitted as exhibit in Heller v. Legislature*, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 1-3). Although there are no official records specifically detailing the occupations of legislators who served in the Legislature during the 1800s and early 1900s, the records that are available indicate that state and local government employees have been serving in the Legislature since at least 1903. Id. The earliest known examples of local government employees who served as members of the Legislature are Mark Richards Averill, who was a member of the Assembly in 1903, and Ruth Averill, who was a member of the Assembly in 1921. Id. The earliest known examples

of state executive branch employees who served as members of the Legislature are August C. Frohlich, who was a member of the Assembly in 1931, and Harry E. Hazard, who was a member of the Assembly in 1939. Id.

Based on research conducted by the Legislative Counsel Bureau covering the period from 1967 to 2019, state and local government employees have served as members of the Legislature during each regular session convened over the past 50-plus years. See Nevada Legislative Manual (LCB 1967-2019); Affidavit of Donald O. Williams, Former Research Director of the Research Division of the Legislative Counsel Bureau of the State of Nevada (Apr. 28, 2004), *submitted as exhibit in Heller v. Legislature*, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 4-5).

Thus, the historical evidence from the Nevada Legislature supports the conclusion that the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee or a local government employee. Under well-established rules of constitutional construction, this historical evidence represents a long-standing interpretation of the separation-of-powers provision by the Legislature which must be given great weight.

When interpreting a constitutional provision, the Nevada Supreme Court “looks to the Legislature’s contemporaneous actions in interpreting constitutional language to carry out the intent of the framers of Nevada’s Constitution.” Halverson v. Miller, 124 Nev. 484, 488-89 (2008). Because the Legislature’s interpretation of a constitutional provision is “likely reflective of the mindset of the framers,” such a construction “is a safe guide to its proper interpretation and creates a strong presumption that the interpretation was proper.” Id. (internal quotation marks omitted); Hendel v. Weaver, 77 Nev. 16, 20 (1961); State ex rel. Herr v. Laxalt, 84 Nev. 382, 387 (1968); Tam v. Colton, 94 Nev. 452, 458 (1978).

Furthermore, when the Legislature’s construction is consistently followed over a considerable period of time, that construction is treated as a long-standing interpretation of the constitutional provision, and such an interpretation is given great weight and deference by the Nevada Supreme Court, especially when the constitutional provision involves legislative operations or procedures. State ex rel. Coffin v. Howell, 26 Nev. 93, 104-05 (1901); State ex rel. Torreyson v. Grey, 21 Nev. 378, 387-90 (1893) (Bigelow, J., concurring); State ex rel. Cardwell v. Glenn, 18 Nev. 34, 43-46 (1883). As a result, “[a] long continued and contemporaneous construction placed by the coordinate branch of government upon a matter of procedure in such coordinate branch of government should be given great weight.” Howell, 26 Nev. at 104.

The weight given to the Legislature’s construction of a constitutional provision involving legislative operations or procedures is of particular force when the meaning of the constitutional provision is subject to any uncertainty, ambiguity or doubt. See, e.g., Nev. Mining Ass’n v. Erdoes, 117 Nev. 531, 539-40 (2001). Under such circumstances, the Nevada Supreme Court has stated that “although the [interpretation] of the legislature is not final, its

decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail.” Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 399-400 (1876).

The Nevada Supreme Court has also stated that when the meaning of a constitutional provision involving legislative operations or procedures is subject to any uncertainty, ambiguity or doubt, the Legislature may rely on an opinion of LCB Legal which interprets the constitutional provision, and “the Legislature is entitled to deference in its counseled selection of this interpretation.” Nev. Mining Ass’n, 117 Nev. at 540. For example, when the meaning of the term “midnight Pacific standard time,” as formerly used in the constitutional provision limiting legislative sessions to 120 days, was subject to uncertainty, ambiguity and doubt following the 2001 regular session, the Nevada Supreme Court explained that the Legislature’s interpretation of the constitutional provision was entitled to deference because “[i]n choosing this interpretation, the Legislature acted on Legislative Counsel’s opinion that this is a reasonable construction of the provision. We agree that it is, and the Legislature is entitled to deference in its counseled selection of this interpretation.” Id.

With regard to state and local government employees serving as legislators, the Legislature has chosen to follow LCB Legal’s long-standing interpretation of the separation-of-powers provision for decades, and it has acted on LCB Legal’s opinion that this is a reasonable construction of the separation-of-powers provision. As a result, “the Legislature is entitled to deference in its counseled selection of this interpretation.” Nev. Mining Ass’n, 117 Nev. at 540.

Therefore, under the rules of constitutional construction, the Legislature’s long-standing interpretation of the separation-of-powers provision “should be given great weight.” Howell, 26 Nev. at 104 (“A long continued and contemporaneous construction placed by the coordinate branch of government upon a matter of procedure in such coordinate branch of government should be given great weight.”). Furthermore, to the extent there is any ambiguity, uncertainty or doubt concerning the interpretation of the separation-of-powers provision, the interpretation given to it by the Legislature “ought to prevail.” Dayton Gold & Silver Mining, 11 Nev. at 400 (“[I]n case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail.”).

III. Case law from other jurisdictions.

Several courts from other jurisdictions have decided cases involving the legal issue of whether a state constitutional separation-of-powers provision prohibits legislators from being state or local government employees. However, the cases from the other jurisdictions are in conflict on this issue. Because the cases are in conflict, we believe that it will be helpful to review those cases in some detail.

In State ex rel. Barney v. Hawkins, 257 P. 411, 412 (Mont. 1927), an action was brought to enjoin the state from paying Grant Reed his salary as an auditor for the state board of railroad commissioners while he served as a member of the state legislature. The complaint alleged that Reed was violating the separation-of-powers provision in the state constitution because he was occupying a position in the executive branch of state government at the same time that he was serving as a member of the state legislature. Id. at 412. At the time, the separation-of-powers provision in the Montana Constitution provided that “no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others.” Id. at 413. The complaint also alleged that Reed was violating section 7 of article 5 of the state constitution, which provided that “[n]o senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the State.” Id. The Montana Supreme Court framed the issue it was deciding as follows:

The only question for us to decide is—is the position of auditor, held by Grant Reed, a civil office(?); for, if it be a civil office, he is holding it unlawfully; and, if it be not a civil office, he is not an officer, but only an employee, subject to the direction of others, and he has no power in connection with his position, and is not exercising any powers belonging to the executive or judicial department of the state government. In the latter event, Article IV of the Constitution [separation of powers] is not involved.

Id.

After considering voluminous case law concerning the definition of a “civil office,” including cases from Nevada that we will discuss below, the Montana Supreme Court determined that Reed was not exercising any portion of the sovereign power of state government when he was acting as an auditor for the board of railroad commissioners and that, therefore, Reed did not occupy a civil office. Id. at 418. Rather, the court found that Reed was simply an employee “holding a position of employment, terminable at the pleasure of the employing power, the Board of Railroad Commissioners.” Id. Thus, because Reed did not occupy a civil office, the court concluded that he had “no powers properly belonging to the judicial or executive department of the state government, for he is wholly subject to the power of the board, and, having no powers, he can exercise none; and, therefore, his appointment was not violative of Article IV of the Constitution [separation of powers].” Id.

The reasoning of the Montana Supreme Court was followed by the New Mexico Court of Appeals in State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1094-95 (N.M. Ct. App. 1991). In Stratton, the Attorney General argued that two members of the state legislature were violating the separation-of-powers provision in the state constitution because the legislators also occupied positions as a teacher and an administrator in local public school districts. Id. at 1088. At the time, the separation-of-powers provision in the New Mexico Constitution was identical to the separation-of-powers provision interpreted by the Montana Supreme Court in Hawkins: “no person or collection of persons charged with the exercise of

powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others[.]” Id. at 1094.

Like the Montana Supreme Court, the New Mexico Court of Appeals determined that a violation of the separation-of-powers provision could occur only if the members of the legislature were invested in their positions as school teacher and school administrator with sovereign power that properly belonged to another branch of government. Id. Because only public officers exercised sovereign power, the court determined that the separation-of-powers provision “applies [only] to public officers, not employees, in the different branches of government.” Id. at 1095. After considering the nature of the public school positions, the court concluded that “[p]ublic school instructors and administrators are not ‘public officials.’ They do not establish policy for the local school districts or for the state department of education.” Id. at 1094. Instead, “[a] school teacher employed by a common school district is [an] ‘employee’ not [an] ‘officer’, and the relationship between school teacher and school board is contractual only.” Id. at 1095 (citing Brown v. Bowling, 240 P.2d 846, 849 (N.M. 1952)). Therefore, because the school teacher and school administrator were not public officers, but simply public employees, the court held that they were not barred by the separation-of-powers provision from being members of the legislature. Id.

The Colorado Supreme Court has also adopted this view. Hudson v. Annear, 75 P.2d 587, 588-89 (Colo. 1938) (holding that a position as chief field deputy for the state income tax department was not a civil office, but a position of public employment, and that therefore a legislator could occupy such a position without violating Colorado’s separation-of-powers provision). See also Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring in a memorandum per curiam opinion and arguing that Utah’s separation-of-powers provision would not prohibit a legislator from also being a public school teacher); State v. Osloond, 805 P.2d 263, 264-67 (Wash. Ct. App. 1991) (holding that a legislator who served as a judge pro tempore in a criminal case did not violate the principle of separation of powers as recognized in Washington, which does not have an express separation-of-powers provision in its constitution).

In stark contrast to the foregoing court decisions are several court decisions from Indiana, Oregon and Nebraska. The court decisions from Indiana and Oregon are especially notable because the language in the separation-of-powers provisions of those states more closely resembles the language in Nevada’s separation-of-powers provision.

In State ex rel. Black v. Burch, 80 N.E.2d 294 (Ind. 1948), actions were brought to prevent the state from paying four members of the state legislature salaries that they had earned while occupying positions with various state commissions and boards in the executive branch of government. After reviewing the relevant statutes relating to these positions, the court held that the legislators’ positions in the executive branch “are not public offices, nor do they in their respective positions, perform any official functions in carrying out their duties in these respective jobs; they were acting merely as employees of the respective commission or boards by whom they were hired.” Id. at 299. In other words, “[i]n performing their respective jobs,

none of these [legislators] were vested with any functions pertaining to sovereignty.” Id. Having determined that the legislators occupied positions of public employment, rather than public offices, the court’s next task was to determine whether such public employment in another branch of state government violated Indiana’s separation-of-powers provision, which provided at the time that “no person, charged with official duties under one of these departments[,] shall exercise any of the functions of another[.]” Id. The court framed the issue as follows: “[I]t now becomes necessary for this Court to determine what is the meaning of the phrase ‘any of the functions of another,’ as set out in the above quoted section of the Constitution.” Id.

In interpreting the use of the term “functions,” the court noted that the term “power” had been used instead of the term “functions” in the original draft of the separation-of-powers provision. Id. at 302. However, the term “functions” was inserted in the final version of the provision that was adopted by the drafters of the constitution. Id. The court then stated that “[i]t would seem to us that these two words are interchangeable but, if there is any distinction, the term ‘functions’ would denote a broader field of activities than the word ‘power.’” Id. The court also quoted extensively from the decision in Saint v. Allen, 126 So. 548 (La. 1930), in which the Louisiana Supreme Court held that a member of the state legislature was prohibited from being employed by the executive department of state government pursuant to the separation-of-powers provision in the Louisiana Constitution, which provided at the time that “[no] person or collection of persons holding office in one of [the departments], shall exercise power properly belonging to either of the others[.]” Saint, 126 So. at 550. In particular, the Louisiana Supreme Court held that:

It is not necessary, to constitute a violation of the article, that a person should hold office in two departments of government. It is sufficient if he is an officer in one department and at the same time is employed to perform duties, or exercise power, belonging to another department. The words “exercise power,” speaking officially, mean perform duties or functions.

Id. at 555.

Based on the Saint case and other court decisions, the Indiana Supreme Court in Burch concluded that:

In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an

employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.

80 N.E.2d at 302.

The reasoning of the Indiana Supreme Court was followed by the Oregon Supreme Court in Monaghan v. School Dist. No. 1, 315 P.2d 797 (Or. 1957), *superseded by* Or. Const. art. XV, § 8. In that case, the court was asked “to determine whether or not [a state legislator, Mr. Monaghan,] is eligible for employment as a teacher in the public schools of this state while he holds a position as a member of the [state] House of Representatives.” *Id.* at 799. At that time, the separation-of-powers provision in the Oregon Constitution provided that “no person charged with official duties under one of these departments, shall exercise any of the functions of another[.]” *Id.* at 800. Mr. Monaghan argued that the term “official duties” was synonymous with the term “functions,” and that therefore the separation-of-powers provision applied only to a person holding a public office in more than one department of state government and not to a person merely occupying a position of public employment. *Id.* at 801. The court flatly rejected this argument:

It is not difficult to define the word “official duties.” As a general rule, and as we think the phrase is used in the section of the constitution, they are the duties or obligations imposed by law on a public officer. 67 C.J.S. Officers § 110, p. 396; 28 C.J.S. Duty, p. 597. There can be no doubt that Mr. Monaghan, as a legislator, is “charged with official duties.” But the exercise of the “functions” of a department of government gives to the word “functions” a broader sweep and more comprehensive meaning than “official duties.” It contemplates a wider range of the exercise of functions including and beyond those which may be comprehended in the “official duties” of any one officer.

It may appear to some as a construction of extreme precaution, but we think that it expresses the considered judgment and deliberation of the Oregon Convention to give greater force to the concepts of separation by thus barring any official in one department of government of the opportunity to serve any other department, even as an employee. Thus, to use the language of O’Donoghue v. United States, *supra* [289 U.S. 516], in a sense, his role as a teacher subjugates the department of his employment to the possibility of being “controlled by, or subjected, *directly or indirectly*, to the coercive influence of” the other department wherein he has official duties and vice versa. (Emphasis supplied.) In the Burch case, *supra* [80 N.E.2d 294, 302], when considering the word “functions” in its similar setting in the Indiana Constitution, the court observed that the term “functions” denotes a broader field of activities than the word “power.”

* * *

Our conclusion is that the word “functions” embodies a definite meaning with no contradiction of the phrase “official duties,” that is, he who exercises the functions of another department of government may be either an official or an employee.

Id. at 802-04. Although acknowledging that a public school teacher was not a public officer, the court concluded, nevertheless, that a public school teacher was a public employee who was exercising one of the functions of the executive department of state government. Id. at 804-06. Therefore, the court held that Mr. Monaghan could not be employed as a public school teacher while he held a position as a member of the state legislature. Id.; see also Jenkins, 589 P.2d at 773-77 (Ellett, C.J., concurring and dissenting in a memorandum per curiam opinion and arguing that Utah’s separation-of-powers provision would prohibit a legislator from also being a public school teacher).

After the decision in Monaghan, the Oregon Constitution was amended to permit legislators to be employed by the State Board of Higher Education or to be a member of any school board or an employee thereof. In re Sawyer, 594 P.2d 805, 808 & n.7 (Or. 1979). However, the amendment did not apply to other branches of state government. Id. In Sawyer, the Oregon Supreme Court was asked whether the state’s separation-of-powers provision prohibited a judge from being regularly employed as a part-time professor at a state-funded college. The court answered in the affirmative, stating that:

It is true that Judge Sawyer is not a full-time teacher. In our opinion, however, a part-time teacher regularly employed for compensation by a state-funded college to perform the duties of a teacher also performs “functions” of the executive department of government within the meaning of Article III, § 1, as construed by this court in Monaghan.

Id. at 809. The court noted, however, that “[w]e do not undertake to decide in this case whether the same result would necessarily follow in the event that a judge should occasionally, but not regularly, lecture at a state-funded college, but without other responsibilities as a teacher.” Id. at 809 n.8.

Finally, in State ex rel. Spire v. Conway, 472 N.W.2d 403 (Neb. 1991), the Attorney General brought an action claiming that the separation-of-powers provision of the Nebraska Constitution prohibited a person from occupying a position as an assistant professor at a state-funded college while simultaneously serving as a member of the state legislature. At the time, Nebraska’s separation-of-powers provision provided that “no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others.” Id. at 404.

Unlike most other courts, the Nebraska Supreme Court determined that, under certain circumstances, an assistant professor at a public college could be considered to be holding a public office. Id. at 406-07. However, despite this determination, the court found that the

public officer-public employee distinction was not “determinative of the [separation-of-powers] issue now under consideration, for article II does not speak in terms of officers or employees; it speaks of persons ‘being one of’ the branches of government.” Id. at 408. Rather, the court found that “[t]he unusual expression ‘being one of these departments’ is not clear; accordingly, construction is necessary. One thing that is clear, however, is that ‘being one of these departments’ is not intended to be synonymous with ‘exercising any power of’ a branch.” Id. at 409.

After considering the text and history of the Nebraska Constitution, the court determined that the provision should be construed to read, “no person or collection of persons being [a member of] one of these departments.” Id. at 412. Based on this construction, the court held that the separation-of-powers provision “prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch.” Id. The court then applied this construction to conclude that an assistant professor at a state college is a member of the executive branch and that a legislator, therefore, could not occupy such a position during his term in the legislature. Id. at 414-16. Specifically, the court held that:

Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are but three branches, and the state colleges clearly are not part of the judicial or legislative branches.

* * *

The Board of Regents of the University of Nebraska performs a function for the university which is identical to that of the Board of Trustees of the Nebraska State Colleges. While the Board of Regents is an “independent body charged with the power and responsibility to manage and operate the University,” it is, nevertheless, an administrative or executive agency of the state. As the regents are part of the executive branch, so, too, are the trustees.

Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.

* * *

Respondent is therefore a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution.

Id. at 414-15 (citations omitted).

If the Nevada Supreme Court were to follow the reasoning of the courts of Indiana, Oregon and Nebraska, rather than the reasoning of the courts of Montana, New Mexico and

Colorado, a state executive branch employee could not, pursuant to Nevada's separation-of-powers provision, serve as a member of the Legislature. Although we cannot determine with any reasonable degree of certainty whether the Nevada Supreme Court would adopt those holdings, we do believe that the decisions of those courts are not consistent with the text and structure of the Nevada Constitution. In particular, while we agree with the courts of Indiana and Oregon that the term "functions" is distinct in meaning from other terms such as "powers" or "duties," we do not believe that the meaning ascribed to the term "functions" in Burch and Monaghan is consistent with the structure and organization of Nevada's government.

Thus, despite the holdings of the courts of Indiana, Oregon and Nebraska, it is the opinion of LCB Legal that Nevada's separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. Obviously, we cannot say with any certainty whether the Nevada Supreme Court would agree with our opinion. However, as we explain next, we do believe that our opinion is supported by the text and structure of the Nevada Constitution and by the concept of the "citizen-legislator," which is a concept that is the cornerstone of an effective, responsive and qualified part-time legislative body.

IV. Interpretation of Nevada's separation-of-powers provision with regard to state executive branch employees.

It is a fundamental rule of constitutional construction that the Nevada Constitution must be interpreted in its entirety and that each part of the Constitution must be given effect. State ex rel. Herr v. Laxalt, 84 Nev. 382, 386 (1968). Therefore, the separation-of-powers provision in the Nevada Constitution cannot be read in isolation, but rather must be construed in accordance with the Nevada Constitution as a whole. Thus, the meaning of the phrases "no persons charged with the exercise of powers properly belonging to one of these departments" and "shall exercise any functions, appertaining to either of the others" cannot be based on a bare reading of the separation-of-powers provision alone. Rather, these phrases must be read in light of the other parts of the Nevada Constitution which specifically enumerate the persons who are to be charged with exercising the powers and functions of state government. As stated by the Nevada Supreme Court:

[Article 3, Section 1] divides the state government into three great departments, and directs that "no person 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 herein expressly directed or permitted." As will be noticed, it is the state government as created by the constitution which is divided into departments. *These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers.*

Sawyer v. Dooley, 21 Nev. 390, 396 (1893) (emphasis added).

According to the Nevada Supreme Court, the prohibition in Article 3, Section 1 applies only to persons who are charged by other parts of the Nevada Constitution with exercising powers or duties belonging to one of the three departments of state government. In other words, for the purposes of the separation-of-powers provision, the officers who are prohibited from exercising functions appertaining to another department of state government are limited to those officers in the legislative, executive and judicial departments who are expressly given powers and duties under the Nevada Constitution.

This construction of the separation-of-powers provision in the Nevada Constitution is consistent with the Utah Supreme Court's construction of an identical separation-of-powers provision in section 1 of article V the Utah Constitution. As to that provision, the Utah Supreme Court has held:

[T]he prohibition of section 1, is directed to a "person" charged with the exercise of powers properly belonging to the "executive department." The Constitution further specifies in Article VII, Section 1, the persons of whom the Executive Department shall consist. Thus it is the "persons" specified in Article VII, Section 1, who are charged with the exercise of powers belonging to the Executive Department, who are prohibited from exercising any functions appertaining to the legislative and judicial departments.

State v. Gallion, 572 P.2d 683, 687 (Utah 1977); accord Robinson v. State, 20 P.3d 396, 399-400 (Utah 2001).

Consequently, a constitutional officer is an officer of the legislative, executive or judicial department who is "charged with the exercise of powers properly belonging to one of these departments." Nev. Const. art. 3, § 1; see also People v. Provines, 34 Cal. 520 (1868). No other person may exercise the powers given to a constitutional officer by the Nevada Constitution. As a result, when the Nevada Constitution grants powers to a particular constitutional officer, "their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person." King v. Bd. of Regents, 65 Nev. 533, 556 (1948) (quoting State ex rel. Crawford v. Hastings, 10 Wis. 525, 531 (1860)). Thus, the constitutional powers of each department may be exercised only by the constitutional officers from that department to whom the powers have been assigned.

Even though it is only the constitutional officers of each department who may exercise the constitutional powers given to that department, the Framers realized that each department would also be charged with the exercise of certain nonconstitutional functions. Accordingly, the Framers provided for the creation by statute of nonconstitutional officers who could be charged by the Legislature with the exercise of nonconstitutional functions. See Nev. Const. art. 15, §§ 2, 3, 10 and 11. As observed by the Nevada Supreme Court:

[T]he framers of the constitution decided for themselves that the officers named [in the constitution] were necessary and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county, or township. . . . The duty of deciding as to the necessity of any office, other than those named in the constitution, is placed upon the legislature[.]

State ex rel. Perry v. Arrington, 18 Nev. 412, 417-18 (1884). As a result, the Nevada Constitution recognizes two distinct types of offices, “one which is created by the constitution itself, and the other which is created by statute.” Douglass, 33 Nev. at 93 (quoting People v. Bollam, 54 N.E. 1032, 1033 (Ill. 1899)).

Like the framers of other state constitutions, the Framers of the Nevada Constitution could have simply stated that a constitutional officer shall not exercise any “powers” appertaining to another department of state government. However, the Framers of the Nevada Constitution provided that a constitutional officer shall not exercise any “functions” appertaining to another department of state government. We believe that the Framers used the term “functions” because they realized that, in each department of state government, the functions of the department would be performed by constitutional officers *and* by nonconstitutional officers. Thus, had the Framers used only the term “powers” in Article 3, Section 1, the separation-of-powers provision would have been too restrictive in its meaning, for it may have been construed simply to mean that a constitutional officer in one department could not exercise the powers entrusted to the constitutional officers in another department. To avoid this restrictive construction, we believe that the Framers used the term “functions” to ensure that a constitutional officer in one department could not perform the *sovereign functions* entrusted to both constitutional officers *and* nonconstitutional officers in another department.

Therefore, by using the term “functions,” we believe that the Framers intended to prohibit a constitutional officer in one department from holding constitutional offices or nonconstitutional offices in another department, because persons holding constitutional or nonconstitutional offices in another department exercise the *sovereign functions* of state government. Because public employees do not exercise the sovereign functions of state government, we do not believe that the Framers intended to prohibit a constitutional officer from holding a position of *public employment* in another department of state government. Our conclusion is based on a well-established body of case law which holds that public officers are the only persons who exercise the sovereign functions of state government and that public employees do not exercise such sovereign functions.

In State ex rel. Kendall v. Cole, 38 Nev. 215 (1915), the Nevada Supreme Court discussed extensively the attributes of a public office, and the court also cited numerous cases that had been decided in other jurisdictions well before the Nevada Constitution was drafted in 1864. See Bradford v. Justices of Inferior Ct., 33 Ga. 332 (1862); Shelby v. Alcorn, 36 Miss. 273 (1858); see also Annotation, Offices Within Constitutional or Statutory Provisions Against Holding Two Offices, 1917A L.R.A. 231 (1917). From these cases, the Nevada Supreme Court concluded that the single most important characteristic of a public office is that the person who

holds such a position is “*clothed with some portion of the sovereign functions of government.*” Cole, 38 Nev. at 229 (quoting Attorney-General v. McCaughey, 43 A. 646 (R.I. 1899)). In later cases, the court expressed a similar view:

The nature of a public office as distinguished from mere employment is the subject of a considerable body of authority, and many criteria of determination are suggested by the courts. Upon one point at least the authorities uniformly appear to concur. A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government.

State ex rel. Mathews v. Murray, 70 Nev. 116, 120-21 (1953) (citation omitted). Simply put, “the sovereign function of government is not delegated to a mere employee.” Eads v. City of Boulder City, 94 Nev. 735, 737 (1978).

Thus, in each department of state government, only two types of persons are empowered to exercise the sovereign functions of that department, those who hold constitutional offices and those who hold nonconstitutional offices. We believe this is how the Framers of the Nevada Constitution understood the structure and organizational framework of each department of state government, and we believe that this is why the Framers used the word “functions” in Article 3, Section 1—to prohibit a constitutional officer in one department of state government from holding any other *public office* that was empowered, either by the constitution or statute, to exercise the sovereign functions of another department of state government. Because public employees do not exercise the sovereign functions of state government, a broader construction of the term “functions” to include public employees would not be consistent with the manner in which the sovereign functions of government are exercised in Nevada.

Moreover, a broader construction of the term “functions” to include public employees would run counter to “the constituency concept of our legislature in this state, which can accurately be described as a citizens’ legislature.” Stratton, 806 P.2d at 1093. Thus, we believe that the Framers of the Nevada Constitution realized that “[i]n a sparsely populated state . . . it would prove difficult, if not impossible, to have a conflict-free legislature.” Id. In addition, we believe that any potential conflicts of interests experienced by a legislator who is also a public employee in another branch of state government are no greater than those conflicts experienced by other members of the Legislature. As stated 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, 589 P.2d at 771 (Crockett, J., concurring).

Finally, it is clear that the Framers intended the Nevada Legislature to be a part-time legislative body. In particular, the Framers provided for biennial legislative sessions in Article 4, Section 2 of the Nevada Constitution, and they originally limited those biennial sessions to 60 days in Article 4, Section 29. Although Article 4, Section 29 was repealed in 1958, the fact that the citizens of Nevada voted in 1998 to limit biennial sessions to 120 days is a clear indication that the citizens of Nevada, like the Framers, want the Nevada Legislature to be a part-time legislative body.

The economic reality of a part-time Legislature is that most legislators must continue to be employed in other occupations on a full-time or part-time basis during their terms of legislative service. This is as true today as it was when the Nevada Constitution was originally adopted. Given this economic reality, it is likely that the Framers fully expected that public employees, like other citizens, would be members of the Legislature, especially since some of the most qualified and dedicated citizens of the community often occupy positions of government employment. As stated by Chief Justice Hastings of the Nebraska Supreme Court in his dissent in Conway:

A senatorial position in the Nebraska Legislature is a part-time position. Therefore, it is not uncommon for senators to have additional sources of income and careers. An uncompromising interpretation of the separation of powers would inhibit the ability of a part-time legislature to attract qualified members.

472 N.W.2d at 417 (Hastings, C.J., dissenting). Therefore, we believe that construing the term “functions” in Article 3, Section 1 to prohibit a member of the Nevada Legislature from occupying a position of *public employment* would not comport with the concept of the “citizen-legislator” that was undoubtedly envisioned by the Framers of the Nevada Constitution.

In sum, it is the opinion of LCB Legal that the separation-of-powers provision in the Nevada Constitution only prohibits a legislator from holding a *public office* in another department of state government, because a person who holds a *public office* exercises sovereign functions appertaining to another department of state government. However, it is also the opinion of LCB Legal that the separation-of-powers provision in the Nevada Constitution does not prohibit a legislator from occupying a position of *public employment* in another department of state government, because a person who occupies a position of *public employment* does not exercise any sovereign functions appertaining to another department of state government.

Based on this construction of the separation-of-powers provision, if a legislator holds another position in state government, the deciding issue under the Nevada Constitution is whether the other position is a *public office* or a position of *public employment*. If the other position is a *public office*, then the legislator would be prohibited by the separation-of-powers provision from holding the *public office*. However, if the other position is merely a position of *public employment*, then the legislator would not be prohibited by the separation-of-powers provision from holding the position of *public employment*.

As discussed previously, the Nevada Supreme Court has addressed the distinction between a public officer and a public employee on many occasions. See State ex rel. Kendall v. Cole, 38 Nev. 215 (1915); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953); Mullen v. Clark Cnty., 89 Nev. 308 (1973); Eads v. City of Boulder City, 94 Nev. 735, 737 (1978). As recently as 2013, the court reaffirmed that “as is clear from our jurisprudence, officers are fundamentally different from employees.” City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 361 (2013). In one of its more recent cases on the issue, the court restated the two fundamental principles that distinguish a public officer from a public employee. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 200-06 (2001) (holding that, for the purposes of the Open Meeting Law, the position of community college president is not a public office).

The first fundamental principle is that a public officer must serve in a position created by law, not one created by mere administrative authority and discretion. Id. The second fundamental principle is that the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Id. Both fundamental principles must be satisfied before a person is deemed a public officer. See Mullen v. Clark Cnty., 89 Nev. 308, 311 (1973). Thus, if a position is created by mere administrative authority and discretion or if the person serving in the position is subordinate and responsible to higher-ranking policymakers, the person is not a public officer but is simply a public employee. We believe that these fundamental principles are best illustrated by the cases of State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), and Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195 (2001).

In Mathews, the defendant accepted the position of Director of the Drivers License Division of the Public Service Commission of Nevada. 70 Nev. at 120. The Attorney General brought an original action in quo warranto in the Nevada Supreme Court to oust the defendant from that position because when the defendant accepted his position in the executive branch he was also serving as a State Senator. Id. The Attorney General argued that the defendant acted in violation of the separation-of-powers provision of the Nevada Constitution. Id. Before the court could determine the constitutional issue, the court needed to have jurisdiction over the original action in quo warranto. Id. Because an original action in quo warranto could lie only if the defendant’s position in the executive branch was a public office, the issue before the court was whether the position of Director of the Drivers License Division was a public office or a position of public employment. Id. The court held that the Director’s position was a position of public employment, not a public office, and thus the court dismissed the original action for lack of jurisdiction without reaching the constitutional issue. Id. at 124.

In concluding that the Director’s position was a position of public employment, the court reviewed the statutes controlling the state department under which the Drivers License Division operated. Id. at 122. The court found that the position of Director of the Drivers License Division was created by administrative authority and discretion, not by statute, and that the position was wholly subordinate and responsible to the administrator of the department. Id. at 122-23. In this regard, the court stated:

Nowhere in either act is any reference made to the “drivers license division” of the department or to a director thereof. Nowhere are duties imposed or authority granted save to the department and to its administrator. It appears clear that the position of director was created not by the act but by the administrator and may as easily by him be discontinued or destroyed. It appears clear that the duties of the position are fixed not by law but by the administrator and may as easily by him be modified from time to time. No tenure attaches to the position save as may be fixed from time to time by the administrator. The director, then, is wholly subordinate and responsible to the administrator. It cannot, then, be said that that position has been created by law; or that the duties which attach to it have been prescribed by law; or that, subject only to the provisions of law, the holder of such position is independent in his exercise of such duties. It cannot, then, be said that he has been invested with any portion of the sovereign functions of the government.

Id. at 122-23.

In DR Partners, the court was asked to determine whether the position of community college president was a public office for the purposes of the Open Meeting Law, which is codified in chapter 241 of NRS. Although the Open Meeting Law does not define the term “public office” or “public officer,” the court found that the definition of “public officer” in chapter 281 of NRS was applicable because “[t]he Legislature’s statutory definition of a ‘public officer’ incorporates the fundamental criteria we applied in Mathews and Kendall, and is in harmony with those cases, as we subsequently confirmed in Mullen v. Clark County.” 117 Nev. at 201.

When the court applied the fundamental criteria from Mathews and Kendall and the statutory definition from chapter 281 of NRS to the position of community college president, the court concluded that the position of community college president was not a public office. DR Partners, 117 Nev. at 202-06. In reaching this conclusion, the court first found that the position of community college president is not created by the Nevada Constitution or statute, but is created by administrative authority and discretion of the Board of Regents. Id. Second, the court found that a community college president does not exercise any of the sovereign functions of the state. Id. Instead, a community college president is wholly subordinate to the Board of Regents and simply implements policies made by higher-ranking state officials. Id. As explained by the court:

The community college president holds an important position, but the sovereign functions of higher education repose in the Board of Regents, and to a lesser degree in the chancellor, and not at all in the community college president.

* * *

Because the president is wholly subordinate and responsible to the Board, and can only implement policies established by the Board, we conclude that the community college president does not meet the statutory requisites of a public officer set forth in NRS 281.005(1)(b).

Id. at 205-06.

Based on the foregoing discussion, it is the opinion of LCB Legal that state executive branch employees are not *public officers* because they do not exercise any sovereign functions appertaining to the executive branch of state government. As a result, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* as state executive branch employees because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch.

V. Interpretation of Nevada’s separation-of-powers provision with regard to local government employees.

Nevada’s separation-of-powers provision provides 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 separation-of-powers provision, the Framers of the Nevada Constitution expressed a clear intent to have the provision apply only to the three departments of state government. As explained by the Ohio Supreme Court:

[I]n general at least, when the constitution speaks of the “State,” the whole State, in her political capacity, *and not her subdivisions*, is intended. That such is the natural import of the language used, no one denies. That such must be its construction, to make the constitution consistent with itself, and sensible, is very apparent.

Cass v. Dillon, 2 Ohio St. 607, 616 (1853) (emphasis added).

The Nevada Supreme Court has recently stated that “the language of the separation-of-powers provision in the Constitution does not extend any protection to political subdivisions.” City of Fernley v. State Dep’t of Tax’n, 132 Nev. 32, 43 n.6 (2016). This determination is consistent with prior cases in which the court has recognized that political subdivisions are not part of one of the three departments of state government. See Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 203-04 (2001) (“Neither state-owned institutions, nor state departments, nor public corporations are synonymous with political subdivisions of the state.”); Nunez v. City of N. Las Vegas, 116 Nev. 535, 540 (2000) (“Although municipal courts are created by the legislature pursuant to authority vested in that body by the Nevada Constitution, these courts are separate branches of their respective city governments. . . . [T]hey are not state governmental entities.”); City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 362 n.5 (2013)

(“While municipal courts are included within the state constitutional judicial system, they are nonetheless primarily city entities, rather than an extension of the state.”).

Because political subdivisions are not part of one of the three departments of state government, their local officers generally are not considered to be state officers who are subject to the separation-of-powers provision. See State ex rel. Mason v. Bd. of Cnty. Comm’rs, 7 Nev. 392, 396-97 (1872) (noting that the exercise of certain powers by a board of county commissioners was not limited by the doctrine of separation of powers); Lane v. Second Jud. Dist. Ct., 104 Nev. 427, 437 (1988) (noting that the doctrine of separation of powers was not applicable to the exercise of certain powers by a county’s district attorney because he was not a state constitutional officer).

Furthermore, as discussed previously, the Nevada Constitution was modeled on the California Constitution of 1849. State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 761 (2001). Because the provisions of the Nevada Constitution were taken from the California Constitution of 1849, those provisions “may be lawfully presumed to have been taken with the judicial interpretation attached.” Mason, 7 Nev. at 397.

In construing the separation-of-powers provision in the California Constitution of 1849, the California Supreme Court held that the separation-of-powers provision did not apply to local governments and their officers and employees. People ex rel. Att’y Gen. v. Provines, 34 Cal. 520, 523-40 (1868). In Provines, the court stated that “[w]e understand the Constitution to have been formed for the purpose of establishing a *State Government*; and we here use the term ‘State Government’ in contradistinction to local, or to county or municipal governments.” Id. at 532. After examining the history and purpose of the separation-of-powers provision, the court concluded that “the Third Article of the Constitution means that the powers of the *State Government*, not the local governments thereafter to be created by the Legislature, shall be divided into three departments.” Id. at 534. Thus, the court held that the separation-of-powers provision had no application to the functions performed by a person at the local governmental level. Id. at 523-40.

In later cases, the California Supreme Court reaffirmed that under California law, “it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government.” Mariposa County v. Merced Irrig. Dist., 196 P.2d 920, 926 (Cal. 1948). This interpretation of the separation-of-powers doctrine is followed by a majority of other jurisdictions. See, e.g., Poynter v. Walling, 177 A.2d 641, 645 (Del. Super. Ct. 1962); La Guardia v. Smith, 41 N.E.2d 153, 156 (N.Y. 1942); 16 C.J.S. Constitutional Law § 112, at 377 (1984).

Consequently, it is well settled that “a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a ‘State.’” United States ex rel. Norton Sound Health Corp. v. Bering Strait Sch. Dist., 138 F.3d 1281, 1284 (9th Cir. 1998). Furthermore, “a local government with authority over a limited area, is a different type of government unit than a state-wide agency

that is part of the organized government of the state itself.” Wash. State Dep’t of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 800 n.5 (9th Cir. 1995). Thus, “[w]hile local subdivisions and boards created by the state may have some connection with one of the departments of the state government as defined by the Constitution, they are not ‘departments of state government’ within the intent and meaning of the [law].” State v. Coulon, 3 So. 2d 241, 243 (La. 1941). In the face of these basic rules of law, courts have consistently found that cities, counties, school districts and other local governmental entities are not included within one of the three departments of state government. See, e.g., Dermott Special Sch. Dist. v. Johnson, 32 S.W.3d 477, 480-81 (Ark. 2000); Dunbar Elec. Supply, Inc. v. Sch. Bd., 690 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1997); Stokes v. Harrison, 115 So. 2d 373, 377-79 (La. 1959); Coulon, 3 So. 2d at 243.

Likewise, in the context of the Eleventh Amendment, federal courts interpreting Nevada law have consistently found that cities, counties, school districts and other local governmental entities in this state are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada’s sovereign immunity in federal court. See, e.g., Lincoln County v. Luning, 133 U.S. 529, 530 (1890); Eason v. Clark Cnty. Sch. Dist., 303 F.3d 1137, 1144 (9th Cir. 2002); Herrera v. Russo, 106 F. Supp. 2d 1057, 1062 (D. Nev. 2000). These federal cases are important because when a federal court determines whether a political subdivision is part of state government for the purposes of the Eleventh Amendment, the federal court makes its determination based on *state* law. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977); Austin v. State Indus. Ins. Sys., 939 F.2d 676, 678-79 (9th Cir. 1991).

After examining state law in Nevada, federal courts have found that the Nevada Gaming Control Board, the Nevada Gaming Commission, the Nevada State Industrial Insurance System, the Nevada Supreme Court and the Nevada Commission on Judicial Discipline are state agencies included within one of the three departments of state government and that these state agencies are entitled to Nevada’s sovereign immunity under the Eleventh Amendment. See Carey v. Nev. Gaming Control Bd., 279 F.3d 873, 877-78 (9th Cir. 2002); Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999); Austin, 939 F.2d at 678-79; O’Connor v. State, 686 F.2d 749, 750 (9th Cir. 1982); Salman v. Nev. Comm’n on Jud. Discipline, 104 F. Supp. 2d 1262, 1267 (D. Nev. 2000). In contrast, after examining state law in Nevada, federal courts have found that cities, counties and school districts in Nevada are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada’s sovereign immunity under the Eleventh Amendment. See Lincoln County, 133 U.S. at 530; Eason, 303 F.3d at 1144; Herrera, 106 F. Supp. 2d at 1062. Thus, as viewed by federal courts that have interpreted Nevada law, local political subdivisions in this state are not included within one of the three departments of state government.

Accordingly, because local political subdivisions in this state are not included within one of the three departments of state government, their officers and employees also are not part of one of the three departments of state government. Therefore, legislators who hold positions of *public employment* with local governments do not hold such positions within one of the three

departments of state government. Consequently, given that the separation-of-powers provision applies only to the three departments of state government, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because local governments are not part of one of the three departments of state government.

Furthermore, as discussed previously, it is the opinion of LCB Legal that the separation-of-powers provision prohibits legislators from holding only *public offices*, not positions of *public employment*. Thus, even assuming that the separation-of-powers provision applied to local governments, it is the opinion of LCB Legal that the separation-of-powers provision still would not prohibit legislators from holding positions of *public employment* with local governments because persons who hold such positions of *public employment* do not exercise any sovereign functions of state government.

CONCLUSION

It is 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 because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. By contrast, it is the opinion of LCB Legal that the separation-of-powers provision prohibits legislators from holding only *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. Finally, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision applies only to the three departments of state government, and local governments and their officers and employees are not part of one of the three departments of state government.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Sincerely,



Kevin C. Powers
General Counsel

KCP:dtm
Ref No. 200807100628
File No. OP_Erdoes200807221145

Leg.'s Ex. C—033

JA000157

Nevada Legislature's

Exhibit D

Powers, Kevin

From: Powers, Kevin
Sent: Monday, September 21, 2020 11:01 PM
To: 'dforbush@foxrothschild.com'; 'cmccarty@foxrothschild.com'
Subject: NPRI v. Cannizzaro, et al., EJDCT Case No. A-20-817757-C Intervention by Legislature
Attachments: 2020_09-17_01_Legis Comm'n_Resolution Regarding Litigation_NPRI v. Cannizzaro.pdf

To: Fox Rothschild LLP, Counsel for Plaintiff NPRI
dforbush@foxrothschild.com; cmccarty@foxrothschild.com

From: Legislative Counsel Bureau, Legal Division, Counsel for the Nevada Legislature
kpowers@lcb.state.nv.us

Re: Nevada Policy Research Institute v. Cannizzaro, et al., Eighth Jud. Dist. Ct. Case No. A-20-817757-C

Counsel:

On July 9, 2020, a civil action was filed in the case of Nevada Policy Research Institute v. Cannizzaro, et al., Case No. A-20-817757-C, Eighth Judicial District Court, Clark County (NPRI action). On July 28, 2020, the Plaintiff filed an amended complaint in the NPRI action. On August 29, 2020, the Plaintiff first served the summons and a copy of the amended complaint on one of the defendants in the NPRI action.

Pursuant to NRS 218F.720, at its meeting on September 18, 2020, the Legislative Commission approved and adopted a resolution (copy attached) which directed “the General Counsel and the Legal Division [collectively LCB Legal] to take any and all actions on behalf of the Legislature that they deem to be necessary or advisable for the Legislature to appear in, commence, prosecute, defend or intervene in the NPRI action.” See NRS 218F.720(1), as amended by section 23 of Assembly Bill No. 2, 2020 Nev. Stat., 32nd Spec. Sess., ch. 2, § 23, at 16. A video recording of the Legislative Commission’s meeting is available on the Legislature’s website at: <https://www.leg.state.nv.us/Video/>

The complaint in the NPRI action raises the issue of constitutional law of whether the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution prohibits state legislators from holding positions of public employment with the state executive branch or with local governments. As a result, the Plaintiff’s claims for declaratory and injunctive relief implicate the official interests of the Legislature, including, without limitation, the official interests of the Legislature in ensuring that it continues to be an effective, responsive and qualified part-time legislative body or “citizens’ legislature” that is consistent with:

the public policy of this State under which 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).

Pursuant to NRS 218F.720, because the Plaintiff’s complaint 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 or enforceability of a constitutional measure—in particular, the separation-of-powers provision in Article

3, Section 1 of the Nevada Constitution—"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." NRS 218F.720(2)-(3).

Pursuant to NRCP 24, the district court must permit a movant to intervene who "is given an unconditional right to intervene by a state or federal statute." NRCP 24(a)(1). Additionally, pursuant to NRCP 24, the district court must permit a movant to intervene when the movant has significantly protectable interests in the subject matter of the action which will be impaired if the plaintiffs succeed on their claims. NRCP 24(a)(2).

In the interests of promoting judicial efficiency and economy, LCB Legal is respectfully asking counsel for the Plaintiff whether the Plaintiff is agreeable to entering into a stipulation and order regarding the intervention of the Legislature as a defendant in the NPRI action to avoid the need for the district court to consider and decide the motion to intervene.

If the Plaintiff is agreeable to entering into such a stipulation and order, LCB Legal will prepare a proposed stipulation and order for review by counsel for the Plaintiff.

Thank you for your prompt consideration of this matter.

Kevin C. Powers

General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701-4747
(775) 684-6830
(775) 684-6761-Fax

ATTENTION

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Nevada Legislature's

Exhibit E



Fox Rothschild LLP
ATTORNEYS AT LAW

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www.foxrothschild.com

September 23, 2020

Sent via U.S. Mail and E-mail: kpowers@lcb.state.nv.us

Kevin C. Powers, General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701

Re: NPRI v. Cannizzaro, et al.; Eighth Judicial District Court Case No.: A-20-817757-C

Dear Mr. Powers:

Thank you for reaching out and for advising us of the Resolution of the Legislative Commission ("Resolution"), adopted September 18, 2020. Upon review of the Resolution and the statutes referenced therein, and in your email correspondence dated September 21, 2020, we respectfully disagree with the position of LCB Legal and are not amenable to the proposed stipulation and order.

As set forth in the Amended Complaint in *Nevada Policy Research Institute v. Nicole Cannizzaro et al.*, our client, the Nevada Policy Research Institute ("NPRI"), seeks to address the ongoing constitutional violations under Nevada Const. Art. 3, §1, ¶1 by the named Defendants, who are engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with the State of Nevada or local governments. We do not believe the suit implicates the official interests of the Legislature, rather it examines the personal decisions of individual lawmakers to engage in conflicted dual employment. Further, in addition to its references to the public policy surrounding "citizen Legislators," NRS 281A.020 speaks at length regarding the duties of public officers to avoid conflicts between their private interests and those of the general public, which is what the instant lawsuit seeks to resolve. Accordingly, we can ascertain no official interest of the Legislature as a public body implicated by the instant litigation.

Further, the Resolution and your email appear to omit key language from NRS 218F.720 which precludes the Legislature's intervention as a matter of right. NRS 218F.720(2)(b) states in full:



Fox Rothschild LLP
ATTORNEYS AT LAW

September 23, 2020

Page 2

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.

(Emphasis added.) Contrary to LCB Legal's analysis, NPRI interprets this statute to apply to challenges to the efficacy of a constitutional provision, as opposed to challenges regarding how a constitutional provision may be interpreted. To be clear, NPRI is not challenging the constitutional provision in question as it is written, NPRI is challenging each individual Legislators' decision to engage in dual employment and whether this is permissible pursuant to Nevada Const. Art. 3, §1, ¶1. NPRI does not believe the Legislature has an unconditional right to intervene in these specific circumstances.

Accordingly, should the Legislature wish to intervene in the litigation at issue, we respectfully request that a motion be filed, as contemplated under NRS 218F.720.

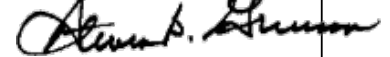
Sincerely,

FOX ROTHSCHILD LLP

/s/ Colleen E. McCarty

Colleen E. McCarty

cc: Client



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*Attorneys for Defendants
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the Nevada
State Senate and Clark County District Attorney;
KASINA DOUGLAS-BOONE, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County School
District; JASON FRIERSON, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County Public
Defender; OSVALDO FUMO, an individual
engaging in dual employment with the Nevada
State Assembly and University of Nevada, Las

Case No.: A-20-817757-C

Dept. No.: 1

HEARING NOT REQUESTED

**DEFENDANTS OSVALDO FUMO,
HEIDI SEEVERS GANSERT, AND
DINA NEAL'S MOTION TO DISMISS
PURSUANT TO
NRCP 12(b)(5) and NRCP 12(b)(6)**

1 Vegas; HEIDI SEEVERS GANSERT, an
2 individual engaging in dual employment with
3 the Nevada State Senate and University of
4 Nevada Reno; GLEN LEAVITT, an individual
5 engaging in dual employment with the Nevada
6 State Assembly and Regional Transportation
7 Commission; BRITTNEY MILLER, an
8 individual engaging in dual employment with
9 the Nevada State Assembly and Clark County
10 School District; DINA NEAL, an individual
11 engaging in dual employment with the Nevada
12 State Assembly and Nevada State College;
13 JAMES OHRENSCHALL, an individual
14 engaging in dual employment with the Nevada
15 State Senate and Clark County Public Defender;
16 MELANIE SCHEIBLE, an individual engaging
17 in dual employment with the Nevada State
18 Senate and Clark County District Attorney;
19 TERESA BENITEZ-THOMPSON, an
20 individual engaging in dual employment with
21 the Nevada State Assembly and University of
22 Nevada, Reno; JILL TOLLES, an individual
23 engaging in dual employment with the Nevada
24 State Assembly and University of Nevada,
25 Reno; and SELENA TORRES, an individual
26 engaging in dual employment with the Nevada
27 State Assembly and Clark County School
28 District,

Defendants.

NSHE DEFENDANTS' MOTION TO DISMISS

Defendant Heidi Seevers Gansert ("Gansert"), sued herein as an employee of the University of Nevada, Reno, an institution of the Nevada System of Higher Education ("NSHE"), Defendant Dina Neal ("Neal"), sued herein as an employee of Nevada State College, also an NSHE institution, and Defendant Osvaldo Fumo ("Fumo"), sued herein as an employee of the University of Nevada, Las Vegas, also an NSHE institution, (Gansert, Neal and Fumo, collectively the "NSHE Defendants") hereby move to dismiss Plaintiff Nevada Policy Research Institute's ("NPRI") Amended Complaint for Declaratory and Injunctive Relief on the basis that it fails to state a claim upon which relief can be granted in favor of NPRI or against the NSHE Defendants, and on the further basis that NPRI has failed to join required parties.

1 This motion is brought pursuant to NRCP 12(b)(5), NRCP 12(b)(6) and NRCP 19(a) and is based
2 upon the following memorandum of points and authorities, all of the pleadings and documents on file
3 herein, and any argument to be made at a hearing, if any.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 NPRI is at it again – suing citizen legislators who happen to also be employees of an NSHE
7 institution. This time, NPRI is attacking adjunct instructors at Nevada State College and the University
8 of Nevada, Las Vegas, and renewing its attack on Heidi Seevers Gansert, an employee of the University
9 of Nevada, Reno, arguing that their mere employment within two separate branches of government
10 violates the Nevada Constitution. As was the case the last time it sued Gansert, NPRI has failed to state
11 a claim for which relief can be granted. And as was the case last time, NPRI's lawsuit should be
12 dismissed with prejudice on that ground alone.

13 Moreover, as Judge Russell intimated in *French v. Gansert*, Case No. 1700000231B, filed in the
14 First Judicial District Court of the State of Nevada in 2017, NPRI has failed to include indispensable
15 parties to this litigation, as several other state employees – including NSHE adjunct instructors also
16 employed by the judicial branch – have an interest relating to the subject of this suit and are so situated
17 that the disposition of the matter in their absence may, as a practical matter, impair or impede their
18 interests. As such, the case should also be dismissed because it fails to include these necessary and
19 indispensable parties.

20 **II. STATEMENT OF FACTS**

21 The Amended Complaint alleges that Osvaldo Fumo is an Adjunct Instructor for the University
22 of Nevada, Las Vegas (Am. Compl. ¶ 10), that Dina Neal is an Adjunct Instructor for Nevada State
23 College (*Id.* ¶ 14), and that Heidi Seevers Gansert is the Executive Director, External Relations for the
24 University of Nevada, Reno (*Id.* ¶ 11). Beyond describing Fumo and Neal as adjunct instructors and
25 Gansert as a director, however, the Amended Complaint contains no allegations as to their duties as
26 employees of NSHE institutions.

27 Nor does the Amended Complaint allege that any of the positions held by NSHE Defendants are
28 created by the Nevada Constitution or by statute, or that adjunct instructor positions or director positions

1 are “public officer” positions. To be clear, however, adjunct instructors and directors by their very titles
2 are not “public officers” in that they are not college or university presidents, and they are not members
3 of the Board of Regents of NSHE (“Board of Regents”).

4 Notably, the Amended Complaint does not reference any members of the judiciary who also
5 hold employment positions in Nevada State or local governments, such as four sitting judges in Nevada
6 State courts who teach at NSHE institutions:¹

- 7 • The Honorable Jerome T. Tao, Nevada Court of Appeals Judge and Adjunct Professor at
8 William S. Boyd School of Law at the University of Nevada, Las Vegas;²
- 9 • The Honorable Frank P. Sullivan, Clark County Family Court Judge and Adjunct
10 Professor at William S. Boyd School of Law at the University of Nevada, Las Vegas;³
- 11 • The Honorable Scott N. Freeman, Second Judicial District Court Judge and instructor at
12 the University of Nevada, Reno;⁴ and
- 13 • The Honorable Dixie Grossman, Second Judicial District Court Judge and instructor at
14 the University of Nevada, Reno.⁵

15 These NSHE employees, who also work in another branch of government, undoubtedly have an interest
16 in the outcome of this matter. But again, NPRI has failed to join them or include any allegations
17 regarding their dual employment. (*See generally* Am. Compl.)

18 The Amended Complaint asserts two causes of action, one for Declaratory Relief and one for
19 Injunctive Relief, both premised on the claim that simultaneously holding positions in separate branches
20 of the government violates the separation of powers doctrine. (*See* Am. Compl.)

21 // //

22 // //

24 ¹ The Court may take judicial notice of information on governmental websites. *See* discussion *infra* Section III.B.1.a.

25 ² *See* Nevada Supreme Court website at:
26 https://nvcourts.gov/Supreme/Court_Information/Court_of_Appeals/Judges/Judge_Jerome_T._Tao/ and Boyd School of
27 Law’s list of Adjunct Faculty at: <https://law.unlv.edu/faculty/adjuncts>.

28 ³ *See* Clark County Courts website at: <http://www.clarkcountycourts.us/departments/judicial/> and Boyd School of Law’s
list of Adjunct Faculty at: <https://law.unlv.edu/faculty/adjuncts>.

⁴ *See* Second Judicial District Court Website at: <https://www.washoecourts.com/Judges/Main/D9> and University of Nevada,
Reno Employee Directory at: <https://apps.unr.edu/CampusDirectory/index.aspx?AcceptsCookies=1>.

⁵ *See* Second Judicial District Court Website at: <https://www.washoecourts.com/Judges/Main/D2> and University of Nevada,
Reno Employee Directory at: <https://apps.unr.edu/CampusDirectory/index.aspx?AcceptsCookies=1>.

1 **III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (NRCP 12(B)(5))**

2 **A. Legal Standard**

3 Nevada Rule of Civil Procedure 12(b)(5) requires the Court to dismiss a complaint that fails to
4 state a claim upon which relief can be granted. Dismissal is appropriate where Plaintiff “could prove
5 no set of facts, which, if true, would entitle it to relief.” *Buzz Stew, LLC v. City of North Las Vegas*, 124
6 Nev. 224, 226–227, 181 P.3d 670, 672 (2008).

7 When considering a Rule 12(b)(5) motion to dismiss, the Court will construe the pleading
8 liberally and consider well-pled factual allegations as though they were true. *Buzz Stew*, 124 Nev. at
9 226–227, 181 P.3d at 672. But a plaintiff cannot survive a motion to dismiss when its “complaint is
10 replete with generalizations and conclusory matter.” *Sproul Homes of Nev. v. State*, 96 Nev. 441, 445,
11 611 P.2d 620, 622 (1980).

12 A court may take judicial notice of matters of public record without converting a motion to
13 dismiss into a motion for summary judgment. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847,
14 858 P.2d 1258, 1261 (1993). A court may properly take judicial notice of factual information “capable
15 of accurate and ready determination by resort to sources whose accuracy cannot reasonably be
16 questioned.” NEV. REV. STAT. § 47.130; *see also Mack v. Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106
17 (2009). Accordingly, it is appropriate to take judicial notice of information made publicly available on
18 a governmental website. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-999 (9th Cir. 2010).

19 **B. Analysis**

20 **1. Plaintiff cannot state a claim for violation of the separation clause of the Nevada Constitution**

21 NPRI brings this suit under Article 3 of the Nevada Constitution, which provides:

22 The powers of the Government of the State of Nevada shall be divided into three separate
23 departments, — the Legislative, — the Executive and the Judicial; and no persons charged
24 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.

25 NEV. CONST. art. III, §1, cl. 1. NPRI’s lawsuit is fatally flawed because this provision has been
26 interpreted to prohibit public officials or officers, as opposed to mere public employees, from holding
27 positions in separate branches of government.
28

Moreover, there is well-established case law to support the tenet that public employees do not generally exercise sovereign functions. *See State ex rel. Kendall v. Cole*, 38 Nev. 215, 229 (1915); *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21 (1953) (finding a public office distinguishable from other forms of employment in that its holder has, by the sovereign, been invested with some portion of the sovereign functions of government); *Eads v. City of Boulder City*, 94 Nev. 735, 737 (1978). Public officers are the only persons who exercise the sovereign functions of state government and, therefore, only public officers can be in violation of Article 3 and the separation of powers clause. *See* NEV. CONST. art. III, §1, cl. 1; *Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at 737.

a. The NSHE Defendants are not public officials or officers

For purposes of the Amended Complaint, the issue is whether the NSHE Defendants' positions at their respective institution is one of a public officer or one of public employment. *See Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at 737. The Amended Complaint merely alleges that Defendants Neal and Fumo are adjunct instructors and that Defendant Gansert is an executive director. It does not allege that any NSHE Defendant is a president or member of the NSHE Board of Regents. It does not allege that any NSHE Defendant serves in a position created by law or exercises sovereign duties of the executive branch. The Amended Complaint contains no factual allegations from which the Court could infer that any NSHE Defendant holds a position that would cause them to fall under the constitutional prohibition NPRI seeks to enforce.

The definition of public officer can be found in both case and statutory law. The case law establishes two guiding principles in defining a public officer. First, a public officer must serve in a position created by law. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117 Nev. 195, 200, 18 P.3d 1042, 1046 (2001) (citing *Mathews*, 70 Nev. at 120-121). Second, the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state. *DR Partners*, 117 Nev. at 200 (citing *Kendall*, 38 Nev. at 224). Both of these principles must be satisfied before a person is deemed a public officer. *See Mullen v. Clark Cnty.*, 89 Nev. 308, 310-311 (1973).

Nevada Revised Statutes ("NRS") 281.005(1) states that a public officer is a person elected or appointed to a position which: (a) is established by the Constitution or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and (b) involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty. NEV. REV. STAT. § 281.005(1). The case law and statute can be read in harmony because NRS

1 281.005(1)(a) encompasses the fundamental principle that a public officer is created by law, and NRS
2 281.005(1)(b) encompasses the fundamental principle that a public officer's duties are fixed by law and
3 involve an exercise of the state's sovereign power. *See DR Partners*, 117 Nev. at 201, 18 P.3d at 1047.

4 Plaintiff does not allege that the NSHE Defendants' positions are established by the Nevada
5 Constitution or by statute. This is because Plaintiff cannot make this allegation. In *DR Partners*, the
6 Supreme Court determined that only the Board of Regents hold positions established by the Constitution
7 or a statute of the state. *See DR Partners*, 117 Nev. at 205, 18 P.3d at 1048 ("the sovereign functions of
8 higher education repose in the Board of Regents, which has been constitutionally entrusted to control
9 and manage the University"). After *DR Partners* was decided, the legislature enacted NRS 281A.182
10 which provides that a president of a university, state college or community college within the NSHE
11 system is also considered a public officer for purpose of Chapter 281A, the Nevada Ethics in
12 Government Law chapter. NEV. REV. STAT. § 281A.182. NRS 281A.182 does not create any further
13 classifications of public officers in the NSHE system and there is nothing in NRS 281A.182 that
14 designates an adjunct professor or director as a public officer. Hence, only the Board of Regents and
the President of the college or university are considered public officers.

15 Further, Plaintiff does not allege that the NSHE Defendants are members of the Board of Regents
16 nor has it alleged that Gansert, Neal or Fumo is a college or university president. Again, this is because
17 it cannot make these allegations. The Court can take judicial notice of the current elected members of
18 the Board of Regents as posted on NSHE's website (www.nshe.nevada.edu), and see that no NSHE
19 Defendant is a current Board member. *See* NEV. REV. STAT. § 47.130; NEV. REV. STAT. § 47.150; *FTC*
20 *v. AMG Servs.*, No. 2:12-cv-00536-GMN-VCF, 2014 U.S. Dist. LEXIS 10490, *45-46, n. 5 (D. Nev.
21 Jan. 28, 2014) (allowing judicial notice of information posted on government websites as it can be
22 "accurately and readily determined from sources whose accuracy cannot reasonably be questioned");
23 *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-999 (9th Cir. 2010) ("It is appropriate to take
24 judicial notice of this information, as it was made publicly available by government entities.").
25 Additionally, the Court can take judicial notice of the current presidents of University of Nevada, Reno
26 (www.unr.edu), Nevada State College (www.nsc.edu) and University of Nevada, Las Vegas
27 (www.unlv.edu) to demonstrate that Gansert, Neal and Fumo are not president. *Id.* Hence, NPRI cannot
28 meet the first tenet of establishing Gansert, Neal or Fumo's position is one of a public officer because it
cannot prove they are a member of the Board of Regents or a university or college president.

1 The *Mathews* case further illustrates why the NSHE Defendants' position is not one of a public
2 officer. In *Mathews*, the government employee was the director of the Driver's License Division. The
3 Nevada Supreme Court determined that Mathews was not a public officer because his position was
4 created by administrative authority and not by statute, and the position was wholly subordinate and
5 responsible to the administrator of the department. *Mathews*, 70 Nev. at 122-123, 258 P.2d at 983.
6 The Nevada Supreme Court reasoned that if the position was wholly subordinate and responsible to the
7 administrator, the position was not created by law, the duties attached to the position had not been
8 prescribed by law and the person holding the position was not independent in exercising his or her duties.
9 *Mathews*, 70 Nev. at 123, 258 P.2d at 983. As such, the position had not been invested with any portion
10 of the sovereign functions of the government. *Id.*

11 All that can be inferred from the Amended Complaint is that Neal and Fumo's positions as
12 adjunct faculty are even more tenuous than the director in the *Mathews* case. There is no allegation that
13 the adjunct positions were created by law or that they have constitutional responsibilities. "Adjunct"
14 implies subordinate positions subject to modification or elimination. Nothing about the term suggests
15 permanency. Absent factual allegations to demonstrate that adjuncts are constitutional officers, the most
16 generous interpretation of the Amended Complaint is that Neal and Fumo are public employees, not
17 public officers.

18 Likewise, there are no allegations that Gansert is a regent or president or holds any other position
19 that could be characterized as a public official or officer. As in the *Mathews* case, even a director is not
20 a public officer or official. Accordingly, and as previously determined by Judge Russell in *French v.*
21 *Gansert* (see Exhibit 2), Gansert is a public employee, not a public officer, and the Amended Complaint
22 lacks factual allegations to suggest any other conclusion.

23 **b. The NSHE Defendants do not exercise sovereign functions**

24 NPRI also cannot establish that Gansert, Neal or Fumo's position is one of a public officer under
25 the second tenet, which states that duties of a public officer must be fixed by law and must involve an
26 exercise of the sovereign functions of the state. *DR Partners*, 117 Nev. at 201, 18 P.3d at 1047. NPRI
27 did not allege that the NSHE Defendants' duties were fixed by law and that they involved the exercise
28 of the sovereign functions of the state. Even if NPRI had made these allegations, they would not save
its claim as case law and statutory law make it clear that the NSHE Defendants' positions exercise no
sovereign functions. Sovereign functions can only be exercised by public officers, not public
employees. See *Kendall*, 38 Nev. at 229; *Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at 737. Only

1 the Board of Regents and college or university presidents are public officers for the NSHE System. *DR*
2 *Partners*, 117 Nev. at 201, 18 P.3d at 1047; NRS 281A.182.

3 The University of Nevada, Reno and Senator Heidi Gansert recently made this argument, and
4 the Court agreed. In *French v. Gansert*, the Court explained the distinction between simply being a
5 public employee and exercising powers such that one's employment would be restricted by the
6 separation of powers clause. In that case, Plaintiff Douglas E. French brought suit against Nevada State
7 Senator Heidi Gansert and University of Nevada, Reno advancing a virtually identical argument by
8 NPRI attorneys regarding the defendants' alleged violation of the Nevada Constitution. *French v.*
9 *Gansert*, First Amended Complaint, ¶13, attached hereto as Exhibit 1 and incorporated by reference
10 herein. Specifically, French alleged "Defendant Gansert's employment in a Nevada State Executive
11 Branch position expressly violates the Nevada Constitution and undermines the public interest and
12 liberty by diluting the separation of powers, concentrating power, creating conflicts of interests and
13 appearances thereof." Exhibit 1, ¶13. Plaintiff French sought declaratory relief on the basis that
14 Defendant Gansert holds the Nevada executive branch position of Executive Director of External
15 Relations for the University of Nevada, Reno while concurrently serving as a Senator in the Nevada
16 Legislature, thus directly violating Art. 3. § 1. of the Nevada Constitution." Exhibit 1, ¶15.

16 Finding French's allegations untenable, the Court dismissed French's Complaint. A copy of
17 the full Order, dated August 4, 2017 is attached hereto as Exhibit 2 and incorporated herein by
18 reference. In the order of dismissal, Judge Russell analyzed the issue as follows:

19 "By its own terms, Article 3, Section 1(1) does not prohibit all persons in one
20 branch from exercising any function related to another branch. The limitation on
21 exercising any function only applies to those persons who are charged with the
22 exercise of powers given to the departments or branches of government. These
23 departments are each charged by other parts of the Constitution with certain duties and
24 functions and it is to these constitutional duties and functions to which the prohibition
25 in Article 3, Section 1(1) refers. *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P.437 439
26 (Nev. 1893).

27 "Not every employee in a branch is charged with these constitutional powers, duties
28 and functions. Public employees, as distinguished from public officials or officers, do
not exercise functions or powers of the state. See, *State ex rel. Kendall v. Cole*, 38
Nev. 215, 9, 148 P. 551, 553 (1915); *State ex rel. Mathews v. Murray*, 70 Nev. 116,
120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder City*, 94 Nev. 735, 737,
587 P.2d 39, 41 (1978). Public officers are the only persons who exercise the
sovereign functions of state government. *Mathews*, 70 Nev. at 120-21, 258 P.2d at
983. This is because public employees have not been invested by the State with some
portion of the powers, duties and functions of the government. *Mathews*, 70 Nev. at

120-21, 258 P.2d at 983; *Kendall*, 38 Nev. at 229, 148 P. at 553 (“To be an officer, one must be charged by law with duties involving the exercise of some part of the sovereign power of the state”).

“The case law describing public officials is consistent with the statutory law. NRS 281.005(1) states that a public officer is a person elected or appointed to a position which: (a) Is established by the Constitution or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and (b) involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty. NRS 281.005(1).

“Defendant [sic] French does not allege that Defendant Gansert’s position is established by the Nevada Constitution, by statute or is a public officer position. Defendant Gansert’s position as Executive Director, External Relations is not a public office. **There are only two groups of people in NSHE that have been determined to be public officers: members of the Board of Regents and presidents of the universities, state colleges and community colleges.** *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117 Nev. 195, 205, 18 P.3d 1042, 1048 (2001) (“the sovereign functions of higher education repose in the Board of Regents, which has been constitutionally entrusted to control and manage the University”); NRS 281A.182 (a president of a university, state college or community college within the NSHE system is a public officer for purpose of Chapter 281A).” (emphasis added)

The same result is required here. The Amended Complaint in this matter merely alleges that NSHE Defendants Neal and Fumo are adjunct professors and that Gansert is a director. It does not allege that any of the NSHE Defendants are officers or public officials. It does not allege that they exercise constitutional or sovereign powers of the executive branch of the state. Moreover, the Amended Complaint is completely devoid of any factual allegations describing the job duties and responsibilities of any of the NSHE Defendants such that there is no factual basis from which to draw an inference that any of the NSHE Defendants fall into that category of public employee to which the constitutional prohibition stated in Article 3, §1, ¶1 would apply. And of course, the NSHE Defendants are neither presidents of their respective institutions nor members of the Board of Regents. Due to the absence of any allegations that the NSHE Defendants are public officials or that they exercise sovereign or constitutional powers, and because there are no factual allegations from which such conclusions might reasonably be drawn, the Amended Complaint is deficient and defective and must be dismissed for failure to state a claim.

2. The Amended Complaint Fails to State A Claim for Declaratory Relief

The Amended Complaint must also be dismissed because it fails to state a claim for declaratory relief against the NSHE Defendants. To state a claim for declaratory relief, the four elements of

1 declaratory relief must be met: (a) there must exist a justiciable controversy; that is to say, a controversy
2 in which a claim of right is asserted against one who has an interest in contesting it; (b) the controversy
3 must be between persons whose interests are adverse; (c) the party seeking declaratory relief must have
4 a legal interest in the controversy, that is to say, a legally protectable interest; and (d) the issue involved
5 in the controversy must be ripe for judicial determination. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d
6 443, 444 (1986) (citing *Kress v. Corey*, 65 Nev. 1, 25-26, 189 P.2d 352, 364 (1948)). Failure to set
7 forth allegations sufficient to make out the elements of a right to relief requires dismissal of the
8 complaint. *Edgar*, 101 Nev. at 227, 699 P.2d at 111.

9 **a. There is no justiciable controversy**

10 Nevada law requires an actual justiciable controversy as a predicate to judicial relief. *Bryan*,
11 102 Nev. at 525, 728 P.2d at 444. A justiciable controversy is a controversy in which a claim of right
12 is asserted against one who has an interest in contesting it. *Id.* at 525. Additionally, “litigated matters
13 must present an existing controversy, not merely the prospect of a future problem.” *Bryan*, 102 Nev. at
14 525, 728 P.2d at 444. When the rights of the plaintiff are contingent on the happening of some event
15 which cannot be forecast and which may never take place, a court cannot provide declaratory relief.
16 *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 11, 908 P.2d 724, 726 (1996) (citing *Farmers Insurance*
17 *Exchange v. District Court*, 862 P.2d 944, 948 (Colo. 1993)).

18 As demonstrated above, there is no existing controversy. Gansert, Neal and Fumo are public
19 employees who do not exercise any sovereign functions. Therefore, there is no present or existing
20 controversy regarding their collegiate employment, their service in the legislature and any alleged
21 violation of Article 3.

22 Moreover, NSHE Defendants assert that NPRI does not have standing to bring a constitutional
23 violation action and, concurrent with the filing of this Motion, has joined Defendant Brittney Miller’s
24 Motion to Dismiss for lack of standing, filed herein on September 18, 2020. Defendant Miller’s motion
25 is adopted by reference and incorporated herein as if set forth in full at this point.

26 // //

27 // //

28 // //

1 **b. NPRI cannot establish an adverse interest**

2 A justiciable controversy requires a ripe dispute between two interested and adverse parties.
3 *UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union v. Nev. Serv. Emps. Union/SEIU Local*
4 *1107, AFL-CIO*, 124 Nev. 84, 93-94, 178 P.3d 709, 715-716 (2008).

5 The interests of NPRI and the NSHE Defendants are not adverse. As demonstrated above,
6 Gansert, Neal and Fumo are allowed to work as public employees and serve in the state legislature at
7 the same time. *See also* NEV. REV. STAT. § 613.040 (stating employers in Nevada are prohibited from
8 preventing any employee from engaging in politics or becoming a candidate for any public office in this
9 state). Therefore, Gansert, Neal and Fumo's employment at their respective institutions is not in
10 violation of the Nevada Constitution or Nevada statutory law and, therefore, their employment and
11 public service are not adverse to NPRI's claimed interest. Additionally, as will be demonstrated below,
12 NPRI does not have an interest in challenging the NSHE Defendants' conduct because it has not suffered
13 any injury.

14 **c. NPRI does not have a legally protectable interest**

15 The element of a legally protectable interest is connected to the requirement of standing to
16 bring a lawsuit. To have standing to bring a lawsuit, the plaintiff must have suffered an "injury in
17 fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 1196 Ed. 2d 351, 112 S. Ct. 2130 (1992).
18 An injury in fact is an invasion of the legally protectable interest. *Id.*; *Centa. Delta Water Agency v.*
19 *United States*, 306 F.3d 938, 946-947 (9th Cir. 2002). NPRI asks the Court to declare that the NSHE
20 Defendants are violating the separation of powers clause, but has not established that it has standing.
21 Concurrent with the filing of this Motion, NSHE Defendants have joined the Motion to Dismiss filed
22 by Defendant Brittney Miller and incorporate by reference the arguments made regarding standing.

23 In short, NRPI asserts that "If allowed to proceed with the dual employment stated herein,
24 legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation
25 of Nevada Const. Art. 3, §1, ¶1." (Am. Compl. ¶5.) NPRI has not, however, made any allegations of
26 any past misconduct or improprieties resulting from dual employment. Because there is no injury in
27 fact in the Amended Complaint, it fails to state a claim for declaratory relief.
28

1 **d. This case is not ripe for review**

2 A case is ripe for review when “the degree to which the harm alleged by the party seeking review
3 is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a justiciable controversy.”
4 *Herbst Gaming, Inc. v. Sec’y of State*, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006) (citing *Matter*
5 *of T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279-1280 (2003)). If harm is likely to occur in the future
6 because of a deprivation of a constitutional right, then a ripe case or controversy may exist. But the
7 party must show that it is *probable* that future harm will occur. *Resnick v. Nevada Gaming Comm’n*,
8 104 Nev. 60, 66, 752 P.2d 29, 33 (1988). This element is closely aligned with the concept of justiciable
9 controversy.

10 Not only has NPRI failed to allege facts to support a finding of a concrete, justiciable
11 controversy, but it has also failed to allege any facts from which the Court could conclude that there
12 exists an issue ripe for review. NSHE Defendants are not prohibited by law from serving in the
13 legislature while being employed with their respective institutions in positions of public employment.
14 As such the harm alleged is not sufficiently concrete or rising to the level of a justiciable controversy,
15 and the absence of ripeness is yet another defect that requires dismissal of the First Cause of Action.

16 **3. The Amended Complaint Fails to State a Claim for Injunctive Relief**

17 “It is axiomatic that a court cannot provide a remedy unless it has found a wrong. “[T]he
18 existence of a right violated is a prerequisite to the granting of an injunction.” *State Farm Mut. Auto.*
19 *Ins. Co. v. Jafbros, Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993). Accordingly, an injunction will
20 not issue “to restrain an act which does not give rise to a cause of action” *Id.* at 928. Further,
21 injunctive relief is inappropriate when there is no justiciable controversy with the named defendant. *See*
22 *Lamb v. Doe*, 92 Nev. 550, 551, 554 P.2d 732, 733 (1976). Injunctive relief requires actual or threatened
23 loss, damage or injury and it must be reasonably probable that real injury will occur. *Berryman v.*
24 *International Brotherhood of Electrical Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388-389 (1962).
25 “[An injunction] should not be issued upon the bare possibility of an injury, or upon any unsubstantial
26 or unreasonable apprehension of it. The injury, too, must be real, and not merely theoretical.” *Sherman*
27 *v. Clark*, 4 Nev. 138, 142 (1868). NPRI’s Amended Complaint alleges at most, the theoretical, bare
28 possibility of some potential injury. Thus, the absence of allegations of an actual or probable threatened

1 injury is fatal NPRI's claim for injunctive relief.

2 Injunctive relief is only available if there is no adequate remedy at law. *Id.* at 141. Chapter
3 281A of the Nevada Revised Statutes establishes a comprehensive framework for dealing with ethical
4 issues in government, including a Code of Ethical Standards set out in NRS 281A.400 to NRS 281A.430.
5 NRS 281A.420 provides specific requirements for disclosing conflicts of interest and defines those
6 circumstances in which abstention from voting is necessary. Enforcement of these ethical requirements
7 is available through a complaint process and significant penalties may be imposed under NRS 281A.785
8 and NRS 281A.790. Because there is an adequate remedy at law for the speculative harm NPRI
9 identifies in its Amended Complaint, injunctive relief is unavailable.

10 Due to the absence of allegations that support or suggest that NPRI has suffered harm or will
11 most likely suffer future harm, the Second Cause of Action is defective. Moreover, because the
12 Amended Complaint does not set forth sufficient facts to show the existence of a justiciable controversy,
13 the claim for injunctive relief fails on that basis as well. Given the adequate remedies at law available
14 to address the speculative harm that NPRI alleges *might* flow from dual employment, injunctive relief
15 is unwarranted here. For all of these reasons, the Second Cause of Action must be dismissed.

16 **IV. MOTION TO DISMISS FOR FAILURE TO JOIN REQUIRED PARTIES**

17 **A. Legal Standard**

18 The absence of a necessary party may be raised either by the necessary party or by another party
19 in the litigation. *Rose, LLC, v. Treasure Island, LLC*, 135 Nev. 145, 150, 445 P.3d 860, 865 (2019).
20 When raised by another party already in the suit, it is done by either a motion for judgment on the
21 pleadings under NRCP 12(h)(2) or by a motion to dismiss under NRCP 12(b)(6). *Id.* Whether a missing
22 party is necessary is governed by NRCP 19(a), which states as follows:

23 **Rule 19. Required Joinder of Parties**

24 (a) *Persons Required to Be Joined if Feasible.*

25 (1) *Required Party.* A person who is subject to service of process and whose joinder
26 will not deprive the court of subject-matter jurisdiction must be joined as a party if:

27 (A) in that person's absence, the court cannot accord complete relief among
existing parties; or

28 (B) that person claims an interest relating to the subject of the action and is so
situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the

1 interest; or

2 (ii) leave an existing party subject to a substantial risk of incurring double,
3 multiple, or otherwise inconsistent obligations because of the interest.

4 “Whether a party is necessary does not depend upon broad labels or general
5 classifications, but rather comprises a highly fact-specific inquiry. Rule 19 ‘calls for
6 courts to make pragmatic, practical judgments that are heavily influenced by the facts
7 of each case.’” *Rose*, 135 Nev. 153, 445 P.3d 867 (internal citations omitted).

8 **B. Analysis**

9 The constitutional provision upon which NPRI bases its case applies to all three branches of
10 state government.

11 The powers of the Government of the State of Nevada shall be divided to three separate
12 departments, the Legislature, the Executive and the Judicial; and **no person charged with
13 the exercise of powers properly belonging to one of these departments shall exercise
14 any functions, appertaining to either of the others**, except in the cases expressly directed
15 or permitted in this constitution.

16 Nev. Const. art. III, § 1, cl. 1. (emphasis added).

17 NPRI, however, has limited the litigation only to legislators who are also employed in the
18 executive branch. NPRI has failed to include those members of the judicial branch who also hold
19 employment positions in the executive branch. Any decision granting the relief NPRI seeks here would
20 necessarily impact the rights of members of the judicial branch. *Cf. French v. Gansert*. Unless members
21 of the judiciary who also serve as adjunct professors are included as parties to this litigation, employment
22 at NSHE institutions would be denied to them without allowing them an opportunity to participate in
23 the litigation to protect their interests. Under NRCP 19(a)(1)(B)(i), members of the judiciary who also
24 teach at NSHE institutions are therefore required parties and should have been joined in the litigation.
25 If NPRI is granted the relief it seeks in this litigation, judges would be required to resign their teaching
26 positions or their benches. One interest or the other would be impaired or impeded if this litigation
27 proceeds in their absence. Judicial branch employees who will be affected by this litigation are “required
28 parties” as defined by NRCP 19 (a), and NPRI’s failure to include these required parties warrants
dismissal of this action.

///

///

1 **IV. CONCLUSION**

2 NPRI's Amended Complaint may be dismissed on any one of multiple grounds. The initial
3 defect in the Amended Complaint is that it is devoid of any allegations that NSHE Defendants Gansert,
4 Neal and Fumo are public employees to whom the constitutional provision in question would apply.
5 The law is clear that the separation of powers doctrine applies only to public officials or officers, or
6 those who are entrusted by law to exercise sovereign powers. The Amended Complaint merely alleges
7 that Defendants Neal and Fumo are adjunct instructors and that Gansert is a director without any further
8 factual allegation that would bring these defendants within the purview of Article 3 of the Nevada
9 Constitution. Absent such factual allegations, the Amended Complaint fails and must be dismissed.

10 Even were the allegations of the Amended Complaint sufficient to allow the Court to infer that
11 Defendants Gansert, Neal and Fumo fall into the category of public employee to which Article 3 applies,
12 the Amended Complaint is otherwise defective and insufficient to state a claim for declaratory relief or
13 injunctive relief. The Amended Complaint lacks any factual allegations to show the existence of a
14 justiciable controversy. It fails to allege sufficient facts to show that NRPI has a legally protectable
15 interest or that its alleged interest is adverse to the interests of the defendants. The Amended Complaint
16 fails to include any allegations to support a finding that there is a controversy ripe for review. The
17 Amended Complaint attempts to state a claim for declaratory relief with bare conclusory allegations,
18 falling far short of the legal standard NPRI must meet to state a viable claim for relief.

19 The attempted claim for injunctive relief is equally deficient. Not only are the allegations in the
20 Amended Complaint insufficient to demonstrate a justiciable controversy, they also fail to show any
21 actual or probable threatened harm. The theoretical speculation that conflicts of ethics may occur, that
22 power may be "concentrated" or that separation of powers will be "diluted" is unsupported by any
23 allegation of past wrongdoing or any factual allegations to demonstrate the real and probable threat of
24 future harm. Moreover, the claim for injunctive relief must fail because there are adequate legal
25 remedies available through Nevada's ethics statutes.

26 With respect to both causes of action, and as set forth in Defendant Brittney Miller's Motion to
27 Dismiss, NPRI has not alleged any facts that would give it standing to bring this action. The lack of
28 standing is yet another reason the Amended Complaint must be dismissed.

1 Finally, the Amended Complaint must be dismissed because NPRI has failed to join required
2 parties necessary to the resolution of the dispute. Because members of the judiciary who also hold
3 teaching positions will be affected by any ruling in this matter, they must be joined so that their interests
4 are protected. Because they were not joined, it is appropriate to dismiss the Amended Complaint on this
5 basis as well.

6
7 Respectfully submitted this 24th day of September, 2020

8
9 /s/ Berna L. Rhodes-Ford

10 BERNAL RHODES-FORD

11 Nevada Bar No. 7879

12 General Counsel

13 Nevada State College

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19 /s/ Gary A. Cardinal

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Attorneys for Defendants

Oswaldo Fumo, Heidi Seevers Gansert,

and Dina Neal

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State
3 College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party
4 to the within cause. Pursuant to NRCP 5, I further certify that on September 24, 2020, I caused the
5 following document, **DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND**
6 **DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5) and NRCP 12(b)(6)**, to
7 be served as follows:

8 ☒

9 **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to
10 be electronically served through the Eighth Judicial District Court's electronic filing system,
11 with the date and time of the electronic service substituted for the date and place of deposit in the
12 mail to the attorneys listed below at the address indicated below.

13 Deanna L. Forbush, Esq.
14 **FOX ROTHSCHILD LLP**
15 Email: dforbush@foxrothschild.com
Attorneys for Plaintiff

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16 Bradley Schragar, Esq.
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Daniel Bravo, Esq.
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Attorneys for Defendant Brittney Miller

20 ☐

21 **BY MAIL** I caused such envelope(s) with first class postage thereon fully prepaid to be
22 placed in the U.S. Mail in Henderson, Nevada.

23
24
25 *Nita Armendariz*
26 An employee of the Office of General Counsel
27 Nevada State College
28

EXHIBIT 1

1 JOSEPH F. BECKER, ESQ.
2 Nevada State Bar No.12178
3 NPRI CENTER FOR JUSTICE AND
4 CONSTITUTIONAL LITIGATION
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10 Attorney for Petitioner

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MAY 03 2017

University of Nevada, Reno
General Counsel

REC'D & FILED

2017 MAY -1 PM 3:22

SUSAN MERRIWETHER

J. HARKLEROD

DEPUTY

11 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR CARSON CITY**

13 DOUGLAS E. FRENCH,

14 Plaintiff,

15 vs.

16 HEIDI GANSERT in her official capacity as Executive Director,
17 External Relations for the University of Nevada, Reno;
18 UNIVERSITY OF NEVADA, RENO; NEVADA SYSTEM OF
19 HIGHER EDUCATION; NEVADA BOARD OF REGENTS;
20 and the STATE OF NEVADA on Relation to The Nevada
21 System of Higher Education, The Nevada Board of Regents, and
22 the University of Nevada, Reno;

23 Defendants.

) Case No.: 1700000231B

) Dept. No. I

24 **FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE**
25 **RELIEF**

26 For his Complaint, Plaintiff alleges:

27 1. On or about February 6, 2017, Defendant, HEIDI GANSERT, began service in the
28 Nevada Legislature, as a Nevada State Senator, despite concurrently holding a position in the Executive
Branch of the State of Nevada, contrary to The Constitution of Nevada Art. 3, §1, ¶1.

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1 7. Defendant NEVADA SYSTEM OF HIGHER EDUCATION, (hereinafter "NSHE") is
2 named as a Defendant herein as a governing body of the University of Nevada, Reno, a sub-unit of the
3 Nevada System of Higher Education, and as an employer of Defendant GANSERT, despite Defendant
4 GANSERT's concurrent service as a Senator in the Seventy-ninth Session of the Nevada State
5 Legislature.
6

7 8. Defendant NEVADA BOARD OF REGENTS, (hereinafter "NBOR"), is named as a
8 Defendant herein as a governing body of the Nevada System of Higher Education and the University of
9 Nevada, Reno, a sub-unit of the Nevada System of Higher Education, and as an employer of Defendant
10 GANSERT, despite Defendant GANSERT's concurrent service as a Senator in the Seventy-ninth
11 Session of the Nevada State Legislature.
12

13 9. Defendant STATE OF NEVADA on relation to The Nevada System of Higher
14 Education, The Nevada Board of Regents, and the University of Nevada, Reno (hereinafter
15 "NEVADA") resides in Carson City, Nevada and, pursuant to NRS § 12.105, is named as a Defendant
16 herein as an employer of Defendant GANSERT, despite Defendant GANSERT's concurrent service as a
17 Senator in the Seventy-ninth Session of the Nevada State Legislature.
18

19 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

20 10. On or about February 6, 2017, Defendant GANSERT was sworn-in to the Seventy-ninth
21 Session of the Nevada Legislature, despite holding a position as an employee of the Nevada Executive
22 Branch.
23

24 11. The Nevada Constitution reads, in relevant part: "The powers of the Government of the
25 State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the
26 Judicial; and no persons charged with the exercise of powers properly belonging to one of these
27
28

1 departments shall exercise *any functions*, appertaining to either of the others. . .” Nevada Const. Art. 3,
2 §1, ¶1 (emphasis added).

3 12. The rationale underlying the Separation of Powers provision can be traced to the desire of
4 the constitutional framers to encourage and preserve independence and integrity of action and decision
5 on the part of individual members of the Nevada state government and to guard against conflicts of
6 interest, self-aggrandizement, concentration of power, and dilution of separation of powers.
7

8 13. Defendant GANSERT’s employment in a Nevada State Executive Branch position
9 expressly violates the Nevada Constitution and undermines the public interest and liberty by diluting the
10 separation of powers, concentrating power, creating conflicts of interests and appearances thereof.
11

12 **FIRST CLAIM FOR RELIEF**

13 (Declaratory and Injunctive Relief – Violation of Nevada Constitution, Art. 3, §1, ¶1)

14 14. Plaintiff hereby incorporates Paragraphs 1 through 13 as though fully set out herein.

15 15. Defendant GANSERT holds the Nevada executive branch position of Executive Director
16 of External Relations for the University of Nevada, Reno while concurrently serving as a Senator in the
17 Nevada Legislature, thus directly violating Art. 3, §1, ¶1 of the Nevada Constitution.
18

19 16. This constitutional violation by Defendants harms the public interest of all Nevadans
20 including Plaintiff FRENCH as well as Plaintiff FRENCH’s legally protectable interests both as he is
21 earnestly seeking and is qualified for the executive branch position currently held by Defendant
22 GANSERT and as a Nevada taxpayer whose taxes are being expended unconstitutionally.
23

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff prays that this Court:

26 1. Declare that Defendant GANSERT, by holding a Nevada executive branch position while
27 concurrently serving in the Seventy-ninth Session of the Nevada Legislature, and/or the UNIVERSITY
28

1 OF NEVADA, RENO; NEVADA SYSTEM OF HIGHER EDUCATION; NEVADA BOARD OF
2 REGENTS; and the STATE OF NEVADA on Relation to The Nevada System of Higher Education, The
3 Nevada Board of Regents, and/or the University of Nevada, Reno, by employing Defendant GANSERT
4 while she concurrently serves in the Nevada Legislature, violate the Nevada Constitution, Art. 3, §1, ¶1.

5
6 2. Enjoin Defendant GANSERT from continuing in her Nevada executive branch
7 employment position and from retaining any monetary or employment benefits derived from said
8 position from such time as she began serving in the Nevada Legislature and/or enjoin the UNIVERSITY
9 OF NEVADA, RENO; NEVADA SYSTEM OF HIGHER EDUCATION; NEVADA BOARD OF
10 REGENTS; and the STATE OF NEVADA on Relation to The Nevada System of Higher Education, The
11 Nevada Board of Regents, and the University of Nevada, Reno, from employing Defendant GANSERT
12 during such time she serves in another branch of the Nevada government.
13

14 3. Award Plaintiff his reasonable costs and attorney fees.

15 4. Grant such other relief as the Court deems appropriate and proper.

16 DATED this 1st day of May, 2017.

17
18 NPRI CENTER FOR JUSTICE
19 AND CONSTITUTIONAL LITIGATION

20 BY: 

21 JOSEPH F. BECKER, ESQ.
22 Nevada Bar No. 12178
23 NPRI CENTER FOR JUSTICE
24 AND CONSTITUTIONAL LITIGATION
25 75 Caliente Street
26 Reno, NV 89502
27 Telephone: (775) 636-7703
28 Fax: (775) 201-0225

Attorney for Plaintiff

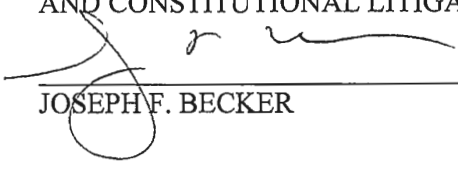
CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2017, I caused a true and correct copy of the foregoing First Amended Complaint for Declaratory Judgment and Injunctive Relief to be served via U.S. Mail, postage pre-paid addressed as follows:

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Adam Laxalt
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Carson City, NV 89701-4717

NPRI CENTER FOR JUSTICE
AND CONSTITUTIONAL LITIGATION



JOSEPH F. BECKER

EXHIBIT 2

RECEIVED

AUG 04 2017

University of Nevada, Reno
General Counsel

REC'D & FILED

2017 AUG -3 AM 9:55

SUSAN MERRIWEATHER

CLERK
BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

DOUGLAS E. FRENCH,

Plaintiff,

Case No. 1700000231B

Dept. No. I

vs.

HEIDI GANSERT in her official capacity as
Executive Director, External Relations for
the University of Nevada, Reno;
UNIVERSITY OF NEVADA, RENO;
NEVADA SYSTEMS OF HIGHER
EDUCATION; NEVADA BOARD OF
REGENTS; and the STATE OF NEVADA on
Relation to The Nevada System of Higher
Education, The Nevada Board of Regents,
and the University of Nevada, Reno;

Defendants.

ORDER

This matter is before this Court on a Motion to Dismiss filed by Defendant Heidi Gansert and a Motion to Dismiss filed by Defendant Board of Regents of the Nevada System of Higher Education on behalf the University of Nevada, Reno ("NSHE Defendants"). Defendant Gansert's Motion to Dismiss the First Amended Complaint was filed pursuant to NRCP 12(b)(5) and NSHE Defendants' Motion to Dismiss the First Amended Complaint was filed pursuant to NRCP 12(b)(1), 12(b)(2) and 12(b)(5). Both Motions were filed on May 12, 2017. On May 26, 2017, Plaintiff Douglas E.

1 French filed one Opposition in response to both Motions. Defendant Gansert filed a
2 Reply to the Opposition on June 8, 2017 and the NSHE Defendants also filed a Reply
3 to the Opposition on June 8, 2017. A Request for Submission was filed in regards to
4 both Motions on June 8, 2017.

5 The First Amended Complaint filed in this matter asserts that because
6 Defendant Gansert holds the Nevada Executive Branch position of Executive
7 Director, External Relations at the University of Nevada, Reno while concurrently
8 serving as a State Senator in the Nevada Legislature, there is a violation of Article 3,
9 Section 1(1) of the Nevada Constitution.

10 The Motions to Dismiss assert that Article 3, Section 1(1) is not written as
11 broadly as Plaintiff French claims and that there are several conditions that must be
12 met before the restrictions of Article 3, Section 1(1) apply. Specifically, Article 3,
13 Section 1(1) applies only to those employees charged with Constitutional power for
14 their particular branch and only to those employees when they exercise a function
15 related to another branch. Defendant Gansert asserts that Plaintiff French failed to
16 allege that Defendant Gansert was charged with any Constitutional powers and also
17 failed to allege that she exercised any function related to another branch. The NSHE
18 Defendants assert that Plaintiff French also failed to bring any allegations against the
19 NSHE Defendants that state a cause of action or entitle him to any relief against
20 them. Finally, the NSHE Defendants also seek dismissal of the University of
21 Nevada, Reno on the basis that it is not a legal entity capable of being sued.

22 Nevada Rule of Civil Procedure 12(b)(5) requires the Court to dismiss a
23 complaint that fails to state a claim upon which relief can be granted. Dismissal is
24 appropriate where plaintiff "could prove no set of facts, which, if true, would entitle [him]
25 to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 226–227, 181
26 P.3d 670, 672 (2008); *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985)
27 (court must dismiss complaint which fails to "set forth allegations sufficient to make out
28 the elements of a right to relief.").

When considering a Rule 12(b)(5) motion to dismiss, the Court will construe the
pleading liberally and consider well-pled factual allegations as though they were true.
Buzz Stew, 124 Nev. at 226–227, 181 P.3d at 672. The Court need only accept the

1 nonmoving party's factual allegations as true. *Shoen v. SAC Holding Corp.*, 122 Nev.
2 621, 635, 137 P.3d 1171, 1180 (2006). Moreover, the Court is not required to "assume
3 the truth of legal conclusions merely because they are cast in the form of factual
4 allegations." *See W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)
5 (interpreting substantively identical Fed. R. Civ. P. 12(b)(6)); *see also Sproul Homes of*
6 *Nev. v. State*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (plaintiff cannot survive a
7 motion to dismiss when its "complaint is replete with generalizations and conclusory
8 matter.").

8 **A. Necessary Parties**

9 NRCP 12(b)(6) authorizes dismissal for failure to join a necessary party. In order
10 to render a complete decree in any civil action, "all persons materially interested in the
11 subject matter of the suit [must] be made parties so that there is a complete decree to
12 bind them all." *Olsen Family Trust v. District Court*, 110 Nev. 548, 553, 874 P.2d 778,
13 781 (1994). Failure to join a necessary party to a case is "fatal to the district court's
14 judgment." *Olsen Family Trust*, 110 Nev. at 554, 874 P.2d at 782; *see also Univ. of Nev.*
15 *v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979). Thus, the trial court may
16 raise the issue *sua sponte*. *Tarkanian*, 95 Nev. at 396, 594 P.2d at 1163.

17 NRCP 19(a) requires joinder when an individual claims an interest in the subject
18 matter of the action and adjudication in the individual's absence may inhibit the ability to
19 protect that claimed interest or when an individual claims an interest in the subject
20 matter of the action and adjudication in the individual's absence potentially subjects an
21 existing party to "double, multiple, or otherwise inconsistent obligations." NRCP 19(a).
22 In applying NRCP 19(a), the Nevada Supreme Court has broadly indicated that a third
23 party must be joined if the third party's interest "may be affected or bound by the
24 decree," or if the third party "claims an interest in the subject matter of the action." *Olsen*
Family Trust, 110 Nev. at 553-54, 874 P.2d at 781-82.

25 Here, Plaintiff French is asking the Court to declare that employment in the
26 Executive Branch of Nevada while serving in the Nevada State Legislature violates
27 Article 3, Section 1(1) of the Nevada Constitution. Plaintiff French is also asking this
28 Court to enjoin Defendant Gansert from continuing employment in the Executive Branch
and also from retaining any money or benefits while she concurrently served in both

1 branches. If the Court were to grant Plaintiff French's requested declaratory relief, it
2 would affect additional State legislators who are also State employees. At the hearing
3 on the Motions to Dismiss, the parties indicated that there are as many as four other
4 additional legislators who are State employees. The Court finds that these other State
5 employees claim an interest relating to the subject of Plaintiff's First Amended
6 Complaint and are so situated that the disposition of the matter in their absence may as
7 a practical matter impair or impede their interests.

8 At the hearing on the Motions to Dismiss, Plaintiff French conceded that he had
9 no standing to bring an action against the other legislators who are State employees.
10 As such, the Court finds that these additional State legislators could not be made a
11 party to the action. Pursuant to NRCP 19(b), the Court has determined that the case
12 should be dismissed in the absence of these other State legislators since an adverse
13 judgment would be prejudicial to them because their employment with the State would
14 be impacted. The Court does not believe that it could make the broad declaration
15 requested by Plaintiff French and also shape relief that would lessen or avoid the
16 prejudice to these other State employees because the requested relief impacts their
17 employment and also their service in these two branches. As such, Plaintiff French's
18 First Amended Complaint is dismissed pursuant to NRCP 19(a) for failure to join
19 necessary parties.

18 **B. Defendant University of Nevada, Reno**

19 Defendant University of Nevada, Reno asserts that it is not a legal entity capable
20 of being sued because it does not legally exist for purposes of bringing or defending suits.
21 NRS § 396.020 provides that the legal and corporate name for the State
22 University is the University of Nevada and that it is administered by a Board of
23 Regents, collectively known as the Nevada System of Higher Education ("NSHE").
24 NSHE comprises all the various institutions and facilities that the Board of Regents
25 deems appropriate. NRS § 396.020. The University of Nevada, Reno is one of the
26 institutions or sub-units of NSHE, but it is not an independent legal or corporate entity
27 capable of being sued. See, *Robinson v. Nev. Sys. Of Higher Educ.*, 2016 U.S. Dist.
28 LEXIS 92221 (D. Nev. 2016). Accordingly, Defendant University of Nevada, Reno is
dismissed.

1 **C. Defendants NSHE and Board of Regents**

2 NSHE Defendants assert French has failed to set forth any allegations in his First
3 Amended Complaint against NSHE or the Board of Regents. There are no factual
4 allegations that reference or mention NSHE or the Board of Regents in the "Allegations
5 Common to All Claims for Relief" or the "First Claim for Relief" seeking declaratory and
6 injunctive relief. The only factual allegations in the body of the First Amended
7 Complaint related to NSHE and the Board of Regents are the allegations in the section
8 entitled "Parties" where Plaintiff French identifies NSHE and the Board of Regents as
9 Defendant Gansert's employer.

10 At the hearing on the Motions, Plaintiff French asserted that the First Amended
11 Complaint was amended to specifically make allegations against NSHE and the Board
12 of Regents and these allegations are found in the prayer for relief of the First Amended
13 Complaint. Allegations in a prayer for relief are not part of the cause of action.
14 *Kingsbury v. Copren*, 43 Nev. 448, 454-455, 187 P. 728, 729 (1920); *Keyes v. Nevada*
15 *Gas Co.*, 55 Nev. 431, 435-436, 38 P.2d 661, 663 (1943).

16 Dismissal is appropriate where plaintiff "could prove no set of facts, which, if true,
17 would entitle [him] to relief." *Buzz Stew*, 124 Nev. at 226-227, 181 P.3d at 672. Based
18 upon the lack of factual allegations against NSHE and the Board of Regents in the First
19 Amended Complaint and in the cause of action for declaratory and injunctive relief,
20 Plaintiff French failed to state a claim against NSHE and the Board of Regents.
21 Accordingly, the First Amended Complaint as against NSHE and the Board of Regents
22 is dismissed.

23 **D. Defendant Gansert**

24 Plaintiff French asserts that the Nevada Constitution, Article 3, Section 1(1)
25 states that no one may serve any function in one branch while serving in another
26 branch. Defendants assert that Article 3, Section 1(1) is not as broad as Plaintiff
27 claims and the limitation on exercising any function applies only to those persons
28 charged with powers under the Nevada Constitution.

Article 3, Section 1(1) states:

1 "The powers of the Government of the State of Nevada shall be divided
2 into three separate departments, the Legislative, the Executive and the
3 Judicial; and no persons charged with the exercise of powers properly
4 belonging to one of these departments shall exercise any functions,
appertaining to either of the others..."

5 By its own terms, Article 3, Section 1(1) does not prohibit all persons in one branch from
6 exercising any function related to another branch. The limitation on exercising any
7 function only applies to those persons who are charged with the exercise of powers
8 given to the departments or branches of government. These departments are each
9 charged by other parts of the Constitution with certain duties and functions, and it is to
10 these constitutional duties and functions to which the prohibition in Article 3, Section
11 1(1) refers. *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P. 437, 439 (Nev. 1893).

12 Not every employee in a branch is charged with these constitutional powers,
13 duties and functions. Public employees, as distinguished from public officials or
14 officers, do not exercise functions or powers of the state. See, *State ex rel. Kendall v.*
15 *Cole*, 38 Nev. 215, 9, 148 P. 551, 553 (1915); *State ex rel. Mathews v. Murray*, 70
16 Nev. 116, 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder City*, 94 Nev.
17 735, 737, 587 P.2d 39, 41 (1978). Public officers are the only persons who exercise
18 the sovereign functions of state government. *Mathews*, 70 Nev. at 120-21, 258 P.2d
19 at 983. This is because public employees have not been invested by the State with
20 some portion of the powers, duties and functions of the government. *Mathews*, 70 Nev.
21 at 120-21, 258 P.2d at 983; *Kendall*, 38 Nev. at 229, 148 P. at 553 ("To be an officer,
22 one must be charged by law with duties involving the exercise of some part of the
sovereign power of the state").

23 The case law describing public officials is consistent with the statutory law. NRS
24 281.005(1) states that a public officer is a person elected or appointed to a position
25 which: (a) Is established by the Constitution or a statute of this State, or by a charter or
26 ordinance of a political subdivision of this State; and (b) involves the continuous
27 exercise, as part of the regular and permanent administration of the government, of a
public power, trust or duty. NRS 281.005(1).

28 Defendant French does not allege that Defendant Gansert's position is
established by the Nevada Constitution, by statute or is a public officer position.

1 Defendant Gansert's position as Executive Director, External Relations is not a public
2 office. There are only two groups of people in NSHE that have been determined to be
3 public officers: members of the Board of Regents and presidents of the universities,
4 state colleges and community colleges. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117
5 Nev. 195, 205, 18 P.3d 1042, 1048 (2001) ("the sovereign functions of higher education
6 repose in the Board of Regents, which has been constitutionally entrusted to control and
7 manage the University"); NRS 281A.182 (a president of a university, state college or
8 community college within the NSHE system is a public officer for purpose of Chapter
9 281A).

10 The Court may take judicial notice of facts generally known or capable of
11 verification from a reliable source, whether it is requested to or not. NRS 47.150(1). The
12 Court may take judicial notice of facts that are "[c]apable of accurate and ready
13 determination by resort to sources whose accuracy cannot reasonably be questioned,
14 so that the fact is not subject to reasonable dispute." See NRS 47.130(2)(b). The Court
15 may take judicial notice of information posted on government websites as it can be
16 "accurately and readily determined from sources whose accuracy cannot reasonably be
17 questioned". *FTC v. AMG Servs.*, 2014 U.S. Dist. LEXIS 10490, *45-46, n. 5 (Nev.
18 2014); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-999 (9th Cir. 2010) ("It is
19 appropriate to take judicial notice of this information, as it was made publicly available
20 by government entities").


21 The Court takes judicial notice of the University of Nevada, Reno organizational
22 chart because it is a public record available on the University's website, capable of
23 verification from a reliable source and the facts are not subject to reasonable dispute.
24 The organizational chart demonstrates that Defendant Gansert is not the president of
25 the University. The Court takes judicial notice of the current elected members of the
26 Board of Regents as posted on NSHE's website to demonstrate that Defendant Gansert
27 is not a current member. Defendant Gansert's position of Executive Director, External
28 Relations is not one that is charged with constitutional powers as described in Article 3,
Section 1(1).

There are no allegations that Defendant Gansert is charged with any power belonging to NSHE and there are no allegations that she exercised any functions relating to the Legislative Branch. The Court finds that the specific criteria of Article 3, Section 1(1) have not been met and there has been no violation under that provision in this matter.

Therefore, good cause appearing,

IT IS HEREBY ORDERED that the NSHE Defendants Motion to Dismiss is granted and Defendant Gansert's Motion to Dismiss is granted. Plaintiff French's First Amended Complaint is dismissed with prejudice.

Dated this 3 day of August, 2017.



James T. Russell
District Judge

CERTIFICATE OF MAILING

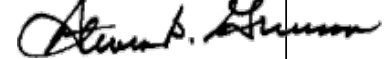
Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 3rd day of August, 2017, I deposited for mailing, postage paid, at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

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Melissa P. Barnard, Esq.
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Angela Jeffries
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OMD

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Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: I

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FILED BY
DEFENDANT BRITTNEY MILLER,
AND THE JOINDER THERETO
FILED BY DEFENDANTS OSVALDO
FUMO, HEIDI SEEVERS GANSERT,
AND DINA NEAL¹**

Date of Hearing: October 28, 2020

Time of Hearing: 9:00 a.m.

¹ On September 25, 2020, NPRI filed a Motion to Disqualify the Official Attorneys from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal, which hearing is pending. The outcome of that motion, however, does not substantively impact the challenged counsels' Joinder to Defendant Brittney Miller's Motion to Dismiss Complaint, as the Joinder merely adopts and incorporates by reference therein the identical arguments.

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna
13 L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Opposition
14 to the Motion to Dismiss Complaint filed on September 18, 2020 by Defendant, Brittney Miller
15 (“Defendant Miller”), and the Joinder incorporating the same arguments therein by reference filed on
16 September 24, 2020 by Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal (the
17 “Joinder Defendants”).

18 This Opposition is based on the following Memorandum of Points and Authorities, the
19 papers and pleadings on file, and any oral argument the Court permits at the hearing of this matter.

20 Dated this 2nd day of October, 2020.

21 **FOX ROTHSCHILD LLP**

22
23 By: /s/ Deanna L. Forbush

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Nevada Policy Research Institute

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I.**

4 **INTRODUCTION**

5 Three words are conspicuously absent from Defendant Miller's motion to dismiss:
6 Separation of Powers. When the time is appropriate, this entire case will boil down to one primary
7 determination by the factfinder and that is whether Defendant Miller's dual employment with the
8 Nevada State Legislature and the Clark County School District violates Nevada's Separation of
9 Powers doctrine, which expressly prohibits any one branch of government from encroaching on the
10 functions of another. This is without question an issue of significant public importance, and as much
11 is assumed by Defendant Miller in her motion. *See* Motion at 8:5-6. It is also a matter that can only
12 be determined upon a future review of the factual evidence, which is entirely precluded at this stage
13 of the litigation.

14 By way of the instant motion, Defendant Miller and the Joinder Defendants first argue that
15 NPRI lacks standing to sue because it cannot show a particularized injury and otherwise fails to meet
16 the public importance exception to the injury requirement, as set forth in *Schwartz v. Lopez*, 132
17 Nev. 732, 743, 382 P.3d 886, 894 (2016), because it is not challenging a legislative appropriation or
18 expenditure and it is otherwise unable to be considered an appropriate party. *See* Motion at 3:5-9.
19 The Court obviously cannot make any of these key factual determinations without the parties putting
20 forward evidence, which is fatal to a request for dismissal under all applicable legal standards.
21 Indeed, the motion is rife with factual assumptions made by Defendant Miller including, but not
22 limited to, that NPRI can show no specific injury for purposes of standing, that Defendant Miller
23 does not receive compensation by way of legislative appropriation or expenditure, and that another
24 party is in a better position than NPRI to bring the instant case, to name but a few. In fact, as shown
25 herein, NPRI not only qualifies for the public-importance standing exception under *Schwartz v.*
26 *Lopez*, it can articulate its own particularized injury, and, regardless, the constitutionality of the dual
27 employment of Defendant Miller and her co-Defendants is a factual matter that clearly requires
28 substantive adjudication.

1 Defendant Miller and the Joinder Defendants also argue, in the alternative, that NPRI's
2 Amended Complaint must fail because the State or a political subdivision is not also named as a
3 party defendant. As argued herein, the provisions of NRS Chapter 41 cited in the motion do not
4 apply in the instant case because the case is not based on any alleged act or omission in furtherance
5 of the Defendants' public duties or employment. On the contrary, Defendant Miller and her co-
6 Defendants were sued solely as a result of their individual actions to hold simultaneous positions
7 with the Nevada State Legislature and another branch of government, in violation of Article 3,
8 Section 1 of the Nevada Constitution, and not in any official capacity that would constitute a
9 circumstance under which an official government attorney would be permitted to provide a defense
10 or the State or political subdivision itself is required to be named.

11 In sum, because the Court must assume to be true all facts alleged in the Amended Complaint
12 when addressing the instant motion to dismiss, and NPRI has met its burden to set forth cognizable
13 legal theories based on those facts, the strenuous debate over the merits of NPRI's Amended
14 Complaint must be left for another day, and this case must be allowed to proceed forward in the
15 normal course.

16 II.

17 FACTUAL ALLEGATIONS

18 The facts properly at issue with regard to the motion are those set forth in NPRI's Amended
19 Complaint filed on July 28, 2020, a copy of which is attached hereto as **Exhibit 1** for ease of
20 reference. In the interest of judicial and party economy, NPRI will not repeat and reallege those
21 facts herein, except as necessary in support of the arguments that follow.

22 III.

23 STANDARD OF REVIEW

24 A. NRCP 12(b)(5) Dismissals Are Subject to Rigorous Review.

25 A district court's decision to dismiss a complaint for failure to state a claim will be subject to
26 a rigorous, de novo appellate review. See *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224,
27 227, 181 P.3d 670, 672 (2008). A motion brought pursuant to NRCP 12(b)(5) may, in fact, only be
28 granted if the claimant would be entitled to no relief under the facts set forth in the pleading. *Morris*

1 v. *Bank of America Nevada*, 110 Nev. 1274, 1277, 886 P.2d 454, 457 (1994) (citing *Edgar v.*
2 *Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)). Nevada remains a notice-pleading
3 jurisdiction, where all that is required is for a pleading provide fair notice to the adverse party of the
4 nature of the claims stated therein, and the basis or grounds for such claims. *Crucil v. Carson City*,
5 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Western States Constr. v. Michoff*, 108 Nev.
6 931, 936, 840 P.2d 1220, 1223 (1992). And, “notice pleading” simply requires a claimant to set
7 forth a general recitation of facts that support a cognizable legal theory. *See Liston v. Las Vegas*
8 *Metropolitan Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995) (citing *Swartz v. Adams*,
9 93 Nev. 240, 245, 563 P.2d 74, 77 (1977)). NPRI has clearly met this pleading standard.

10 **B. NRCP 12(b)(1) Dismissals Are Held to an Equally High Standard.**

11 The Supreme Court reviews dismissal of a complaint for lack of standing under the same
12 rigorous, de novo standard as dismissal for failure to state a claim upon which relief may be granted.
13 *See Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009).
14 Defendant Miller acknowledges this as well. *See* Motion at 4:1-5. With regard to legal standing
15 specifically, under Nevada law an action commenced by a real party in interest is not generally
16 subject to dismissal. *See, e.g., El Rancho, Inc. v. First Nat. Bank of Nev.*, 406 F.2d 1205, 1209 (9th
17 Cir. 1968). A real party in interest with standing to sue is one who possesses the right to enforce the
18 claim and has a significant interest in the litigation. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365,
19 368, 252 P.3d 206, 208 (2011) (citation omitted). And, as such, it is axiomatic that if a party has
20 standing to assert its claims, the court has subject matter jurisdiction to hear those claims. *See, e.g.,*
21 *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C.App. 110, 113, 574 S.E.2d 48, 51 (2002)
22 (holding defendants’ standing argument implicates Rule 12(b)(1) (citation omitted).

23 According to the standards stated above, Defendant Miller and the Joinder Defendants are
24 not entitled to dismissal of NPRI’s Amended Complaint, and their respective motion to dismiss and
25 joinder thereto should each be denied in its entirety.

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1 IV.

2 **ARGUMENT**

3 A. **The Public-Importance Exception Grants NPRI Standing to Raise the Instant**
4 **Constitutional Challenge.**

5 As the Supreme Court held in *Schwartz v. Lopez*, cases of significant public importance such
6 as the instant matter enjoy an exception to the basic standing requirement of showing a particularized
7 injury. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. Defendant Miller and the Joinder Defendants
8 would argue that this recent holding creates only a “very narrow” exception, to which NPRI is not
9 entitled. *See* Motion at 3:8. On the contrary, although the exception is identified as being narrow,
10 the Supreme Court ultimately set forth three very clear criteria for the application of the exception,
11 each of which applies to NPRI in the instant case.

12 **I. Significant Public Importance.**

13 First, for the public-importance standing exception to apply, the case must involve an issue of
14 significant public importance. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (citation omitted). The
15 motion purposefully glosses over the first criteria by stating that, even if it is assumed to apply,
16 NPRI fails to meet the other two criteria. *See* Motion at 8:5-6. NPRI addresses the obvious
17 applicability of the other two below. The applicability—and significant importance—of the first
18 criteria, however, cannot be overstated.

19 As the Supreme Court articulated in *Commission on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d
20 1098 (2009), “states are not required to structure their governments to incorporate the separation of
21 powers doctrine (citation omitted), but Nevada has embraced this doctrine and incorporated it into its
22 constitution.” *Hardy*, 125 Nev. at 291, 212 P.3d at 1103. The Court further found that “[t]he
23 purpose of the separation of powers doctrine is to prevent one branch of government from
24 encroaching on the powers of another branch.” *Id.* (citation omitted). Finally, the Court articulated
25 the true importance of the separation of powers doctrine in Nevada when it found that “[u]nlike the
26 United States Constitution, which expresses separation of powers through the establishment of the
27 three branches of government (citation omitted), Nevada’s Constitution goes one step further; it
28 contains an express provision prohibiting any one branch of government from impinging on the

functions of another.” *Id.* (citing *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004) (noting that Nevada’s separation of powers provision is contained in Article 3, Section 1 of the Nevada Constitution and that separation of powers “works by preventing the accumulation of power in any one branch of government”))).

To the extent NPRI has alleged herein that Defendant Miller and her co-Defendants are violating Nevada’s Separation of Powers doctrine, i.e. the express constitutional provision prohibiting any one branch of government from encroaching on the other, by the engagement in dual employment with Nevada’s Legislature and another branch of government, the significant public importance of the factfinder making such a determination and imposing the appropriate remedy could not be more clear.

2. Legislative Expenditure or Appropriation.

Second, the public-importance standing exception requires that a case involve a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (citation omitted). The motion argues for denial of the application of the second criteria in the instant case by claiming that NPRI’s Amended Complaint focuses only on Defendant Miller’s salary as an employee of the Clark County School District. *See* Motion at 8:14-16; 9:17-19. This assertion is patently false.

The motion cites to certain paragraphs in the Amended Complaint for the contention that NPRI claims only that “taxpayer monies will be paid to Defendants” but does not “allege or challenge of [sic] *legislative appropriation or expenditure* in this action.” *See* Motion at 8:11-14 (emphasis in original). In truth, the actual language in each operative Amended Complaint paragraph reads in pertinent part as follows:

5. If allowed to proceed with the dual employment stated herein, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1....

....

28. Without this Court’s intervention, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1, and irrevocable harm and irreparable harm will occur to the rights provided under this provision of the Nevada Constitution.

1 See Amended Complaint at 3:11-13, 6:13-16 (emphasis added). NPRI trusts Defendant Miller and
2 the Joinder Defendants were not intentionally seeking to mislead the Court and that their exclusion
3 of the allegation of legislative expenditures or appropriations being made in violation of a specific
4 provision of the Nevada Constitution, as required by *Schwartz v. Lopez*, is merely a drafting
5 oversight. That said, NPRI obviously made the necessary allegation, and this Court may take
6 judicial notice of the fact that Legislators are compensated by Legislative Department expenditure.

7 Specifically, Legislators are paid a minimum daily salary of \$130 for the first 60 days of a
8 regular session and for up to 20 days of a special session. NRS 218A.630(1)(a) and (b); *see also*
9 https://www.leg.state.nv.us/General/AboutLeg/General_Short.html (last visited Sept. 29, 2020).
10 Legislators also receive a per diem allowance, paid each day the Legislature is in session, which is
11 intended to cover, among other things, lodging, meals and incidental expenses. NRS 218A.635, *et*
12 *seq.* While in session, Legislators are also entitled to allowances for communications, postage,
13 stationery and travel. *Id.* And, while the Legislature is not in session, each Senator and Assembly
14 member is entitled to receive a salary and the per diem allowance and travel expenses for each day
15 of attendance at a conference, training session, meeting, seminar, or other gathering at which the
16 Legislator officially represents the State or its Legislature. *Id.*

17 To the extent NPRI has alleged herein that Defendant Miller and her co-Defendants are
18 compensated as a result of legislative expenditure or appropriation and that said compensation
19 violates Article 3, Section 1 of the Nevada Constitution, the second factor for application of the
20 public-importance standing exception is also clearly satisfied.

21 **3. Appropriate Party.**

22 Finally, for NPRI to be granted standing under the public-importance exception, it must
23 show that there is no one better positioned to bring the instant action and that it is fully capable of
24 advocating its position in court. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894-95 (citation omitted).
25 The pleading on file, coupled with the instant briefing, should more than satisfy the Court regarding
26 NPRI's advocacy capabilities. The motion itself focuses only NPRI's ability to bring the instant
27 case and, in so doing, primarily restates its arguments that NPRI cannot show a particularized injury
28 to meet the basic requirement for standing. *See* Motion at 6:27-7:1, 11:6-7. NPRI addresses the

1 injury issue below, for purposes of completing the record, but respectfully asserts it is not otherwise
2 an issue germane to the third prong of the public-interest exception analysis.

3 More problematic for Defendant Miller and the Joinder Defendants, however, is the
4 misplaced reliance in their argument on two prior dual employment challenges brought at the behest
5 of NPRI, i.e. *Pojunis v. Denis*, First Judicial District Court Case No. 11 OC 00394 (filed November
6 30, 2011), and *French v. Gansert*, First Judicial District Court Case No. 17 OC 00231B (filed May
7 1, 2017). See Motion at 4:8-5:22. The discussion in the motion of these cases, in fact, makes the
8 argument for NPRI that it is an appropriate party. First and foremost, as these prior cases illustrate,
9 NPRI is the only entity to challenge Legislators engaging in dual employment either directly or
10 indirectly. Defendant Miller and the Joinder Defendants point to no other such litigation and,
11 indeed, none exists. Additionally, the prior indirect litigation efforts undertaken by NPRI, through
12 individual plaintiffs alleging an interest in the government position held by a specific Legislator,
13 never received substantive adjudication. In *Pojunis v. Denis*, the district court dismissed the matter
14 as moot upon the resignation from government employment by Defendant Denis. And, in *French v.*
15 *Gansert*, the district court dismissed the matter pursuant to NRCP 19, having determined that joinder
16 of other legislators engaging in dual employment was both necessary and unable to be accomplished
17 by the individual plaintiff. It is not reasonably in dispute therefore that there is no one else in a
18 better position than NPRI to bring this type of action and that NPRI is fully capable of advocating its
19 position in the instant case.

20 In the alternative, Defendant Miller and the Joinder Defendants cite *Secretary of State v.*
21 *Nevada State Legislature*, 120 Nev. at 473, 93 P.3d at 757, to advance the argument that the only
22 “‘appropriate’ parties to cases claiming dual service of legislators in violation of the state’s
23 constitutional separation of powers clause” are those individuals seeking the government positions
24 held by such legislators. See Motion at 10:12-15. In light of the application of NRCP 19 in *French*
25 *v. Gansert*, wherein the district court mandated joinder of all parties possibly subject to application
26 of the Separation of Powers doctrine, NPRI respectfully requests this Court employ its prudential
27 discretion to expand the application of the public-interest exception and permit NPRI to proceed
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1 where, as here, it has named all similarly situated Defendants.² This is necessary given the sheer
2 number of Defendants named herein, which renders implausible if not impossible adherence to the
3 requirement to procure individual plaintiffs capable of seeking the government positions held by
4 each Legislator. This is also necessary where the Supreme Court speculates in *Secretary of State*,
5 120 Nev. at 473, 93 P.3d at 757, that the Nevada Attorney General might pursue a quo warranto
6 action as a means of challenging dual employment. The Attorney General, however, is a political
7 figure unlikely to take on this bipartisan problem at the risk to members of his own party, and, in
8 fact, no Attorney General has ever chosen to do so.

9 **B. NPRI's Organizational and Associational Injuries-in-Fact Further Confer**
10 **Standing to Raise the Instant Constitutional Challenge.**

11 The motion also cites the holding in *Schwartz v. Lopez*, 132 Nev. at 743, 382 P.3d at 894, for
12 the general standing requirement of an injury-in-fact, which it claims NPRI lacks. *See* Motion at
13 6:19-7:4. On the contrary, although NPRI chose to assert standing based on the public-importance
14 exception in its Amended Complaint, it is certainly not preclusive to NPRI also asserting standing
15 based on its own organizational and associational injuries-in-fact.

16 For nearly thirty years, NPRI has been involved in litigation and other advocacy in support of
17 its missions to defend transparency in government and challenge wasteful government spending. To
18 advance these missions, NPRI uses a combination of research, litigation, advocacy, and public
19 education. NPRI's research regularly includes filing state public records requests and reviewing the
20 records obtained. By publicizing the results of its research, NPRI keeps the public informed about
21 government officials, and in turn, deters violations of law.

22 In the instant case, Defendants' individual and collective violations of the Separation of
23 Powers doctrine set forth in Article 3, Section 1 of the Nevada Constitution have caused NPRI to
24 divert and expend its valuable resources specifically to challenge those violations, significantly
25 impairing its ability to accomplish its stated missions. NPRI has had to challenge Defendants'

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27 ² The motion argues that "NPRI was under no obligation to sue thirteen sitting legislators all at once." *See* Motion at
28 10:18-19. On this point, NPRI fully concurs. But NPRI also remains cognizant of the dismissal occasioned by the
application of NRCP 19 in *French v. Gansert* and, without concession, addresses this argument to make a complete
record.

1 violations because they are particularly harmful to NPRI due to its status as a nonprofit, nonpartisan
2 organization with its unique resources, board of directors, and missions. Further, the time and
3 resources NPRI has used to challenge Defendants' violations of the Separation of Powers doctrine
4 were diverted from other legal projects and activities that NPRI would have otherwise engaged.
5 Except for the expenses involved in preparing for this instant litigation, NPRI would have suffered
6 the harm described even if it had not filed this case. In addition, NPRI has a specific interest in
7 challenging Defendants' violations of the Separation of Powers doctrine because a number of its
8 supporters are duly qualified, hold the job requirements for, and earnestly seek the paid positions
9 with the state or local government held by Defendants. Defendants' constitutional violations,
10 therefore, create immediate irreparable harm to the legally protectable interests of its supporters.

11 For all of these reasons, NPRI respectfully asserts it is entitled to pursue the instant case to its
12 conclusion, regardless of whether the Court determines it is entitled to utilize the public-importance
13 exception to obtain standing.

14 **C. NPRI's Amended Complaint Does Not Require Compliance With the Provisions**
15 **of NRS Chapter 41.**

16 As a final matter, the motion argues that NPRI's Amended Complaint fails because it does
17 not conform to the requirements of NRS 41.0337(2) to name the State or a political subdivision as a
18 party defendant in certain actions brought against employees of the State. *See* Motion at 11:10-12.
19 This argument is equally unavailing where NPRI has sued each Defendant individually, solely as a
20 result of their individual actions to hold simultaneous positions with the Nevada State Legislature
21 and another branch of government in violation of Article 3, Section 1 of the Nevada Constitution,
22 and not in any official capacity. And, as such, the provision of NRS Chapter 41 cited by Defendant
23 Miller and the Joinder Defendants simply does not apply.

24 Indeed, in a substantially similar situation, the Supreme Court ruled as recently as June 2020
25 that certain State Legislators were not entitled to representation by Legislative Counsel Bureau
26 attorneys, and thus there was no conflict of interest in their lawsuit against other State Legislators,
27 because their action in challenging a piece of legislation could not be considered acting on the
28 Legislature's behalf. *Cf. State of Nevada ex rel. Cannizzaro v. First Jud. Dist. Ct.*, 136 Nev. Adv.

1 Op. 34 (June 26, 2020). As this decision illustrates, the provisions of NRS Chapter 41 may only
2 apply where Defendants are alleged to have been acting in their official capacities when sued. *Id.* at
3 *3.

4 V.

5 **CONCLUSION**

6 NPRI adequately pled cognizable claims for declaratory and injunctive relief, Defendant
7 Miller and the Joinder Defendants are indisputably on notice of the nature of those claims, and NPRI
8 should now be permitted to proceed with its substantive action in the normal course. NPRI
9 respectfully requests this Honorable Court deny Defendant Miller's Motion to Dismiss Complaint,
10 and the Joinder Defendants' Joinder thereto, on all asserted grounds.

11 Dated this 2nd day of October, 2020.

12 **FOX ROTHSCHILD LLP**

13
14 By: /s/ Deanna L. Forbush

15 DEANNA L. FORBUSH

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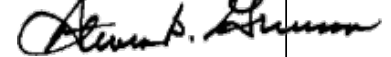
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Exhibit 1



1 **ACOM**
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13 Attorneys for Plaintiff
14 Nevada Policy Research Institute

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 NEVADA POLICY RESEARCH INSTITUTE, a
13 Nevada domestic nonprofit corporation,

14 Plaintiff,

15 vs.

16 NICOLE J. CANNIZZARO, an individual engaging
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19 DOUGLASS-BOONE, an individual engaging in
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25 an individual engaging in dual employment with the
26 Nevada State Assembly and University of Nevada,
27 Las Vegas; HEIDI SEEVERS GANSERT, an
28 individual engaging in dual employment with the
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Case No.: A-20-817757-C
Dept. No.: II

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

[Exemption from Arbitration Based on
Equitable Relief Requested]

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

NEVADA POLICY RESEARCH INSTITUTE (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby alleges and complains against NICOLE J. CANNIZZARO, KASINA DOUGLASS-BOONE, JASON FRIERSON, OSVALDO FUMO, HEIDI SEEVERS GANSERT, GLEN LEAVITT, BRITTNEY MILLER, DINA NEAL, JAMES OHRENSCHALL, MELANIE SCHEIBLE, TERESA BENITEZ-THOMPSON, JILL TOLLES, and SELINA TORRES (collectively herein “Defendants”), as follows:

FACTS COMMON TO ALL CLAIMS

1. NPRI files this Complaint for Declaratory and Injunctive Relief in the public interest to address the ongoing constitutional violations by Defendants, and each of them, for engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments.

2. The Nevada Constitution reads in relevant part:

The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislature, the Executive and the Judicial; and no person 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. Nevada Const. Art. 3, §1, ¶1.

3. The rationale underlying the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 can be traced to the desires of the constitutional framers to encourage and preserve the independence and integrity of the actions and decisions of individual members of the Nevada State Legislature and to guard against conflicts of interest, concentration of powers, and dilution of the separation of powers.

4. Defendants' dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments expressly violates the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and undermines the ethics of their legislative service by creating conflicts, concentrating power, and diluting the separation of powers.

5. If allowed to proceed with the dual employment stated herein, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1. NPRI presents this action, pursuant to NRS 30.030, *et seq.*, and NRS 33.010, *et seq.*, respectively, and can and will fully advocate for: (1) the Court's declaration that it is unconstitutional for Defendants to engage in the dual employment stated herein, and (2) the Court's injunction to prevent Defendants from continuing to engage in the unconstitutional dual employment stated herein.

PARTIES

6. NPRI is a public interest nonprofit, nonpartisan corporation organized under the laws of the State of Nevada whose primary missions are to conduct public policy research and advocate for policies that promote transparency, accountability, and efficiency in government.

7. At all relevant times, Defendant Nicole J. Cannizzaro has simultaneously held the elected office of Nevada State Senator and the paid government position of Chief Deputy District Attorney for the County of Clark, State of Nevada.

8. At all relevant times, Defendant Kasina Douglass-Boone has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Social Worker Mental Health Specialist for the Clark County School District.

1 9. At all relevant times, Defendant Jason Frierson has simultaneously held the elected
2 office of Nevada State Assemblyperson and the paid government position of Assistant Public
3 Defender for the County of Clark, State of Nevada.

4 10. At all relevant times, Defendant Osvaldo Fumo has simultaneously held the elected
5 office of Nevada State Assemblyperson and the paid government position of Adjunct Instructor for
6 the University of Nevada, Las Vegas.

7 11. At all relevant times, Defendant Heidi Seevers Gansert has simultaneously held the
8 elected office of Nevada State Senator and the paid government position of Executive Director,
9 External Relations for the University of Nevada, Reno.

10 12. At all relevant times, Defendant Glen Leavitt has simultaneously held the elected
11 office of Nevada State Assemblyperson and the paid government position of Public Affairs Analyst
12 for the Regional Transportation Commission.

13 13. At all relevant times, Defendant Brittney Miller has simultaneously held the elected
14 office of Nevada State Assemblyperson and the paid government position of Teacher for the Clark
15 County School District.

16 14. At all relevant times, Defendant Dina Neal has simultaneously held the elected office
17 of Nevada State Assemblyperson and the paid government position of Adjunct Professor for the
18 Nevada State College.

19 15. At all relevant times, Defendant James Ohrenschall has simultaneously held the
20 elected office of Nevada State Senator and the paid government position of Deputy Public Defender
21 for the County of Clark, State of Nevada.

22 16. At all relevant times, Defendant Melanie Scheible has simultaneously held the elected
23 office of Nevada State Senator and the paid government position of Deputy District Attorney for the
24 County of Clark, State of Nevada.

25 17. At all relevant times, Defendant Teresa Benitez-Thompson has simultaneously held
26 the elected office of Nevada State Assemblyperson and the paid government position of Adjunct
27 Professor for the University of Nevada, Reno.

1 18. At all relevant times, Defendant Jill Tolles has simultaneously held the elected office
2 of Nevada State Assemblyperson and the paid government position of Adjunct Professor for the
3 University of Nevada, Reno.

4 19. At all relevant times, Defendant Selena Torres has simultaneously held the elected
5 office of Nevada State Assemblyperson and the paid government position of Teacher for the Clark
6 County School District.

7 **JURIDICTION AND VENUE**

8 20. The Court has jurisdiction over all parties, where Plaintiff conducts business in the
9 County of Clark, State of Nevada, and all Defendants either reside in or carry out the duties of their
10 elected offices throughout the State of Nevada, including in the County of Clark.

11 21. Venue is appropriate because the events giving rise to Plaintiff's causes of action
12 have occurred, and continue to occur, in the County of Clark, State of Nevada.

13 **FIRST CAUSE OF ACTION**
14 **Violation of Separation of Powers**
15 **(Declaratory Relief)**

16 22. Plaintiff realleges and incorporates by reference herein each and every foregoing
17 paragraph of this Complaint as if set forth in full.

18 23. There is an actual controversy between Plaintiff, acting in the public interest, and the
19 Defendants and each of them, as to the meaning of the Separation of Powers requirement of Nevada
20 Const. Art. 3, §1, ¶1 and its application to Defendants and their conduct. Plaintiff has taken the
21 position that Defendants are persons simultaneously holding elected offices in the Nevada State
22 Legislature and paid positions with Nevada State or local governments in violation of the Separation
23 of Powers requirement of Nevada Const. Art. 3, §1, ¶1. Upon information and belief, Defendants
24 disagree with Plaintiff's position stated above.

25 24. Plaintiff seeks relief pursuant to NRS 30.010, *et seq.*, in the form of a declaration that
26 Defendants simultaneously holding elected offices in the Nevada State Legislature and paid
27 positions with Nevada State or local governments violates the Separation of Powers requirement of
28 Nevada Const. Art. 3, §1, ¶1. A declaration resolving the actual controversy between Plaintiff and

1 Defendants will serve a useful purpose in settling the legal issues in this action and offering relief
2 from uncertainty for all parties to this action.

3 25. It was necessary for Plaintiff to retain the services of an attorney to bring this cause
4 of action, and it should be properly compensated therefore.

5 **SECOND CAUSE OF ACTION**
6 **Violation of Separation of Powers**
7 **(Injunctive Relief)**

8 26. Plaintiff realleges and incorporates by reference herein each and every foregoing
9 paragraph of this Complaint as if set forth in full.

10 27. Defendants are persons simultaneously holding elected offices in the Nevada State
11 Legislature and paid positions with Nevada State or local governments in violation of the Separation
12 of Powers requirement of Nevada Const. Art. 3, §1, ¶1.

13 28. Without this Court's intervention, legislative expenditures or appropriations and
14 taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1, and
15 irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
16 Constitution.

17 29. There exists no adequate remedy at law to prevent the constitutional violation caused
18 by Defendants simultaneously holding elected offices in the Nevada State Legislature and paid
19 positions with Nevada State or local governments in violation of the Separation of Powers
20 requirement of Nevada Const. Art. 3, §1, ¶1.

21 30. Plaintiff, acting in the public interest, is entitled to injunctive relief to stop and
22 prevent the Separation of Powers violations by Defendants stated herein. The Court has the power
23 to grant such relief, pursuant to its inherent ability to grant equitable relief and the provisions of
24 NRS 33.010, *et seq.*

25 31. It was necessary for Plaintiff to retain the services of an attorney to bring this cause
26 of action, and it should be properly compensated therefore.

27 ///

28 ///

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

3 1. For a declaration that Defendants simultaneously holding elected offices in the
4 Nevada State Legislature and paid positions with Nevada State or local governments violates the
5 Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1;

6 2. For an injunction against Defendants prohibiting each and every one of them from
7 continuing to simultaneously hold elected offices in the Nevada State Legislature and paid positions
8 with Nevada State or local governments in violation of the Separation of Powers requirement of
9 Nevada Const. Art. 3, §1, ¶1;

10 3. For reasonable attorneys' fees and costs; and

11 4. For such other and further relief as the Court may deem just and proper.

12 Dated this 28th day of July, 2020.

13 **FOX ROTHSCHILD LLP**

14
15 By: /s/ Deanna L. Forbush

16 DEANNA L. FORBUSH, ESQ.
17 Nevada Bar No. 6646
18 COLLEEN E. MCCARTY, ESQ.
19 Nevada Bar No. 13186
20 1980 Festival Plaza Dr., Suite 700
21 Las Vegas, Nevada 89135
22 Telephone: (702) 262-6899
23 Attorneys for Plaintiff
24 Nevada Policy Research Institute
25
26
27
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE,

Appellant,

vs.

NICOLE J. CANNIZZARO, an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; JASON FRIERSON, an individual engaging in dual employment with the Nevada State Assembly and Clark County Public Defender; HEIDI SEEVERS GANSERT, an individual engaging in dual employment with the Nevada State Senate and University of Nevada, Reno; GLEN LEAVITT, an individual engaging in dual employment with the Nevada State Assembly and Regional Transportation Commission; BRITTNEY MILLER, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; DINA NEAL, an individual engagement in dual employment with the Nevada State Senate and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defendant; MELANIE SCHEIBLE, an individual engagement in dual employment with the Nevada State Senate and Clark County District Attorney; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno;

Supreme Court Case No.: 82341

[District Court Case No.:
A-20-817757-C]

and SELENA TORRES, an individual
engaging in dual employment with the
Nevada State Assembly and Clark County
School District,

Respondents,

and Legislature of the State of Nevada,

Intervenor-Respondent.

JOINT APPENDIX VOLUME 2 of 7

Appeal from the Eighth Judicial District Court,
Orders Granting Motions to Dismiss and Joinders Thereto;
Order Granting Motion to Intervene; and Order Denying Motion to Disqualify
The Honorable Jim Crockett (Ret.), District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 2021, I caused the foregoing to be served on all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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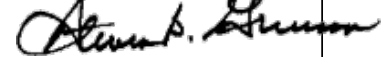
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*Attorneys for Defendants
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the Nevada
State Senate and Clark County District Attorney;
KASINA DOUGLAS-BOONE, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County School
District; JASON FRIERSON, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County Public
Defender; OSVALDO FUMO, an individual
engaging in dual employment with the Nevada
State Assembly and University of Nevada, Las

Case No.: A-20-817757-C

Dept. No.: 1

**NSHE DEFENDANTS FUMO,
GANSERT AND NEAL'S
NOTICE OF NON-OPPOSITION
TO NEVADA LEGISLATURE'S
MOTION TO INTERVENE AS
DEFENDANT**

1 Vegas; HEIDI SEEVERS GANSERT, an
2 individual engaging in dual employment with
3 the Nevada State Senate and University of
4 Nevada Reno; GLEN LEAVITT, an individual
5 engaging in dual employment with the Nevada
6 State Assembly and Regional Transportation
7 Commission; BRITTNEY MILLER, an
8 individual engaging in dual employment with
9 the Nevada State Assembly and Clark County
10 School District; DINA NEAL, an individual
11 engaging in dual employment with the Nevada
12 State Assembly and Nevada State College;
13 JAMES OHRENSCHALL, an individual
14 engaging in dual employment with the Nevada
15 State Senate and Clark County Public Defender;
16 MELANIE SCHEIBLE, an individual engaging
17 in dual employment with the Nevada State
18 Senate and Clark County District Attorney;
19 TERESA BENITEZ-THOMPSON, an
20 individual engaging in dual employment with
21 the Nevada State Assembly and University of
22 Nevada, Reno; JILL TOLLES, an individual
23 engaging in dual employment with the Nevada
24 State Assembly and University of Nevada,
25 Reno; and SELENA TORRES, an individual
26 engaging in dual employment with the Nevada
27 State Assembly and Clark County School
28 District,

Defendants.

NSHE Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal hereby give notice that they do not oppose the Nevada Legislature's Motion to Intervene as Defendant filed herein on September 30, 2020.

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AFFIRMATION

The undersigned hereby affirm that this document does not contain “personal information about any person” as defined in NRS 239B.030 and 603A.040.

Respectfully submitted this 2ND day of October, 2020.

/s/ Berna L. Rhodes-Ford
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*Attorneys for Defendants
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State
3 College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party
4 to the within cause. Pursuant to NRCP 5, I further certify that on October 2, 2020, I caused the
5 following document, **NSHE DEFENDANTS FUMO, GANSERT AND NEAL'S**
6 **NOTICE OF NON-OPPOSITION TO NEVADA LEGISLATURE'S MOTION TO**
7 **INTERVENE AS DEFENDANT**, to be served as follows:

8 ☒

9 **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to
10 be electronically served through the Eighth Judicial District Court's electronic filing system,
11 with the date and time of the electronic service substituted for the date and place of deposit in the
12 mail to the attorneys listed below at the address indicated below.

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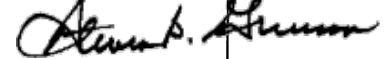
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20 ☐

21 **BY MAIL** I caused such envelope(s) with first class postage thereon fully prepaid to be
22 placed in the U.S. Mail in Henderson, Nevada.

23
24
25 *Nita Armendariz*
26 An employee of the Office of General Counsel
27 Nevada State College
28



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10 *Attorney for Defendant,*
11 *Jason Frierson*

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 NEVADA POLICY RESEARCH
15 INSTITUTE, a Nevada domestic nonprofit
16 corporation,

17 Plaintiff,

18 vs.

19 NICOLE J. CANNIZZARO, an individual
20 engaging in dual employment with the
21 Nevada State Senate and Clark County
22 District Attorney; KASINA
23 DOUGLASSBOONE,
24 an individual engaging in dual
25 employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA

CASE NO: A-20-817757-C

DEPT. NO: 18

**DEFENDANT JASON FRIERSON'S
MOTION TO DISMISS**

HEARING REQUESTED

1 NEAL, an individual engaging in dual
2 employment with the Nevada State Assembly
3 and Nevada State College; JAMES
4 OHRENSCHALL, an individual engaging in
5 dual employment with the Nevada State
6 Senate and Clark County Public Defender;
7 MELANIE SCHEIBLE an individual
8 engaging in dual employment with the
9 Nevada State Senate and Clark County
10 District Attorney; TERESA
11 BENITEZTHOMPSON,
12 an individual engaging in dual
13 employment with the Nevada State Assembly
14 and University of Nevada, Reno; JILL
15 TOLLES, an individual engaging in dual
16 employment with the Nevada State Assembly
17 and University of Nevada, Reno; and
18 SELENA TORRES, an individual engaging
19 in dual employment with the Nevada State
20 Assembly and Clark County School District,

21
22 Defendants.

23 Defendant JASON FRIERSON (hereinafter "Speaker Frierson") by and through his
24 counsel of record, WILEY PETERSEN, hereby moves this Court to dismiss the Amended
25 Complaint for Declaratory and Injunctive Relief, filed by Plaintiff Nevada Policy Research
26 Institute ("NPRI"), pursuant to NRCP 12(b)(5) and NRCP 12(b)(6).

27 DATED this 5 day of October, 2020.

28
WILEY PETERSEN

JONATHAN D. BLUM, ESQ.
Nevada Bar No. 09515
WILEY PETERSEN
1050 Indigo Dr., Suite 200B
Las Vegas, Nevada 89145
*Attorney for Defendant,
Jason Frierson*

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I. INTRODUCTION

Jason Frierson is the current Speaker of the Nevada Assembly. He also holds the position of Assistant Public Defender for Clark County. Plaintiff's most recent attempt to invoke the Separation of Powers doctrine of Article 3, Section 1 of the Nevada Constitution fails for at least four distinct reasons. As such, the Amended Complaint should be dismissed.

The issue presented in the Amended Complaint has been asserted in numerous lawsuits, both modern and historic, in Nevada and throughout the country. As set forth below, and in other motions to dismiss currently pending in this case, the law on this subject makes clear that this latest attempt to preclude the citizen legislature as it has historically operated should fail as well. Plaintiff's position, taken to the logical conclusion, would preclude someone employed as a maintenance worker in the Clark County School District from eligibility to serve in our citizen legislature. While the concept of separation of powers is fundamental to the government of this country and this state, such a result is not the intent of the provision, nor has it been interpreted as such in the past.

Speaker Frierson will separately file formal joinders to the Motions to Dismiss filed already in this case. The first such motion was filed by Defendant Miller on September 18, 2020 (the "First MTD") and the second was filed by Defendants Fumo, Seever Gansert, and Neal on September 28, 2020¹ (the "Second MTD"). Some of the arguments, however, are referred to below, rather than quoting at length.

Plaintiff asserts two claims, and seeks two remedies:

1. For a declaration that Defendants simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments violates the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1; and,
2. For an injunction against Defendants prohibiting each and every one of them from continuing to simultaneously hold elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments in violation of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1;
See Amended Complaint, p. 7.

1 If such relief is granted, Speaker Frierson would have to decide whether he wants to continue his
2 long history of public service, previously in the District Attorney's office and currently in the
3 Public Defender's Office, or continue to serve his ninth year in the Nevada Legislature. Under
4 the Nevada Constitution, and as set forth below, he should not face this decision.

5 **II. LEGAL STANDARD**

6 Pursuant to NRCP 12(b)(5), dismissal of a claim is appropriate if it appears with certainty
7 that a plaintiff can prove no set of facts which would entitle him or her to relief under the claim.
8 *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985). In making this determination,
9 all factual allegations pled must be accepted as true. *Capital Mortgage Holding v. Hahn*, 101
10 Nev. 314, 705 P.2d 126 (1985). However, a "court may take into account matters of public
11 record, orders, items present in the record of the case, and any exhibits attached to the complaint
12 when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted."
13 *Brelian v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). It is
14 requisite that the court construe the pleading liberally and draw every fair inference in favor of
15 the non-moving party. *Squires v. Sierra Nev. Educ. Found.*, 107 Nev. 902, 905, 823 P.2d 256,
16 257 (1991). The sole issue presented before the court is whether a complaint states a claim upon
17 which relief may be granted. *Merluzzi v. Larson*, 96 Nev. 409, 411, 610 P.2d 739, 741 (1980),
18 *overruled on other grounds by Smith v. Clough*, 106 Nev. 568, 796 P.2d 592 (1990).

19 The test for determining whether the allegations are sufficient to assert a claim for relief
20 is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and
21 the relief requested. *See Riviera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984). A
22 lack of standing is grounds for dismissal under NRCP 12(b)(1). *Shoen v. SAC Holding Corp.*,
23 137 P.3d 1171, 122 Nev. 621 (2006). "A shareholder's failure to sufficiently plead compliance
24 with the demand requirement deprives the shareholder of standing and justifies dismissal of the
25 complaint for failure to state a claim upon which relief may be granted." (reversed in part on
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27 ¹ This motion was initially filed on September 24, 2020, and then refiled.
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1 other grounds). Finally, with regard to the failure to join required parties, it can be raised by a
2 motion to dismiss under NRCP 12(b)(6), failure to join a party under Rule 19. *Rose, LLC u.*
3 *Treasure Island, LLC*, 135 Nev. 145, 155, 445 P.3d 860, 868 (Ct. App. 2019).

4 As will be demonstrated below, Plaintiff's Complaint fails as a matter of law as it fails to
5 state a claim upon which relief can be granted and thus requires dismissal under NRCP 12(b)(5)
6 and 12(b)(6).

7 III. ARGUMENT

8 A. PLAINTIFF LACKS STANDING

9 As articulated at length in the First MTD, Plaintiff lacks standing to assert its claims. The
10 arguments set forth in that motion are incorporated herein by reference. Specifically, Plaintiff
11 does not have standing as it cannot show actual or threatened injury in fact and cannot satisfy the
12 *Schwartz* exception regarding issues of significant public importance. Further, Plaintiff failed to
13 name the appropriate political subdivision(s) as required under NRS 41.0337. Thus, the
14 Amended Complaint should be dismissed pursuant the NRCP 12(b)(1) for lack of subject matter
15 jurisdiction.

16 B. THE NEVADA CONSTITUTION'S SEPARATION OF POWERS CLAUSE IS NOT 17 APPLICABLE TO LOCAL GOVERNMENT

18 NPRI's prior attempts to invoke the separation of powers doctrine against legislators is
19 well summarized in the First MTD and the Second MTD. A great deal of litigation has ensued
20 regarding this matter over many years. There are several key points from such prior cases which
21 support dismissal.

22 1. Nevada's Separation of Powers Doctrine does not Apply to Local Government 23 Employees

24 The entire basis of the Amended Complaint rests on the following provision from the
25 Nevada Constitution:

26 Section 1. **Three separate departments; separation of powers;** legislative
27 review of administrative regulations.
28

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

7 Nev. Const. Art. 3, §1. (emphasis added).

8 As discussed below, the Government of the State of Nevada is separate and distinct from the
9 government of Clark County, as well as any local government in the state. This language is
10 deliberate and important. By using “Government of the State of Nevada”, and not any of the
11 more inclusive terms it could have chosen, the Framers of the Constitution expressed a clear
12 intent that this provision applies only to the three departments of the state government it lists
13 thereafter. Neither Clark County, nor any of its departments, are part of these three departments

14 The Nevada Supreme Court recently stated, “[T]he language of the separation of powers
15 provision in the Constitution does not extend any protection to political subdivisions.”

16 *City of Fernley v. State*, 132 Nev. 32, 43 n.6, 366 P.3d 699, 707 (2016). Prior cases are
17 consistent with this finding. The Nevada Supreme Court in *DR Partners*, addressed in detail in
18 the Second MTD, states, “Neither state-owned institutions, **nor state departments**, nor public
19 corporations are synonymous with political subdivisions of the state. *Univ. & Cmty. Coll. Sys. v.*
20 *DR Partners*, 117 Nev. 195, 203-04 (2001) (emphasis added). As such, these distinct bodies
21 must not be conflated. The Nevada Supreme Court has expressed this on numerous occasions
22 applied to various subdivisions.

23 [M]unicipal courts are primarily city, not state entities. Although municipal courts
24 are created by the legislature pursuant to authority vested in that body by the
25 Nevada Constitution, these courts are separate branches of their respective city
26 governments. ... the municipal courts of this state are separate branches of their
27 respective municipal governments. ... they are not state governmental entities
28 *Nunez v. City of N. Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000)

29 The same can be said of County governments and their respective departments. See also *City of*
30 *Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 362 n.5 (2013) (“While municipal courts are included

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1 within the state constitutional judicial system, they are nonetheless primarily city entities, rather
2 than an extension of the state.").

3 As such, because political subdivisions are not part of one of the three departments of
4 state government, their local officers² generally are not considered to be state officers who are
5 subject to the separation-of-powers provision. *See State ex rel. Mason v. Bd. of Cnty. Comm'rs*, 7
6 Nev. 392, 396-97 (1872) (noting that the exercise of certain powers by a board of county
7 commissioners was not limited by the doctrine of separation of powers).

8 As discussed in more detail below in the context of Attorney General Opinion AGO
9 2004-03, it is not disputed that the Nevada Constitution was modeled on the original California
10 Constitution. *State ex rel. Harvey v. Second Judicial Dist. Ct*, 117 Nev. 754, 763, 32 P.3d 1263,
11 1269 (2001) ("[S]ince Nevada relied upon the California Constitution as a basis for developing
12 the Nevada Constitution, it is appropriate for us to look to the California Supreme Court's
13 interpretation of the [specific provision] in the California Constitution.") Because the provisions
14 of the Nevada Constitution were taken from the California Constitution of 1849, those provisions
15 "may be lawfully presumed to have been taken with the judicial interpretation attached." *State ex*
16 *rel. Mason v. Bd. of Cnty. Comm'rs*, 7 Nev. 392, 397 (1872).

17 Construing the separation of powers provision in the California Constitution of 1849,
18 the California Supreme Court held that **it did not apply to local governments and their**
19 **officers and employees.** *People ex rel. Att'y Gen. v. Provines*, In *Provines*, the court stated,

20 We understand the Constitution to have been formed for the purpose of
21 establishing a State Government; and we here use the term 'State Government' in
contradistinction to local, or to county or municipal governments. *Id.* at 532.

22 After examining the history and purpose of the separation of powers provision, the court
23 concluded that "the Third Article of the Constitution means that **the powers of the State**
24 **Government, not the local governments** thereafter to be created by the Legislature, shall be
25 divided into three departments." *Id.* at 534 (emphasis added). Thus, the court held that the

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27 ² As addressed below, an Assistant Public Defender is not a public officer.
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1 separation of powers provision had no application to the functions performed by a person at the
2 local governmental level. *Id.* at 523-40.

3 In later cases, the California Supreme Court reaffirmed that under California law, "it is
4 settled that the separation of powers provision of the constitution; art. 3, § 1, **does not apply to**
5 **local governments** as distinguished from departments of the state government." *Mariposa*
6 *County v. Merced Irrig. Dist.*, 196 P.2d 920, 926 (Cal. 1948)(emphasis added). This
7 interpretation of the separation-of-powers doctrine is followed by a majority of other
8 jurisdictions. *See, e.g., Poynter v. Walling*, 177 A.2d 641, 645 (Del. Super. Ct. 1962); *La*
9 *Guardia v. Smith*, 41 N.E.2d 153, 156 (N.Y. 1942); 16 *C.J.S. Constitutional Law* § 112, at 377
10 (1984).

11 Consequently, it is well settled that "a local government unit, though established under
12 state law, funded by the state, and ultimately under state control, with jurisdiction over only a
13 limited area, is not a 'State.'" *United States ex rel. Norton Sound Health Corp. v. Bering Strait*
14 *Sch. Dist.*, 138 F.3d 1281, 1284 (9th Cir. 1998). Furthermore, "a local government with authority
15 over a limited area, is a different type of government unit than a state-wide agency that is part of
16 the organized government of the state itself." *Wash. State Dep't of Transp. v. Wash. Natural Gas*
17 *Co.*, 59 F.3d 793, 800 n.5 (9th Cir. 1995). Thus, "[w]hile local subdivisions and boards created
18 by the state may have some connection with one of the departments of the state government as
19 defined by the Constitution, they are not 'departments of state government' within the intent and
20 meaning of the [law]." *State v. Coulon*, 3 So. 2d 241,243 (La. 1941). In turn, courts have
21 consistently found that cities, counties, school districts and other local governmental entities are
22 not included within one of the three departments of state government. *See, e.g., Dermott Special*
23 *Sch. Dist. v. Johnson*, 32 S.W.3d 477, 480-81 (Ark. 2000); *Dunbar Blee. Supply, Inc. v. Sch Bd.*,
24 690 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1997); *Stokes v. Harrison*, 115 So. 2d 373, 377-79
25 (La. 1959); *Coulon*, 3 So. 2d at 243.

26 Federal courts interpreting Nevada law have consistently found that cities, counties,
27 school districts and other local governmental entities in this state are not included within one of
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1 the three departments of state government and that these local political subdivisions are not
2 entitled to Nevada's sovereign immunity in federal court. *See, e.g., Lincoln County v. Luning*,
3 133 U.S. 529, 530 (1890); *Eason v. Clark Cnty. Sch. Dist.*, 303 F.3d 1137, 1144 (9th Cir. 2002);
4 *Herrera v. Russo*, 106 F. Supp. 2d 1057, 1062 (D. Nev. 2000). These federal cases are important
5 because when a federal court determines whether a political subdivision is part of state
6 government for the purposes of the Eleventh Amendment, the federal court makes its
7 determination based on state law. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S.
8 274, 280-81 (1977); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 678-79 (9th Cir. 1991).

9 Thus, because local political subdivisions in this state are not included within one
10 of the three departments of state government, their officers and employees also are not part of
11 one of the three departments of state government. Therefore, legislators, such as Speaker
12 Frierson, who hold positions of public employment with local governments do not hold such
13 positions within one of the three departments of state government. Thus, the separation of
14 powers provision does not prohibit legislators from holding positions of public employment with
15 local governments because local governments, such as Clark County, are not part of one of the
16 three departments of state government. This ends the inquiry with regard to Speaker Frierson,
17 and warrants dismissal.

18 **a. The Nevada Attorney General Opined that Nevada's Separation of Powers**
19 **Doctrine does not Apply to Local Government Employees**

20 While not binding on this Court, it is notable that on March 1, 2004, Attorney General
21 Brian Sandoval issued AGO 2004-03.³ That Opinion, which spans 27 pages, states in relevant
22 part:

23 In light of the absence of Nevada authority on the subject of the applicability of
24 the separation of powers to local governments and Nevada's adoption of the
25 California separation of powers provision into the Nevada Constitution, the
26 findings in *Provines* provide strong support for the contention that Article 3,
27 Section 1 of the Nevada Constitution **does not apply to local governments.**

28 ³ Attorney General Opinions are not binding legal authority.

1 Based upon the foregoing legal precedent, historical practice of this state,
2 and the relevant Nevada Attorney General opinions, this office concludes that
3 the constitutional requirement of separation of powers **does not prohibit a local
government employee from also serving in the Nevada Legislature.**
(emphasis added).

4 The Attorney General reaches such conclusion after a review of numerous prior AG opinions, as
5 well as case law, including but not limited to *Provines*. After noting that the Nevada constitution
6 was modeled after California's constitution, and that the provision in questions were identical.⁴

7 The Attorney General goes on to state,

8 Simply put, the court found that the framers of the California Constitution did not
9 contemplate that the state government executive branch included local
10 government. Therefore, California's separation of powers doctrine did not apply
11 to local governments or its employees.
Id. at 35.

12 The conclusion of the Attorney General, based on the cited law and historical precedent, reiterate
13 the conclusion noted above, and should be the conclusion of this Court as well.

14 C. AN ASSISTANT PUBLIC DEFENDER IS NOT A PUBLIC OFFICIAL OR OFFICER
UNDER NEVADA LAW

15 Assuming the Separation of Powers doctrine even applies to local government
16 employees, only public officers, as opposed to public employees, are potentially implicated
17 under the separation of powers provision.⁵ Public officers are the only persons who exercise the
18 sovereign functions of state government and, therefore, only public officers can be in violation of
19 Article 3 and the separation of powers clause. See NEV. CONST. art. III, §1, cl. 1; *State ex rel.*
20 *Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder*
21 *City*, 94 Nev. 735, 737, 587 P.2d 39,41.

22 1. Nevada Statutes and Clark County Code Regarding the Establishment of the
23 Public Defender

24
25 ⁴ "As previously noted, this California distinction is critical to the instant analysis because it is well
26 settled that the framers of the Nevada Constitution modeled the Nevada Constitution after the California
27 Constitution. Aftercare of Clark County v. Justice Court of Clark County, 120 Nev. ___, 82 P.3d 931 935
(Adv. Op. 2 at 5, January 23, 2004)." *Id.* at 35-36.

28 ⁵ Nothing stated in this section negates Speaker Frierson's position that local government as a whole is
not implicated, as set forth above.

1 NRS 260.010(1) states, "In counties whose population is 100,000 or more, the boards of
2 county commissioners shall provide by ordinance for the office of public defender." As such,
3 the office of public defender is created by county ordinance, under the instruction of statute. In
4 the case of Clark County, that is Clark County Code of Ordinances 2.4.100 and 2.16.040(b).
5 NRS 260.010(5) states, "The office of public defender when created must be filled by
6 appointment by the board of county commissioners." As such, the public defender is a local,
7 rather than state government position, created and appointed pursuant to county ordinance, and
8 appointed by the County Manager and Board of County Commissioners.

9 While NRS 260.040(2) allows the public defender to appoint, "as many deputies or
10 **assistant attorneys**, clerks, investigators, stenographers and other employees as the public
11 defender considers necessary to enable him or her to carry out his or her responsibilities"⁶, it is
12 clear to point out the limits of authority of such positions. (emphasis added).

13 The appointment of a deputy, assistant attorney or other employee pursuant to this
14 subsection **must not be construed to confer upon that deputy, assistant**
15 **attorney or other employee policymaking authority for the office of the**
16 **public defender or the county or counties by which the deputy, assistant**
attorney or other employee is employed.
(emphasis added).

17 So, to the extent any local government position within the Public Defender's office is implicated
18 by the separation of power doctrine, it is clear that Assistant Public Defenders, such as Speaker
19 Frierson, are statutorily different than the Public Defender him or herself, as he has no
20 policymaking authority as a mere employee. This is important in connection with the
21 interpreting case law, analyzed below.

22 2. Speaker Frierson Has no Sovereign Duties as an Assistant Public Defender

23 The Amended Complaint is completely devoid of any factual allegations describing the
24 job duties and responsibilities of the individual defendants. To the extent Speaker Frierson's
25 position as a member of local government is not dispositive, this lack of allegations is fatal,
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27 ⁶ This authority is also outlined in Clark County Code of Ordinances 2.16.040(b).
28

1 because, as set forth below and in the Second MTD, the separation of powers provision
2 application hinges on whether the individual defendant exercises sovereign functions. However,
3 permitting amendment in order to add such allegations in this case would be futile since Speaker
4 Frierson has no such duties or responsibilities not only as a matter of fact, but also pursuant to
5 statute. NRS 260.040(2).

6 As an Assistant Public Defender, Speaker Frierson serves at the whim of the Clark
7 County Public Defender, currently Darin Imlay, Esq.,⁷ and is an at-will employee of Clark
8 County.⁸ Mr. Imlay, in turn, is selected by the County Manager, and ratified by the Clark
9 County Board of Commissioners.⁹ “The Public Defender serves at the pleasure of the county
10 manager.”¹⁰ If either the County Manager or Board of County Commissioners decides to relieve
11 Mr. Imlay of his position, or Mr. Imlay decides to remove one or both of two Assistant Public
12 Defender Positions, or remove Speaker Frierson for any reason whatsoever, he would be out of a
13 job. He is not elected. Rather, his job description and duties are contractual.¹¹ In short, Speaker
14 Frierson is a public employee; an employee of local government, and not a public officer.¹²

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19 ⁷ Clark County Code of Ordinances 2.16.040(b);
https://www.clarkcountynv.gov/government/departments/public_defender/firm_profile.php.

20 ⁸ Clark County Code of Ordinances 2.16.040(b).

21 ⁹ *Id.* at 2.16.170.

22 ¹⁰ *Id.* at 2.16.040(a).

23 ¹¹ It is worth noting that Mr. Frierson’s job as an Assistant Public Defender involves no litigation nor
24 direct courtroom duties. Rather, he is in a supervisory role over attorneys, investigators, social workers
25 and clerical staff as it pertains to the office’s representation of those who cannot afford private counsel.
26 He provides general information to those defendants and their families, and he facilitates collaboration
27 with community organizations that have an interest in providing services to poor people who find
28 themselves involved in the criminal justice system. There is nothing in his job description that qualifies
as a sovereign function under *Murray*, discussed below.

¹² It is also worth noting the sacrifices made by Speaker Frierson to serve in the citizen legislature.
Pursuant to Clark County policy, during Nevada’s legislative sessions, Speaker Frierson is put on leave
without pay. Not only does he not receive pay, but all of his benefits are frozen, including health
insurance and retirement benefits. He is not permitted to use vacation or sick leave during sessions. For
all intents and purposes, he is not employed during the legislative sessions.

1 3. Public Employees and Public Officials are Different Under Nevada Law; Speaker
2 Frierson is a Public Employee, Does not Exercise Sovereign Functions, and is
3 therefore not Subject to the Separation of Powers Doctrine

4 In evaluating a claim challenging the right of the defendant to hold the position of
5 director of the drivers license division of the public service commission of Nevada at the time he
6 was serving as a state senator, the Nevada Supreme Court established the distinction between a
7 public office and mere employment.

8 The nature of a public office as distinguished from mere employment is the
9 subject of a considerable body of authority, and many criteria of determination
10 are suggested by the courts. Upon one point at least the authorities uniformly
11 appear to concur. A public office is distinguishable from other forms of
12 employment in that its holder has by the sovereign been invested with some
13 portion of the sovereign functions of government.

14 *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953)
15 (internal citations omitted).

16 First, the Court notes, "All public offices must originally have been created by the sovereign as
17 the foundation of government." *State ex rel. Mathews v. Murray*, 70 Nev. 116, 121 (Nev. June
18 15, 1953), citation omitted. It goes on to state,

19 [T]his court, in **definition of a public office**, quoted Wyman on Public Offices,
20 sec. 44, as follows: 'The right, authority and duty conferred by law by which, for
21 a given period, either fixed by law or through the pleasure of the creating power
22 of government, an individual **is invested with some portion of the sovereign**
23 **functions of the government**, to be exercised by him for the benefit of the public.
24 The warrant to exercise powers is conferred, not by contract, but by law.
25 *Id.* (emphasis added).

26 Here, with respect to the position of the Assistant Public Defender, there is no investment of
27 sovereign function of government, as explicitly stated in NRS 260.040(2). Further, while the
28 position itself is contemplated by statute, the duties and "warrant to exercise powers" in the case
29 of Speaker Frierson, are contractual. Said another way, his day to day duties are determined by
30 what his boss, Public Defender Imlay, tells him are his duties. Further, the fact that his
31 employment is at the will or pleasure of another cannot be disputed. Indeed, per Clark County
32 Code of Ordinances 2.16.040(a), his boss "serves at the pleasure of the county manager."

1 The fact that a public employment is held at the will or pleasure of another, as a
2 deputy or servant, who holds at the will of his principal, **is held to distinguish a**
3 **mere employment from a public office; for in such cases no part of the state's**
4 **sovereignty is delegated to such employees.'**

5 *Murray* at 121-22 (emphasis added, citations omitted).

6 The situation in *Murray* with regard to the defendant's subordinate position is analogous to
7 Speaker Frierson's subordinate position.

8 Nowhere are duties imposed or authority granted save to the department and to its
9 administrator. It appears clear that the position of director was created not by the
10 act but by the administrator and may as easily by him be discontinued or
11 destroyed. It appears clear that the duties of the position are fixed not by law but
12 by the administrator and may as easily by him be modified from time to time. No
13 tenure attaches to the position save as may be fixed from time to time by the
14 administrator. The director, then, is wholly subordinate and responsible to the
15 administrator. It cannot, then, be said that that position has been created by law;
16 or that the duties which attach to it have been prescribed by law; or that, subject
17 only to the provisions of law the holder of such position is independent in his
18 exercise of such duties. **It cannot, then, be said that he has been invested with**
19 **any portion of the sovereign functions of the government.**

20 *Id.* at 123.

21 By this logic and reasoning, the Nevada Supreme Court makes clear that an Assistant Public
22 Defender is not a public officer and is therefore not subject to the separation of powers
23 doctrine.¹³ See also, *Univ. & Cmty. Coll. Sys. v. DR Ptnrs*, 117 Nev. 195, 200, 18 P.3d 1042,
24 1045-46 (2001). For this reason, too, the claims against Speaker Frierson fail.

25 D. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR DECLARATORY
26 RELIEF

27 Aside from the legal analysis regarding the constitutional issue set forth above, as set
28 forth in the Second MTD, the Amended Complaint fails to state a claim for declaratory relief.

¹³ Notably, this decision was reached at the motion to dismiss stage. The Court commented on the lack of
factual evidence regarding the defendant's duties, but noted that such inquiry was not necessary. "The
state asserts that since the record now before this court does not contain any showing as to the nature of
the duties which now attach to the position, we cannot at this stage of the proceedings determine that the
position is not an office. For the reasons discussed, however, **it is apparent that the specific character**
of those duties cannot affect our decision. Regardless of the extent of responsibility which at any
given time might be delegated by the administrator to the defendant, the functions of sovereignty
which are involved continue to repose in the administrator to whom they have been assigned by
sovereign act." *Id.* at 123-124 (emphasis added).

1 *Id.* at 10-13. Specifically, there is no justiciable controversy, the parties are not adverse,
2 plaintiff does not have a legally protectable interest, and the issue is not ripe for judicial
3 determination. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (citing *Kress v.*
4 *Corey*, 65 Nev. 1, 25-26, 189 P.2d 352, 364 (1948)). The arguments set forth in the Second
5 MTD are incorporated herein by reference.

6 E. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR INJUNCTIVE
7 RELIEF

8 Additionally, and again as set forth in the Second MTD, the Amended Complaint fails to
9 state a claim for injunctive relief. *Id.* at 13-14. The arguments set forth in the Second MTD are
10 incorporated herein by reference.

11 F. PLAINTIFF FAILED TO JOIN REQUIRED PARTIES

12 Finally, as set forth in the Second MTD, Plaintiff has failed to join required parties. fails
13 to state a claim for injunctive relief. *Id.* at 14-15. The arguments set forth in the Second MTD
14 are incorporated herein by reference.

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1 **IV. CONCLUSION**

2 Plaintiff's Amended Complaint should be dismissed on multiple grounds. If Plaintiff can
3 overcome the initial standing issues, it is clear that Article 3, Section 1 of the Nevada
4 Constitution does not apply to local government employees like Mr. Frierson. If somehow it
5 does apply to some local government employees, it does not apply to positions such as Assistant
6 District Attorneys that are not public officers or officials, and do not exercise sovereign powers.
7 Finally, both of the asserted claims for relief are also fatally deficient. Based on the foregoing,
8 the Amended Complaint should be dismissed.

9
10 DATED this 5 day of October, 2020.

11 **WILEY PETERSEN**

12
13
14 JONATHAN D. BLUM, ESQ.
Nevada Bar No. 09515
15 **WILEY PETERSEN**
1050 Indigo Dr., Suite 200B
16 Las Vegas, Nevada 89145

17 *Attorney for Defendant,*
Jason Frierson

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CERTIFICATE OF SERVICE

I hereby certify that I an employee of WILEY PETERSEN. On the 5^m day of October, 2020, I caused to be served a true and correct copy of foregoing **DEFENDANT JASON FRIERSON'S MOTION TO DISMISS** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.



An Employee of WILEY PETERSEN



1 **NNOP**

JONATHAN D. BLUM, ESQ.

2 Nevada Bar No. 09515

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4 Telephone: (702) 910-3329

Facsimile: (702) 553-3467

5 E-Mail: jblum@wileypetersenlaw.com

6 *Attorneys for Defendant,*

Jason Frierson

7
8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 NEVADA POLICY RESEARCH
11 INSTITUTE, a Nevada domestic nonprofit
12 corporation,

13 Plaintiff,

14 vs.

15 NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
16 Nevada State Senate and Clark County
District Attorney; KASINA
17 DOUGLASSBOONE,
an individual engaging in dual
18 employment with the Nevada State Assembly
and Clark County School District; JASON
19 FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
20 and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
21 in dual employment with the Nevada State
Assembly and University of Nevada, Las
22 Vegas; HEIDI SEEVERS GANSERT, an
23 individual engaging in dual employment with
the Nevada State Senate and University of
24 Nevada Reno; GLEN LEAVITT, an
25 individual engaging in dual employment with
the Nevada State Assembly and. Regional
26 Transportation Commission; BRITTNEY
27 MILLER, an individual engaging in dual
employment with the Nevada State Assembly

CASE NO: A-20-817757-C

DEPT. NO: 1

**DEFENDANT JASON FRIERSON'S
NOTICE OF NON-OPPOSITION TO
DEFENDANT NEVADA
LEGISLATURE'S MOTION TO
INTERVENE AS DEFENDANT**

1 and Clark County School District; DINA
2 NEAL, an individual engaging in dual
3 employment with the Nevada State Assembly
4 and Nevada State College; JAMES
5 OHRENSCHALL, an individual engaging in
6 dual employment with the Nevada State
7 Senate and Clark County Public Defender;
8 MELANIE SCHEIBLE an individual
9 engaging in dual employment with the
10 Nevada State Senate and Clark County
11 District Attorney; TERESA
12 BENITEZTHOMPSON,
13 an individual engaging in dual
14 employment with the Nevada State Assembly
15 and University of Nevada, Reno; JILL
16 TOLLES, an individual engaging in dual
17 employment with the Nevada State Assembly
18 and University of Nevada, Reno; and
19 SELENA TORRES, an individual engaging
20 in dual employment with the Nevada State
21 Assembly and Clark County School District,
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Defendants.

Defendant JASON FRIERSON ("Frierson") by and through his counsel of record,
WILEY PETERSEN, hereby give notice that he does not oppose the Nevada Legislature's
Motion to Intervene as Defendant, filed on September 30, 2020.

DATED this 5 day of October 2020.

WILEY PETERSEN


JONATHAN D. BLUM, ESQ.
Nevada Bar No. 09515
WILEY PETERSEN
1050 Indigo Dr., Suite 200B
Las Vegas, Nevada 89145
*Attorneys for Defendant,
Jason Frierson*

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CERTIFICATE OF SERVICE

I hereby certify that I an employee of WILEY PETERSEN. On the 5th day of October 2020, I caused to be served a true and correct copy of foregoing **DEFENDANT JASON FRIERSON'S NOTICE OF NON-OPPOSITION TO NEVADA LEGISLATURE'S MOTION TO INTERVENE AS DEFENDANT** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.


An Employee of WILEY PETERSEN



1 **JOIN**

2 JONATHAN D. BLUM, ESQ.

3 Nevada Bar No. 09515

4 **WILEY PETERSEN**

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7 Telephone: (702) 910-3329

8 Facsimile: (702) 553-3467

9 E-Mail: jblum@wileypetersenlaw.com

10 *Attorneys for Defendant,*

11 *Jason Frierson*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 NEVADA POLICY RESEARCH
15 INSTITUTE, a Nevada domestic nonprofit
16 corporation,

17 Plaintiff,

18 vs.

19 NICOLE J. CANNIZZARO, an individual
20 engaging in dual employment with the
21 Nevada State Senate and Clark County
22 District Attorney; KASINA
23 DOUGLASSBOONE,
24 an individual engaging in dual
25 employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly

CASE NO: A-20-817757-C

DEPT. NO: 1

**DEFENDANT JASON FRIERSON'S
JOINDER TO DEFENDANTS
OSVALDO FUMO, HEIDI SEEVERS
GANSERT, AND DINA NEAL'S
MOTION TO DISMISS PURSUANT
TO NRCP 12(b)(5) AND NRCP 12(b)(6)**

1 and Clark County School District; DINA
2 NEAL, an individual engaging in dual
3 employment with the Nevada State Assembly
4 and Nevada State College; JAMES
5 OHRENSCHALL, an individual engaging in
6 dual employment with the Nevada State
7 Senate and Clark County Public Defender;
8 MELANIE SCHEIBLE an individual
9 engaging in dual employment with the
10 Nevada State Senate and Clark County
11 District Attorney; TERESA
12 BENITEZTHOMPSON,
13 an individual engaging in dual
14 employment with the Nevada State Assembly
15 and University of Nevada, Reno; JILL
16 TOLLES, an individual engaging in dual
17 employment with the Nevada State Assembly
18 and University of Nevada, Reno; and
19 SELENA TORRES, an individual engaging
20 in dual employment with the Nevada State
21 Assembly and Clark County School District,
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Defendants.

Defendant JASON FRIERSON ("Frierson") by and through his counsel of record,
WILEY PETERSEN, hereby join, incorporate, and adopt the factual allegations and authorities
asserted in Defendants Osvaldo Fumo. Heidi Seevers Gansert, and Dina Neal's Motion to
Dismiss Pursuant to NRCP 12(b)(5) and NRCP 12(b)(6) filed on September 24, 2020.

DATED this 5 day of October 2020.


WILEY PETERSEN

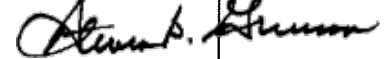
JONATHAN D. BLUM, ESQ.
Nevada Bar No. 09515
WILEY PETERSEN
1050 Indigo Dr., Suite 200B
Las Vegas, Nevada 89145
*Attorneys for Defendant,
Jason Frierson*

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I am an employee of WILEY PETERSEN. On the 5th day of October
4 2020, I caused to be served a true and correct copy of foregoing **DEFENDANT JASON**
5 **FRIERSON'S JOINDER TO DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS**
6 **GANSERT, AND DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP (b)(5)**
7 **AND NRCP 12(b)(6)** in the following manner:

8 (ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced
9 document was electronically filed on the date hereof and served through the Notice of Electronic
10 Filing automatically generated by the Court's facilities to those parties listed on the Court's
11 Master Service List.

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15 An Employee of WILEY PETERSEN
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JOIN

JONATHAN D. BLUM, ESQ.

Nevada Bar No. 09515

WILEY PETERSEN

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*Attorneys for Defendant,
Jason Frierson*

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA
DOUGLASSBOONE,
an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly

CASE NO: A-20-817757-C

DEPT. NO: 1

**DEFENDANT JASON FRIERSON'S
JOINDER TO DEFENDANT
BRITTNEY MILLER'S MOTION TO
DISMISS COMPLAINT**

1 and Clark County School District; DINA
2 NEAL, an individual engaging in dual
3 employment with the Nevada State Assembly
4 and Nevada State College; JAMES
5 OHRENSCHALL, an individual engaging in
6 dual employment with the Nevada State
7 Senate and Clark County Public Defender;
8 MELANIE SCHEIBLE an individual
9 engaging in dual employment with the
10 Nevada State Senate and Clark County
11 District Attorney; TERESA
12 BENITEZTHOMPSON,
13 an individual engaging in dual
14 employment with the Nevada State Assembly
15 and University of Nevada, Reno; JILL
16 TOLLES, an individual engaging in dual
17 employment with the Nevada State Assembly
18 and University of Nevada, Reno; and
19 SELENA TORRES, an individual engaging
20 in dual employment with the Nevada State
21 Assembly and Clark County School District,
22
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Defendants.

Defendant JASON FRIERSON ("Frierson") by and through his counsel of record,
WILEY PETERSEN, hereby join, incorporate, and adopt the factual allegations and authorities
asserted in Defendant Brittney Miller's Motion to Dismiss Complaint, filed on September 18,
2020.

DATED this 5 day of October 2020.

WILEY PETERSEN


JONATHAN D. BLUM, Esq.
Nevada Bar No. 09515
WILEY PETERSEN
1050 Indigo Dr., Suite 200B
Las Vegas, Nevada 89145
*Attorneys for Defendant,
Jason Frierson*

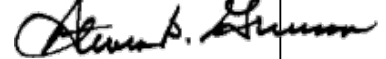
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of WILEY PETERSEN. On the 5th day of October 2020, I caused to be served a true and correct copy of foregoing **DEFENDANT JASON FRIERSON'S JOINDER TO DEFENDANT BRITTNEY MILLER'S MOTION TO DISMISS COMPLAINT** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.


An Employee of WILEY PETERSEN



1 **JMOT**

2 **BRADLEY SCHRAGER, ESQ. (SBN 10217)**

3 **DANIEL BRAVO, ESQ. (SBN 13078)**

4 **WOLF, RIFKIN, SHAPIRO,**

5 **SCHULMAN & RABKIN, LLP**

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9 bschrager@wrslawyers.com

10 dbravo@wrslawyers.com

11 *Attorneys for Defendants,*

12 *Brittney Miller and Selena Torres*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 **NEVADA POLICY RESEARCH**
16 **INSTITUTE, a Nevada domestic nonprofit**
17 **corporation,**

18 **Plaintiff,**

19 **v s .**

20 **NICOLE J. CANNIZZARO, an individual**
21 **engaging in dual employment with the**
22 **Nevada State Senate and Clark County**
23 **District Attorney; KASINA DOUGLASS-**
24 **BOONE, an individual engaging in dual**
25 **employment with the Nevada State Assembly**
26 **and Clark County School District; JASON**
27 **FRIERSON, an individual engaging in dual**
28 **employment with the Nevada State Assembly**
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA

Case No. A-20-817757-C

Dept. No.: I

DEFENDANT SELENA TORRES'S
JOINDER TO BRITTNEY MILLER'S
MOTION TO DISMISS COMPLAINT

HEARING DATE: October 28, 2020
HEARING TIME: 9:00 a.m.

1 NEAL, an individual engaging in dual
2 employment with the Nevada State Assembly
3 and Nevada State College; JAMES
4 OHRENSCHALL, an individual engaging in
5 dual employment with the Nevada State
6 Senate and Clark County Public Defender;
7 MELANIE SCHEIBLE an individual
8 engaging in dual employment with the
9 Nevada State Senate and Clark County
10 District Attorney; TERESA BENITEZ-
11 THOMPSON, an individual engaging in dual
12 employment with the Nevada State Assembly
13 and University of Nevada, Reno; JILL
14 TOLLES, an individual engaging in dual
15 employment with the Nevada State Assembly
16 and University of Nevada, Reno; and
17 SELENA TORRES, an individual engaging
18 in dual employment with the Nevada State
19 Assembly and Clark County School District,
20
21 Defendants.

22 Defendant Selena Torres hereby joins in Defendant Brittney Miller's Motion to Dismiss
23 Complaint filed herein on September 18, 2020, and adopt by reference and incorporate herein
24 Defendant Miller's Motion, Memorandum of Points and Authorities and Exhibits as if set forth
25 in full at this point.

26 DATED this 6th day of October, 2020

27 **WOLF, RIFKIN, SHAPIRO,**
28 **SCHULMAN & RABKIN, LLP**

By: /s/ Bradley Schrager
BRADLEY SCHRAGER, ESQ. (SBN 10217)
DANIEL BRAVO, ESQ. (SBN 13078)
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
(702) 341-5200/Fax: (702) 341-5300

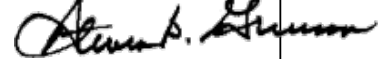
*Attorneys for Defendants,
Brittney Miller and Selena Torres*

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2020, a true and correct copy of the foregoing **DEFENDANT SELENA TORRES’S JOINDER TO BRITTNEY MILLER’S MOTION TO DISMISS COMPLAINT** was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an email address on record, pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

By: /s/ Christie Rehfeld
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP



1 **JMOT**

2 **BRADLEY SCHRAGER, ESQ. (SBN 10217)**

3 **DANIEL BRAVO, ESQ. (SBN 13078)**

4 **WOLF, RIFKIN, SHAPIRO,**

5 **SCHULMAN & RABKIN, LLP**

6 3556 E. Russell Road, Second Floor

7 Las Vegas, Nevada 89120

8 (702) 341-5200/Fax: (702) 341-5300

9 bschrager@wrslawyers.com

10 dbravo@wrslawyers.com

11 *Attorneys for Defendants,*

12 *Brittney Miller and Selena Torres*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 **NEVADA POLICY RESEARCH**
16 **INSTITUTE, a Nevada domestic nonprofit**
17 **corporation,**

18 **Plaintiff,**

19 **v s .**

20 **NICOLE J. CANNIZZARO, an individual**
21 **engaging in dual employment with the**
22 **Nevada State Senate and Clark County**
23 **District Attorney; KASINA DOUGLASS-**
24 **BOONE, an individual engaging in dual**
25 **employment with the Nevada State Assembly**
26 **and Clark County School District; JASON**
27 **FRIERSON, an individual engaging in dual**
28 **employment with the Nevada State Assembly**
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA

Case No. A-20-817757-C
Dept. No.: I

DEFENDANTS BRITTNEY MILLER
AND SELENA TORRES'S JOINDER TO
DEFENDANTS OSVALDO FUMO, HEIDI
SEEVERS GANSERT, AND DINA
NEAL'S MOTION TO DISMISS

HEARING DATE: October 28, 2020
HEARING TIME: 9:00 a.m.

1 NEAL, an individual engaging in dual
2 employment with the Nevada State Assembly
3 and Nevada State College; JAMES
4 OHRENSCHALL, an individual engaging in
5 dual employment with the Nevada State
6 Senate and Clark County Public Defender;
7 MELANIE SCHEIBLE an individual
8 engaging in dual employment with the
9 Nevada State Senate and Clark County
10 District Attorney; TERESA BENITEZ-
11 THOMPSON, an individual engaging in dual
12 employment with the Nevada State Assembly
13 and University of Nevada, Reno; JILL
14 TOLLES, an individual engaging in dual
15 employment with the Nevada State Assembly
16 and University of Nevada, Reno; and
17 SELENA TORRES, an individual engaging
18 in dual employment with the Nevada State
19 Assembly and Clark County School District,

20 Defendants.

21
22 Defendants Britney Miller and Selena Torres hereby join in Defendants Osvaldo
23 Fumo, Heidi Seevers Gansert, And Dina Neal's Motion to Dismiss filed herein on September 30,
24 2020, and adopt by reference and incorporate herein Defendants' Motion, Memorandum of
25 Points and Authorities and Exhibits as if set forth in full at this point.

26 DATED this 6th day of October, 2020

27
28 **WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

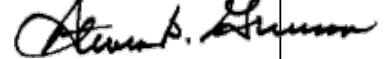
By: /s/ Bradley Schrager

BRADLEY SCHRAGER, ESQ. (SBN 10217)
DANIEL BRAVO, ESQ. (SBN 13078)
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
(702) 341-5200/Fax: (702) 341-5300

*Attorneys for Defendants,
Brittney Miller and Selena Torres*

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By: /s/ Christie Rehfeld
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP



1 **JMOT**

2 **BRADLEY SCHRAGER, ESQ. (SBN 10217)**

3 **DANIEL BRAVO, ESQ. (SBN 13078)**

4 **WOLF, RIFKIN, SHAPIRO,**

5 **SCHULMAN & RABKIN, LLP**

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9 bschrager@wrslawyers.com

10 dbravo@wrslawyers.com

11 *Attorneys for Defendants,*

12 *Brittney Miller and Selena Torres*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 **NEVADA POLICY RESEARCH**
16 **INSTITUTE, a Nevada domestic nonprofit**
17 **corporation,**

18 **Plaintiff,**

19 **v s .**

20 **NICOLE J. CANNIZZARO, an individual**
21 **engaging in dual employment with the**
22 **Nevada State Senate and Clark County**
23 **District Attorney; KASINA DOUGLASS-**
24 **BOONE, an individual engaging in dual**
25 **employment with the Nevada State Assembly**
26 **and Clark County School District; JASON**
27 **FRIERSON, an individual engaging in dual**
28 **employment with the Nevada State Assembly**
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA
NEAL, an individual engaging in dual
employment with the Nevada State Assembly

Case No. A-20-817757-C
Dept. No.: 28

DEFENDANTS BRITTNEY MILLER
AND SELENA TORRES'S JOINDER TO
DEFENDANT JASON FRIERSON'S
MOTION TO DISMISS

HEARING DATE: TBA
HEARING TIME: TBA

1 and Nevada State College; JAMES
2 OHRENSCHALL, an individual engaging in
3 dual employment with the Nevada State
4 Senate and Clark County Public Defender;
5 MELANIE SCHEIBLE an individual
6 engaging in dual employment with the
7 Nevada State Senate and Clark County
8 District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly
11 and University of Nevada, Reno; JILL
12 TOLLES, an individual engaging in dual
13 employment with the Nevada State Assembly
14 and University of Nevada, Reno; and
15 SELENA TORRES, an individual engaging
16 in dual employment with the Nevada State
17 Assembly and Clark County School District,
18
19 Defendants.

20
21 Defendants Britney Miller and Selena Torres hereby join in Defendant Jason
22 Frierson's Motion to Dismiss filed herein on October 5, 2020, and adopt by reference and
23 incorporate herein Defendants' Motion, Memorandum of Points and Authorities and Exhibits as
24 if set forth in full at this point.

25 DATED this 6th day of October, 2020

26
27 **WOLF, RIFKIN, SHAPIRO,**
28 **SCHULMAN & RABKIN, LLP**

By: /s/ Bradley Schrager
BRADLEY SCHRAGER, ESQ. (SBN 10217)
DANIEL BRAVO, ESQ. (SBN 13078)
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
(702) 341-5200/Fax: (702) 341-5300

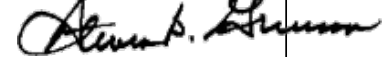
*Attorneys for Defendants,
Brittney Miller and Selena Torres*

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2020, a true and correct copy of the foregoing **DEFENDANTS BRITTNEY MILLER AND SELENA TORRES’S JOINDER TO DEFENDANT JASON FRIERSON’S MOTION TO DISMISS** was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an email address on record, pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

By: /s/ Christie Rehfeld
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
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11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXVIII

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FILED BY
DEFENDANTS OSVALDO FUMO,
HEIDI SEEVERS GANSERT, AND
DINA NEAL AND JOINDERS
THERE TO FILED BY DEFENDANTS
JASON FRIERSON, BRITTNEY
MILLER, AND SELENA TORRES**

Date of Hearing: November 12, 2020

Time of Hearing: Chambers

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Opposition to the Motion to Dismiss Pursuant to NRCP 12(b)(5) and NRCP 12(b)(6) filed on September 24, 2020 by Defendants, Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal (“NSHE Defendants”)¹, as well as the Joinders incorporating the same arguments therein by reference filed by Defendant, Jason Frierson, on October 5, 2020 and Defendants Brittney Miller² and Selena Torres on October 6, 2020, respectively (the “Joinder Defendants”).

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¹ On September 25, 2020, NPRI filed a Motion to Disqualify the Official Attorneys from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal (“Motion to Disqualify”), which hearing is currently set to be heard on this Court’s October 29, 2020 chambers calendar. Nothing in this Opposition is intended to be, nor shall it be, construed as a waiver of any arguments asserted in the Motion to Disqualify. This Opposition is made with all rights reserved to object to the continued representation of the NSHE Defendants in this matter at taxpayers’ expense.

² The Joinder by Defendant Brittney Miller is late-filed, pursuant to EDCR 2.20(d). Defendant Miller was the first Defendant to respond to this litigation and had notice of the NSHE Defendants’ motion on the date filed, making her Joinder thereto due on or before October 1, 2020. That said, as Defendant Miller’s Joinder merely adopts and incorporates by reference the arguments of the NSHE Defendants, NPRI will not oppose the late filing in the interest of judicial and party economy.

1 This Opposition is made and based on the following Memorandum of Points and Authorities,
2 the papers and pleadings already on file, and any oral argument the Court may permit at the hearing
3 of this matter.

4 Dated this 8th day of October, 2020.

5 **FOX ROTHSCHILD LLP**

6
7 By: /s/ Deanna L. Forbush
8 DEANNA L. FORBUSH
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15 Attorneys for Plaintiff
16 Nevada Policy Research Institute

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I.**

19 **INTRODUCTION**

20 As with Defendant Brittney Miller, who filed the first of three motions to dismiss this
21 Honorable Court will consider, the NSHE Defendants' attempt to evade substantive review of the
22 constitutionality of their dual employment is entirely unavailing. The gravamen of the NSHE
23 Defendants' dismissal request is the wholly untenable position that the Separation of Powers clause
24 of the Nevada Constitution "has been interpreted to prohibit public officials or officers, as opposed
25 to public employees, from holding positions in separate branches of government." *See* Motion at
26 5:25-27. Yet there is no such case law interpretation provided by the NSHE Defendants in their
27 motion because, in fact, none exists. To the contrary, for decades the Nevada Supreme Court has
28 interpreted the reach of Separation of Powers to extend to all public employees. *See, e.g., Secretary*
of State v. Nevada State Legislature, 120 Nev. 456, 472, 93 P.3d 746, 757 (2004) (holding quo

1 warranto appropriate to challenge executive branch employees invested with sovereign power, who
2 thereby occupy public offices, “[a]nd declaratory relief, possibly coupled with a request for
3 injunctive relief, could be sought against other executive branch employees”) (emphasis added); *see*
4 *also Galloway v. Truesdell*, 83 Nev. 13, 21-22, 422 P.2d 237, 243 (1967) (holding even ministerial
5 functions of each governmental branch frequently overlap, and it is in the area of “inherent
6 ministerial powers and functions that prohibited encroachments upon the basic powers of [a branch]
7 most frequently occur”). As such, every argument made by the NSHE Defendant’s based on this
8 false premise must necessarily fail.

9 The NSHE Defendants alternatively argue that NPRI’s Amended Complaint must fail
10 because it did not seek to sue four sitting judges who also serve as adjunct professors or instructors
11 with NSHE. *See* Motion at 15:24-26. This argument misses the point entirely that the instant
12 litigation seeks to address the Separation of Powers violations of all Legislators engaging in
13 impermissible dual employment by simultaneously working for another branch of government.
14 NPRI may very well initiate future litigation against the judicial branch violators identified by the
15 NSHE Defendants, but there is no requirement that it do so now, and there is certainly no legal basis
16 for dismissal because it has not done so. The Nevada Supreme Court recognizes that “generally, a
17 party need not assert every conceivable claim against every conceivable defendant in a single
18 action.” *Weddell v. Sharp*, 131 Nev. 233, 240, 350 P.3d 80, 83 (2015) (citing *Humphries v. Eighth*
19 *Jud. Dist. Ct.*, 129 Nev. 788, 796, 312 P.3d 484, 490 (2013)). More importantly, dismissal is only
20 available when joinder of an indispensable party is not feasible, and even then, it is still well within
21 the court’s discretion whether to proceed or dismiss. *Humphries*, 129, Nev. at 792, 312 P.2d at 487
22 (citing NRCP 19(b)). The NSHE Defendants’ sole focus on NRCP 19(a) and exclusion of the
23 required analysis under NRCP 19(b) is equally fatal to their dismissal request.

24 There is no dispute that the Court must assume to be true all facts alleged in the Amended
25 Complaint when addressing the instant motion to dismiss, that NPRI has met its burden to set forth
26 cognizable legal theories based on those facts, and that the NSHE Defendants have provided no
27 legally cognizable theory to warrant dismissal of NPRI’s Amended Complaint. For all of these
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1 reasons, the NSHE Defendants’ motion to dismiss and the Joinder Defendants’ respective joinders
2 thereto must be denied and the instant case must be allowed to proceed in the normal course.

3 II.

4 FACTUAL ALLEGATIONS

5 The facts properly at issue with regard to the motion and joinders thereto are those set forth
6 in NPRI’s Amended Complaint filed on July 28, 2020, a copy of which is on file herein and was
7 previously attached as **Exhibit 1** to the opposition to Defendant Brittney Miller’s motion to dismiss.
8 In the interest of judicial and party economy, NPRI will not reattach the Amended Complaint here
9 and will only repeat and reallege those facts herein as necessary to support of the arguments that
10 follow.

11 III.

12 STANDARD OF REVIEW

13 A. NRCP 12(b)(5) Dismissals Are Subject to Rigorous Review.

14 A district court’s decision to dismiss a complaint for failure to state a claim will be subject to
15 a rigorous, de novo appellate review. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224,
16 227, 181 P.3d 670, 672 (2008). A motion brought pursuant to NRCP 12(b)(5) may, in fact, only be
17 granted if the claimant would be entitled to no relief under the facts set forth in the pleading. *Morris*
18 *v. Bank of America Nevada*, 110 Nev. 1274, 1277, 886 P.2d 454, 457 (1994) (citing *Edgar v.*
19 *Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)). Nevada remains a notice-pleading
20 jurisdiction, where all that is required is for a pleading to provide fair notice to the adverse party of
21 the nature of the claims stated therein, and the basis or grounds for such claims. *Crucil v. Carson*
22 *City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Western States Constr. v. Michoff*, 108
23 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). And, “notice pleading” simply requires a claimant to
24 set forth a general recitation of facts that support a cognizable legal theory. *See Liston v. Las Vegas*
25 *Metropolitan Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995) (citing *Swartz v. Adams*,
26 93 Nev. 240, 245, 563 P.2d 74, 77 (1977)). NPRI has clearly met this pleading standard in the
27 instant case.

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1 Defendants assert that the issue of whether NPRI has a legally protectable interest is connected to the
2 issue of standing and, again, without additional argument, adopt and incorporate by reference
3 Defendant Miller's motion and their joinder thereto. *See* Motion at 12:15-17, 21-22. Both of these
4 arguments are raised as part of the NSHE Defendants' NRCP 12(b)(5) challenge to NPRI's
5 declaratory relief action, and NPRI opposes these arguments in their entirety by adopting by
6 reference and incorporating herein Sections IV(A) and (B) of its opposition to Defendant Miller's
7 motion and joinder. *See* Opposition to Motion to Dismiss Filed by Defendant Brittney Miller at 6:3-
8 11:13, filed October 2, 2020.

9 **B. The Remainder of the Motion to Dismiss Pursuant to NRCP 12(b)(5) Is Legally**
10 **Unsupported and Must Fail.**

11 The remainder of the NSHE Defendants' and Joinder Defendants' dismissal request pursuant
12 to NRCP 12(b)(5) rests entirely on the false premise that the Separation of Powers clause in the
13 Nevada Constitution is restricted in its application solely to public officials or officers. Section
14 III(B) of the motion contains the purported legal analysis in this regard. It begins with the correct
15 citation to Article 3, Section 1 of the Nevada Constitution, which contains the express provision
16 prohibiting any one branch of government from encroaching on the functions of another. *See*
17 Motion at 5:21-25. But that is where any relevant and supported legal discussion ends. The very
18 next sentence proclaims, without any case law reference whatsoever to back it up, that "NPRI's
19 lawsuit is fatally flawed because this provision has been interpreted to prohibit public officials or
20 officers, as opposed to mere public employees, from holding positions in separate branches of
21 government." *See* Motion at 5:25-27. The remainder of Section III(B), then, builds on this wholly
22 unsupported assertion with page after page of discussion regarding which government employees do
23 and do not exercise sovereign functions, ostensibly with only the latter being subject to a Separation
24 of Powers challenge.

25 This wag the dog approach is completely contrary to Nevada Supreme Court precedent and
26 must be disregarded, for the reasons stated below.

1 ***I. The Nevada Supreme Court Expressly Acknowledged the Appropriateness***
2 ***of Using Declaratory and Injunctive Relief Actions to Bring a Separation of***
3 ***Powers Challenge Against Executive Branch Employees Who Are Not***
4 ***Invested With Sovereign Power.***

5 In *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), then-
6 Secretary of State Dean Heller sought by writ of mandamus to challenge state and local government
7 employees' service in the Legislature as violating the Nevada Constitution's Separation of Powers
8 doctrine. In the end, the Court denied the requested writ relief after determining, among other
9 things, that the Secretary of State did not have a discernable beneficial interest to confer standing to
10 bring a writ of mandamus action and that he sued the wrong party, i.e. the Legislature as a whole, to
11 prevent service therein by executive branch employees. *Id.*, 120 Nev. at 462-63, 93 P.3d at 750. But
12 in so doing, it provided a clear path for how to raise such a challenge, which is exactly the path
13 NPRI is traveling in the instant case.

14 Specifically, the Court recognized two mechanisms for challenging what it deemed the "dual
15 service issue. *Secretary of State*, 120 Nev. at 472, 93 P.3d at 756. It held that, "[t]he dual service
16 issue may be raised as a separation-of-powers challenge to legislators working in the executive
17 branch, as the qualifications of legislators employed in the executive branch are not constitutionally
18 reserved to that branch." *Id.*, 120 Nev. at 472, 93 P.3d at 757 (citation omitted). It went on to opine
19 that, "[s]uch a challenge might be well suited for quo warranto or a declaratory relief action filed in
20 the district court." *Id.* Most telling, and particularly relevant to the instant case, however, is the
21 distinction the Court draws between how each of the two types of actions might be employed, and by
22 whom, stating clearly that:

23 A quo warranto action could be used to challenge any executive branch
24 employees invested with sovereign power, who thereby occupy public
25 offices within quo warranto's exclusive reach. And, declaratory relief,
26 possibly coupled with injunctive relief, could be sought against other
27 executive branch employees.

28 The party with the clearest standing to bring the quo warranto action
 would be the attorney general, and declaratory relief could be sought by
 someone with a "legally protectable interest," such as a person seeking the
 executive branch position held by the legislator. Individual legislators
 would need to be named as either quo warranto respondents or declaratory

1 relief defendants.

2 *Id.*, 120 Nev. at 472-73, 93 P.3d at 757 (citations omitted) (emphasis added).

3 In sum, the Nevada Supreme Court in the *Secretary of State* holding squarely endorses the
4 bringing of the causes of action alleged by NPRI, i.e. declaratory and injunctive relief, against
5 executive branch employees without sovereign power, such as the NSHE Defendants and Joinder
6 Defendants named herein. There are no restrictions stated by the Court as to the functions engaged
7 in by the executive branch employees so challenged, and rightfully so, given the Court's prior
8 recognition that it is precisely in the area of non-sovereign, ministerial functions that Separation of
9 Powers violations most frequently occur. *See Galloway v. Truesdell*, 83 Nev. at 22, 422 P.2d at 243.
10 The only condition precedent to NPRI bringing the instant case, then, is a legally protectable interest.
11 The example of a person seeking the executive branch position held by the legislator is just that, an
12 example. NPRI has clearly shown its legally protectable interest, not only through its own
13 particularized injury, but also through standing via the public-importance exception. As such, any
14 argument that NPRI is not properly before this court because it did not limit its lawsuit to public
15 officials and officers fails in its entirety and dismissal on that basis is improper.

16
17 **2. The Nevada Supreme Court Recognized “Prohibited Encroachments” on**
18 **the Separation of Powers Are Most Likely to Occur in the Exercise of**
Inherent Ministerial Powers and Functions.

19 In 1967, the Nevada Supreme Court invalidated a statute that required district courts to issue
20 marriage certificates, finding that such activities were not judicial in nature and thus the Legislature
21 could not compel the Judiciary to perform them, in light of Nevada's Separation of Powers doctrine.
22 Before reaching that conclusion, however, the Court conducted an exhaustive analysis of the
23 Separation of Powers doctrine more broadly, and the role it plays in Nevada's system of government
24 specifically. The Court began by describing the Separation of Powers as “probably the most
25 important single principle of government declaring and guaranteeing the liberties of the people.”
26 *Galloway v. Truesdell*, 83 Nev. at 20, 422 P.2d at 242. The Court then explained that in addition to
27 the constitutionally expressed powers and functions belonging to each branch of government, each
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1 branch also “possesses inherent and incidental powers that are properly termed ministerial.” *Id.* The
2 Court continued, “Ministerial functions are methods of implementation to accomplish or put into
3 effect the basic function of each Department. No Department could properly function without the
4 inherent ministerial functions.” *Id.*

5 Having identified ministerial functions as an essential and fundamental part of the exercise of
6 power itself, the Court would then caution against the “error” of adopting too restricted a view of
7 Nevada’s Separation of Powers doctrine:

8 However, it is in the area of inherent ministerial powers and functions that
9 prohibited encroachments upon the basic powers of a Department most
10 frequently occur. All Departments must be constantly alert to prevent such
11 prohibited encroachments lest our fundamental system of governmental
12 division of powers be eroded. To permit even one seemingly harmless
13 prohibited encroachment and adopt an indifferent attitude could lead to
14 very destructive results. There are not a small number of decisions of
15 courts of last resort in this country that have fallen into this trap of error. It
16 is essential to the perpetuation of our system that the principle of the
17 separation of powers be understood. The lack of understanding about the
18 principle is widespread indeed, and creates a problem of no small
19 proportions. There must be a fullness of conception of the principle of the
20 separation of powers involving all of the elements of its meaning and its
21 correlations to attain the most efficient functioning of the governmental
22 system, and to attain the maximum protection of the rights of the people.

23 *Galloway v. Truesdell*, 83 Nev. at 22, 422 P.2d at 243-44 (emphasis added).

24 As quoted above, the Court stressed that, in order to ensure that not even one “seemingly
25 harmless prohibited encroachment” is tolerated, the Separation of Powers doctrine must be given a
26 “fullness of conception, involving all of the elements of its meaning and its correlations,” while
27 warning that prohibited encroachments are most likely to occur in the area of ministerial functions.
28 Thus, the Court long ago rejected the reasoning set forth by the NSHE Defendants that only
sovereign functions are sufficient to trigger violations, having specifically warned against prohibited
encroachments that occur in the non-sovereign area of functions deemed ministerial. And, while the
Court’s reasoning is fundamentally at odds with the arguments put forth by the NSHE Defendants, it

perfectly aligns with the text of Nevada’s Separation of Powers clause, which NPRI properly seeks herein to enforce.

3. ***NPRI Has No Plain, Speedy and Adequate Remedy in the Ordinary Course of Law.***

As a final matter regarding the arguments for dismissal under NRCP 12(b)(5), the NSHE Defendants and Joinder Defendants assert NPRI’s specific claim for injunctive relief is unsound “because there is an adequate remedy at law.” *See* Motion at 14:8-9. This purported remedy is, in fact, identified as deriving from the Code of Ethical Standards for government employees and its enforcement thereof by the Commission on Ethics, which are authorized under NRS Chapter 281A. Aside from the fact that the majority of the chapter imposes self-actuating requirements that are otherwise reliant on government employees’ voluntarily compliance, the complaint process itself is not a remedy at law. It is at best an administrative remedy to be rendered, if at all, by the Commission on Ethics. NPRI would have no legal rights in the process, no ability to conduct any discovery, and no ability to advocate for a particular outcome. Generally, when courts contemplate finding an adequate remedy at law as preclusive to injunctive relief, it is because there is monetary compensation available that is sufficient to redress the harm. *See, e.g. Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029 (1987) (holding irreparable harm is an injury “for which compensatory damage is an inadequate remedy”). NPRI has appropriately and adequately alleged in the Amended Complaint all of the elements for its cause of action for injunctive relief, and any determination of whether NPRI can factually meet those elements, including providing specific proof of irreparable harm, must made by the Court after a full evidentiary hearing, not upon a motion to dismiss.

C. **NPRI Did Not Fail to Name A Necessary Party, and Dismissal May Not Occur Where Joinder of the Necessary Party Is Feasible Regardless.**

Lastly, NSHE Defendants and Joinder Defendants argue that dismissal of NPRI’s Amended Complaint is mandated under NRCP 19, where NPRI failed to include members of the judicial branch who simultaneously hold NSHE positions in its lawsuit. *See* Motion at 15:15-16. To reach this conclusion, however, the Court must review the matter under both NRCP 19(a) and NRCP 19(b), the latter provision of which the NSHE Defendants neglected to address.

1 Indeed, the NSHE Defendants focus their argument solely on whether the four judicial
2 branch members in question are necessary parties and reach the summary conclusion that NRCP
3 19(a) requires their joinder because they may be interested in the outcome of the litigation. *See*
4 Motion at 15:24-26. This oversimplified analysis, however, is contrary to Nevada law. “NRCP 19
5 asks whether complete relief can be accorded to all current parties without the absent party and/or
6 whether the absent party claims an interest in the action.” *Rose, LLC*, 135 Nev. at 157, 445 P.3d
7 869. But, as the appellate court stated in *Rose, LLC*, how the court analyzes the two inquiries
8 depends on how the question of necessity came before the court, i.e. is the absent party seeking to
9 intervene, or is a party other than the absent party raising the necessity of joinder. *Id.* Where, as
10 here, the party raising the issue is already in the litigation, and the absent party presumably knows
11 about the litigation but has made no effort to intervene, the lack of interest of the absent party
12 suggests it does not fear the impairment of its rights. *Id.* Completeness, however, is ultimately
13 determined based on those persons who are already parties, and not whether relief is also available to
14 the absent party. *Id.*, 135 Nev. at 158, 445 P.3d at 870.

15 That said, even if NPRI assumes for purposes of this argument only that the judicial branch
16 employees engaging in dual employment with NSHE are necessary parties to the instant case, their
17 joinder is entirely feasible and dismissal would be improper. While NPRI did not join these parties
18 and chose to focus this lawsuit on only those legislators engaging in dual employment with the
19 executive branches, the Court could order these parties joined if it deemed it a necessity. NRCP
20 19(a)(2). But it is only if joinder of a necessary party is not feasible that a court must determine, in
21 equity and good conscience, whether the action may proceed or should be dismissed. *Humphries*,
22 129, Nev. at 792, 312 P.2d at 487 (citing NRCP 19(b)).

23 NPRI posits to the Court that complete relief may be had as between it and the members of
24 the legislative branch who are engaging in NSHE employment, and joinder of the members of the
25 judicial branch similarly situated is not necessary. Should the Court disagree, it may then exercise
26 one of two options: (1) it may either join these judicial branch employees by court order, or (2) it
27 may permit this matter to proceed without the joinder of these parties. The one option not available
28

1 at this time is the option requested by the NSHE Defendants and Joinder Defendants, and that is
2 outright dismissal.

3 **V.**

4 **CONCLUSION**

5 Respectfully, there is no legitimate dispute that NPRI has more than adequately pled its
6 claims for declaratory and injunctive relief, that the NSHE Defendants and Joinder Defendants are
7 on notice of the nature of these claims, and that NPRI should now be permitted to proceed with its
8 substantive action in the normal course. For all of the reasons stated herein, NPRI respectfully
9 requests that this Honorable Court deny the NSHE Defendants' Motion to Dismiss Pursuant to
10 NRCP 12(b)(5) and NRCP 12(b)(6), and the Joinder Defendants' Joinders thereto, on all grounds
11 asserted respectively therein.

12 Dated this 8th day of October, 2020.

13 **FOX ROTHSCHILD LLP**

14
15 By: /s/ Deanna L. Forbush

16 DEANNA L. FORBUSH

17 Nevada Bar No. 6646

18 COLLEEN E. MCCARTY

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22 Telephone: (702) 262-6899

23 Attorneys for Plaintiff

24 Nevada Policy Research Institute
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 8th day of October, 2020, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL AND JOINDERS THERETO FILED BY DEFENDANTS JASON FRIERSON, BRITTNEY MILLER, AND SELENA TORRES** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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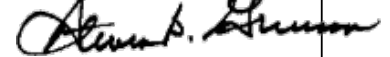
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH
INSTITUTE,
a Nevada domestic nonprofit
corporation,

Plaintiff,

v.

NICOLE J. CANNIZZARO, an
individual engaging in dual
employment with the Nevada State
Senate and Clark County District
Attorney; KASINA DOUGLAS-
BOONE, an individual engaging in dual
employment with the Nevada State

Case No.: A-20-817757-C

Dept. No.: 28

**DEFENDANTS OSVALDO FUMO,
HEIDI SEEVERS GANSERT AND
DINA NEAL'S OPPOSITION TO
PLAINTIFF'S MOTION TO
DISQUALIFY THE OFFICIAL
ATTORNEYS FROM
REPRESENTING DEFENDANTS**

1 Assembly and Clark County School
2 District; JASON FRIERSON, an
3 individual engaging in dual
4 employment with the Nevada State
5 Assembly and Clark County Public
6 Defender; OSVALDO FUMO, an
7 individual engaging in dual
8 employment with the Nevada State
9 Assembly and University of Nevada,
10 Las Vegas; HEIDI SEEVERS
11 GANSERT, an individual engaging in
12 dual employment with the Nevada State
13 Senate and University of Nevada Reno;
14 GLEN LEAVITT, an individual
15 engaging in dual employment with the
16 Nevada State Assembly and Regional
17 Transportation Commission;
18 BRITTNEY MILLER, an individual
19 engaging in dual employment with the
20 Nevada State Assembly and Clark
21 County School District; DINA NEAL,
22 an individual engaging in dual
23 employment with the Nevada State
24 Assembly and Nevada State College;
25 JAMES OHRENSCHALL, an
26 individual engaging in dual
27 employment with the Nevada State
28 Senate and Clark County Public
Defender; MELANIE SCHEIBLE, an
individual engaging in dual
employment with the Nevada State
Senate and Clark County District
Attorney; TERESA BENITEZ-
THOMPSON, an individual engaging
in dual employment with the Nevada
State Assembly and University of
Nevada, Reno; JILL TOLLES, an
individual engaging in dual
employment with the Nevada State
Assembly and University of Nevada,
Reno; and SELINA TORRES, an
individual engaging in dual
employment with the Nevada State
Assembly and Clark County School
District,

Defendants.

1 **DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT AND DINA NEAL’S**
2 **OPPOSITION TO PLAINTIFF’S MOTION TO DISQUALIFY THE OFFICIAL**
3 **ATTORNEYS FROM REPRESENTING DEFENDANTS**

4 Defendant Heidi Seevers Gansert (“Gansert”), sued herein as an employee of the University of
5 Nevada, Reno, an institution of the Nevada System of Higher Education (“NSHE”), Defendant Dina
6 Neal (“Neal”), sued herein as an employee of Nevada State College, also an NSHE institution, and
7 Defendant Osvaldo Fumo (“Fumo”), sued herein as an employee of the University of Nevada, Las
8 Vegas, also an NSHE institution, (Gansert, Neal and Fumo, collectively the “NSHE Defendants”)
9 hereby File their Opposition to Plaintiff’s Motion to Disqualify the Official Attorneys from Representing
10 Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal (“Opposition”). This Opposition is
11 based upon the following Memorandum of Points and Authorities and upon all of the pleadings and
12 papers on file herein.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 Plaintiff, Nevada Policy Research Institute (“NPRI”) seeks to deprive adjunct professors and a
15 director from their chosen counsel and force them to personally pay attorneys’ fees to defend against a
16 baseless action. To do so, NPRI misquotes and misapplies the relevant statutes, all the while not even
17 having standing to bring the Motion.

18 NPRI lacks standing to bring its Motion to Disqualify because it has not demonstrated any
19 particularized harm and it does not have general taxpayer standing. Simply put, NPRI has not been
20 harmed in any way.

21 Additionally, NPRI cannot establish any of the important interests necessary to support its
22 request. Specifically, NSHE Defendants have a right to choose their own counsel and, if NPRI’s Motion
23 is granted, not only will they be deprived of this right but also they will be required to incur unnecessary
24 expense to obtain new counsel. Importantly, NPRI has filed its Motion for tactical purposes to gain
25 additional time to respond to NSHE Defendants’ Motion to Dismiss.

26 Contrary to NPRI’s assertions, current counsel are deemed “official attorneys” by the express
27 words of the statute that designate the chief legal officer or authorized representative as the attorney
28 represent any current employee who is involved in a legal action.

Additionally, Nevada law requires that current counsel defend its employees when they are sued because of their employment. NPRI repeatedly references defendants' dual employment as the basis for the lawsuit. If the defendants were not employed by governmental entities, they would not be sued. Therefore, the official attorneys are required to represent them.

Even if counsel were not obligated to defend, however, there is nothing in the statute that prohibits current counsel from representing the NSHE Defendants on a permissive basis.

For all of these reasons, NPRI's Motion to Disqualify should be denied.

II. FACTS

The caption of the Amended Complaint identifies each and every defendant as “an individual engaging in dual employment.” (Am. Compl.) Specifically, the Amended Complaint alleges that Osvaldo Fumo is engaging in dual employment with the Nevada State Assembly and University of Nevada, Las Vegas as an Adjunct Instructor (*Id.* ¶ 10), that Dina Neal is engaging in dual employment with the Nevada State Assembly and Nevada State College as an Adjunct Instructor (*Id.* ¶ 14), and that Heidi Seevers Gansert is engaging in dual employment with the Nevada State Senate and the University of Nevada, Reno as the Executive Director, External Relations (*Id.* ¶ 11). In fact, “NPRI files this Complaint for Declaratory and Injunctive Relief to address the ongoing constitutional violations by Defendants, and each of them, for engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments.” (*Id.* ¶ 1). Indeed, the word “employee” or “employment” is stated eighteen times in the caption and body of the Amended Complaint. (*Id.*) It is clear from the Amended Complaint that the NSHE Defendants are being sued because they are employed at NSHE educational institutions.

III. LEGAL ANALYSIS

A. NPRI lacks standing to move to disqualify counsel.

Standing is a jurisdictional issue. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 1016, 140 L.Ed.2d 210 (1998); *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, 106 S.Ct. 1236, 1331, 89 L.Ed.2d 501 (1986). “The party seeking to disqualify bears the burden of establishing that it has standing to do so.” *Liapis v. Second Judicial District Court*, 128

1 Nev. 414, 420, 282 P.3d 733, 737 (2012); *see also State ex rel. Cannizzaro v. First Judicial District*
2 *Court*, 136 Nev. Adv. Op. 34, 466 P.3d 529, 531-532 (2020). “The moving party bears the burden of
3 establishing an ethical violation or other factual predicate upon which the motion [to disqualify]
4 depends.” *Hernandez v. Guglielmo*, 796 F.Supp.2d 1285, 1289 (2011) (citing *United States v. Walker*
5 *River Irr. Dist.*, No. 3:73CV127ECR (RAM), 2006 WL 618823 (D. Nev. March 10, 2006)).
6 “Disqualification is a drastic measure which courts should hesitate to impose except when absolutely
7 necessary.” *Id.* at 1289-1290(citing *United States v. Titan Pac. Construction Corpl*, 637 F.Supp 1556,
8 1562 (W.D. Wash. 1986)). A non-client may only establish standing by demonstrating a concrete and
9 particularized injury that is actual and imminent but not hypothetical or conjectural. *Hernandez*, 796 F.
10 Supp. 2d at 1290.

11 **1. NPRI cannot establish any particularized harm to give it standing**

12 NPRI has not set forth any facts to demonstrate that it has standing to bring a motion to
13 disqualify. It has not identified any interest it has in the issue as to who represents the NSHE Defendants.
14 NPRI has not alleged any ethical violation resulting from NSHE’s representation of its employees, nor
15 has NPRI pointed to any other actual or imminent harm that will result if the NSHE attorneys continue
16 representation of their clients. Accordingly, NPRI has no legal standing to move for disqualification.

17 **2. General taxpayer standing is not sufficient to establish standing**

18 Even if it is assumed that NPRI is attempting to show standing to advance the interests of
19 taxpayers generally, this would be insufficient to establish standing. Nevada law is clear that no
20 generalized taxpayer standing is available to NPRI. *Katz v. Incline Village General Improvement*
21 *District*, 414 P.3d 300, 2018 WL 1129140 (unpublished decision), Nev. S. Ct. Case No. 70440 (Feb. 26,
22 2018) (“This court recently reaffirmed the general rule that a taxpayer lacks standing when he or she
23 has not suffered a special or peculiar injury different from that sustained by the general public.”);
24 *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) (“Generally, a party must show a
25 personal injury and not merely a general interest that is common to all members of the public.”);
26 *Blanding v. City of Las Vegas*, 52 Nev. 52, 74, 280 P. 644, 650 (1929) (rejecting the contention that
27 taxpayers can establish standing without showing special injury).
28

1 **B. NPRI cannot establish any of the important interests required to support**
2 **disqualification**

3 Because NPRI has failed to establish standing, this Court lacks jurisdiction to entertain NPRI's
4 motion. Moreover, even if NPRI had standing, an analysis of disqualification principles requires that
5 the motion be denied. Interests that must be considered "include a client's right to choose legal counsel,
6 the expense of obtaining substitute counsel, and the possibility that such a motion was brought for
7 tactical purposes." *Cannizzaro*, 466 P.3d at 532 (citing *People ex rel. Department of Corporations v.*
8 *Speedee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1144-1145, 86 Cal.Rptr.2d 816, 823, 980 P.2d 371,
9 377-378 (1999)).

10 **1. NSHE Defendants have a right to choose their own counsel**

11 As set forth above, the right to choose legal counsel is an important interest that a court should
12 consider when ruling on a motion to disqualify. *Id.* NSHE Defendants have chosen their counsel –
13 counsel who have already begun diligently representing them. The counsel selected by NSHE
14 Defendants have an advantage as it relates to understanding the Nevada System of Higher Education
15 and each of its institutions because counsel is in-house and is familiar with various issues that may arise
16 during the pendency of this litigation. If NSHE Defendants are required to obtain independent counsel,
17 new counsel would be disadvantaged because they would have to familiarize themselves with the
18 operations of three separate institutions and the Nevada System of Higher Education. Not only would
19 disqualification deny Fumo, Gansert and Neal their right to select counsel, but it would also prejudice
20 them by having to hire counsel who is not familiar with the respective institutions.

21 **2. NSHE Defendants will incur unnecessary expense if required to obtain different**
22 **counsel**

23 Should the Court grant NPRI's Motion, the NSHE Defendants will be burdened with
24 unwarranted expense to hire new counsel. The counsel selected by NSHE Defendants – General
25 Counsel for Nevada State College and Assistant General Counsel for University of Nevada, Reno – are
26 salaried employees who have undertaken the defense of the NSHE Defendants as part of their regular
27 workload. As it stands, there is no expense to the NSHE Defendants and no expense to taxpayers.
28 Forcing NSHE Defendants to obtain separate counsel when there is no expense to taxpayers is punitive.
There is no harm to the public. The only harm would be to the NSHE Defendants, two of whom are

1 part-time adjunct professors. Alternatively, and as discussed below, if the NSHE Defendants are forced
2 to obtain separate counsel, they may be entitled to reimbursement of attorneys' fees, costs and other
3 reasonable expenses of their defense from the State of Nevada, pursuant to Nev. Rev. Stat ("NRS")
4 41.0347, which would be an actual cost to taxpayers. The Motion to Disqualify should be denied on
5 this basis.

6 **3. NPRI filed its motion solely for tactical purposes**

7 Moreover, the third consideration raised by *Cannizzaro* – whether the motion to disqualify was
8 brought for tactical purposes – merits close examination. The conclusion to NPRI's motion is telling.
9 Therein, NPRI reveals that one of the objectives behind its motion is to obtain more time to file an
10 opposition to the NHSE Defendants' Motion to Dismiss by seeking a stay until 10 days from the date
11 that new counsel(s) would appear for the NSHE Defendants. Courts, however, should not permit a party
12 to misuse a motion for disqualification as an instrument of harassment or delay. *Brown v. Eighth Judicial*
13 *District Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000). The Court in *Speedee Oil* used the
14 term "tactical abuse" in describing such dangers inherent in a motion to disqualify. *Speedee Oil*, 20
15 Cal.4th 1145, 86 Cal.Rptr.2d 823.

16 NPRI is clearly engaging in such "tactical abuse" here, a wrong that this Court must carefully
17 guard against in considering the motion to disqualify counsel. "Particularly strict judicial scrutiny" must
18 be applied to a motion to disqualify due to the significant possibility of abuse for tactical advantage.
19 *Optyl Eyewear Fashion Int'l Corp. v. Style Cas., Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985)(citing
20 *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715. 721-722 (7th Cir. 1982)). In fact, the *Optyl*
21 court awarded attorneys' fees and double costs as a sanction for misusing a motion to disqualify. *Optyl*,
22 689 F.2d 1052. Applying strict judicial scrutiny here, it is clear that NPRI's motion must be denied
23 because NPRI has completely failed to show any basis to support a finding that it has legal standing to
24 bring this motion.

25 **C. Current counsel qualify as official attorneys per statute**

26 NPRI argues that "the statutory definition of an 'official attorney' who may provide a defense to
27 a State employee at the State's expense, **limits that representation only** to cases where the employee
28 'is named as a defendant solely because of an alleged act or omission relating to the public duties or

1 employment'..." (Motion to Disqualify 8:19-21 (emphasis added).) This argument is inaccurate and
2 misleading and should be summarily rejected.

3 In its Motion, NPRI conveniently and disingenuously omitted the portion of the definition of
4 "official attorney" that relates simply to an action involving an employee. In its entirety, NRS 41.0338
5 reads:

6 NRS 41.0338 "Official attorney" defined. **"Official attorney" means:**

7 1. The Attorney General, in an action which involves:

8 (a) A present or former state judicial officer, State Legislator, officer or employee of
9 this State, immune contractor or member of a state board or commission; or

10 (b) A person who is named as a defendant in the action solely because of an alleged
11 act or omission relating to the public duties or employment of a person listed in paragraph
12 (a).

13 2. **The chief legal officer or other authorized legal representative of a political
14 subdivision, in an action which involves:**

15 (a) A present or former local judicial officer of that political subdivision, **a present or
16 former officer or employee of that political subdivision** or a present or former member
17 of a local board or commission; or

18 (b) A person who is named as a defendant in the action solely because of an alleged
19 act or omission relating to the public duties or employment of a person listed in paragraph
20 (a).

21 NEV. REV. STAT. § 41.0338 (emphasis added).

22 By the clear words of the statute, which is written in disjunctive form, the official attorney
23 designation is established by the mere fact that the NSHE Defendants are present employees who are
24 involved in an action. Therefore, NSHE Defendants' current attorneys are well within statutory
25 parameters to act as official attorneys for the defendants and NPRI's claims to the contrary are
26 groundless.

27 **D. Nevada law clearly requires defense of the NSHE Defendants.**

28 Throughout the Motion to Disqualify, NPRI confirms that it is suing the defendants because of
their "dual employment":

- "NPRI's challenge to the Defendants' continued dual employment as elected officials serving in the Nevada State Legislature and employees of State or local government, ..., is a matter of significant public importance." (Motion to Disqualify 6:20-23.)
- "On the contrary, in the instant case the Defendants were named solely because of their individual decisions to serve in the Nevada State Legislature while also being employed by a State or local government." (Motion to Disqualify 8:3-5.)

- 1 • “Again, the instant litigation seeks only to challenge the fact of Defendants’ State employment,
2 not any actions taken as a result of such employment.” (Motion to Disqualify 8:24-25.)

3 Additionally, the caption of the Amended Complaint identifies Defendants Fumo, Gansert and Neal
4 as employees of NSHE institutions, and the allegations in the body of the Amended Complaint
5 emphasize their employment with NSHE. In other words, *but for* the defendants’ employment with
6 NSHE, they would not be named in this litigation.

7 NPRI seems to argue that a state employee can only be represented by official counsel for matters
8 involving the performance of duties. The statute, however, expressly allows for representation for
9 matters related to the public duties **or** employment. The pertinent statutory language follows:

10 **The official attorney shall provide for the defense, including the defense of** cross-claims
11 and counterclaims, or **any present or former** local judicial officer, state judicial officer,
12 officer or **employee of the State or a political subdivision**, immune contractor or State
13 Legislator **in any civil action brought against that person based on any alleged act or**
14 **omission relating to the person’s** public duties or **employment**, or any other person who
15 is named as a defendant in a civil action solely because of an alleged act or omission related
16 to the public duties or employment of a local judicial officer, state judicial officer or
17 employee of the State or a political subdivision, immune contractor or State Legislator ...

18 NEV. REV. STAT. § 41.0339(1) (emphasis added).

19 The plain reading of the statute requires that official counsel represent its employees if they are
20 sued because of their employment. Any other reading would nullify the words “or employment” in the
21 statute. The fact that Defendants Fumo, Gansert and Neal are employed by NSHE is the basis for NPRI’s
22 lawsuit. (Motion to Disqualify 8:24-15) (“the instant litigation seeks only to challenge the fact of
23 Defendants’ State employment...”) Employment with NSHE is the very essence of NPRI’s argument.
24 In fact, NPRI references the fact of employment or dual employment repeatedly both in the Amended
25 Complaint and the Motion to Disqualify. The fact of employment is as pure an act related to
26 employment as could be. Because being employed is related to employment, the NSHE Defendants are
27 entitled to representation under Nevada law, and NPRI’s Motion to Disqualify should be denied.

28 **E. Official counsel is required to represent employees sued in their individual capacities
for matters related to their employment.**

 NSHE Defendants have been sued because of their employment thereby triggering the
responsibility of current counsel to represent them. *See* NEV. REV. STAT. § 41.0339. The failure to

1 provide such defense would subject NSHE to liability for all NSHE Defendants' attorney's fees and
2 litigation costs. NEV. REV. STAT. § 41.0347. As a result, current counsel should be allowed to continue
3 representing NSHE Defendants.

4 A Nevada U.S. District Court case is instructive. In *Horning v. Washoe County*, the plaintiff
5 sued four sheriffs' deputies in their individual capacities related to a civil rights claim. 108 F.R.D. 364
6 (D. Nev. 1985). Interpreting NRS 41.0339, the Court determined that NRS 41.0339 required the
7 employer "to defend its employees against any civil action arising out of the performance of their duties,
8 if the employees' acts were not wanton or malicious." *Horning*, 108 at 365. The Court made this
9 determination although the employees were sued in their individual capacities.

10 Providing a defense to the NSHE Defendants is a mandatory obligation under NRS 41.0339(1).
11 This obligation is required when employees are sued because of the performance of their duties or
12 because of their employment. NEV. REV. STAT. § 41.0339(1). The appearance of NSHE counsel in this
13 litigation on behalf of Defendants Fumo, Gansert and Neal fulfills the statutory directive to NSHE that
14 it protect the legal interests of its employees when they are sued as a result of their employment with
15 NSHE, and NPRI's Motion to Disqualify should be denied.

16 **F. NRS 41.0339 does not limit official counsel's ability to represent its employees.**

17 NRS 41.0339 only sets forth the criteria when official counsel MUST represent its employees.
18 NEV. REV. STAT. § 41.0339. It does not address circumstances when official counsel MAY represent
19 its employees. Addressing this very issue, the federal court for the District of Nevada determined:

20 The language of NRS 41.0339 specifies the conditions under which the Attorney General
21 is required to provide for the legal defense of certain individuals. It does not purport to
22 limit the conditions under which it may provide for such individuals' defense. Indeed, NRS
23 41.03415 grants the Attorney General the discretion to determine whether to tender the
24 defense of a person submitting a request for defense. Moreover, plaintiff cites no authority
for the proposition he has standing to complain about the Attorney General's decision to
defend these state defendants.

25 *Kenmore v. Toco*, No. 2:06CV00673JCM-PAL, 2007 WL 556923, at *5 (D. Nev. Feb. 13, 2007).

26 As the statute indicates and as the *Kenmore* case confirms, NRS 41.0339 addresses only required
27 representation, not permissive representation. Therefore, even assuming current counsel is not required
28 to represent NSHE Defendants, it is permitted to do so. As such, NPRI's Motion to Disqualify should
be denied.

1 **IV. CONCLUSION**

2 NPRI has no standing to seek disqualification of the NSHE official attorneys. NPRI has failed
3 to demonstrate that it has a legally-protectable interest in the relationship between NSHE and its
4 employees. Further, NPRI has failed to make the necessary showing to invoke taxpayer or general
5 public interest standing, as it has failed to articulate any individual injury.

6 Disqualification is a drastic measure that should be employed only when absolutely necessary.
7 Disqualification in this case is unwarranted and would prevent Fumo, Gansert and Neal from being
8 represented by counsel of their choice. It would prevent NSHE from protecting the interests of its
9 employees who are sued for the very reason that they are NSHE employees. It would prevent NSHE
10 from fulfilling the statutory mandate to defend its employees who are sued due to their connection with
11 NSHE. It would impose unwarranted legal expenses on these individuals who have done nothing wrong
12 and only wish to serve the State as citizen legislators.

13 NPRI's narrow and restrictive reading of NRS 41.0339 is erroneous and misplaced. That statute
14 sets out those circumstances in which representation by the official attorney is mandatory. It does not
15 restrict the official attorney from providing representation in other employment-related matters when
16 the official attorney determines in its discretion that such representation is necessary to protect the
17 interests of its employees and, indeed, the institution's own interest in retaining its valued employees.

18 NPRI's motivation here is very clear. It wishes to place a financial burden on state employees
19 to chill their constitutional right to seek public office. NPRI also seeks to obstruct and delay the
20 litigation by seeking an unwarranted and unnecessary extension of time to oppose the NSHE's Motion
21 to Dismiss until after new counsel would appear. Other courts have recognized and warned against the
22 misuse of motions to disqualify to abuse opposing parties and to gain tactical advantage. NPRI's
23 improper tactics here should be emphatically rejected.

24 For all of the above reasons, NSHE Defendants respectfully request that NPRI's meritless and
25 frivolous Motion to Disqualify be denied.

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AFFIRMATION

The undersigned hereby affirm that this document does not contain “personal information about any person” as defined in NRS 239B.309 and NRS 603A.040.

DATED this 9th day of October, 2020.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State
3 College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party
4 to the within cause. Pursuant to NRCP 5, I further certify that on October 9, 2020, I caused the
5 following document, **DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT AND**
6 **DINA NEAL'S OPPOSITION TO PLAINTIFF'S MOTION TO DISQUALIFY THE**
7 **OFFICIAL ATTORNEYS FROM REPRESENTING DEFENDANTS**, to be served as follows:



9 **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f),
10 to be electronically served through the Eighth Judicial District Court's electronic filing system,
11 with the date and time of the electronic service substituted for the date and place of deposit in
12 the mail to the attorneys listed below at the address indicated below.

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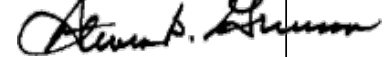
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25 **BY MAIL** I caused such envelope(s) with first class postage thereon fully prepaid to be
26 placed in the U.S. Mail in Henderson, Nevada.

27
28 Nita Armendariz
An employee of the Office of General Counsel
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14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**NOTICE OF NON-OPPOSITION TO
PLAINTIFF'S MOTION FOR ORDER
TO SERVE BY PUBLICATION
DEFENDANTS GLEN LEAVITT,
JAMES OHRENSCHALL, AND
MELANIE SCHEIBLE**

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

TO THE COURT, THE DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, filed and served its Motion for Order to Serve by Publication Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible (“Motion for Service by Publication”) on September 29, 2020. The deadline for filing and serving written opposition thereto was October 13, 2020.

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1 Pursuant to Rule 2.20(e) of the Eighth Judicial District Court Rules, NPRI respectfully
2 requests that this Court construe the failure to file any written or timely opposition to the Motion for
3 Service by Publication as an admission that it is meritorious and as a consent to granting the same.

4 Dated this 14th day of October, 2020.

5 **FOX ROTHSCHILD LLP**

6
7 By: /s/ Deanna L. Forbush
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 14th day of October, 2020, I caused the foregoing document entitled **NOTICE OF NON-OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER TO SERVE BY PUBLICATION DEFENDANTS GLEN LEAVITT, JAMES OHRENSCHALL, AND MELANIE SCHEIBLE** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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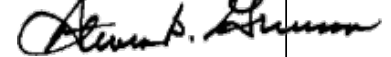
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Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**PLAINTIFF'S OPPOSITION TO
NEVADA LEGISLATURE'S MOTION
TO INTERVENE AS DEFENDANT**

Date of Hearing: December 17, 2020

Time of Hearing: 9:00 a.m.

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 Nevada Policy Research Institute ("NPRI"), by and through its attorneys of record, Deanna
13 L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Opposition
14 to the Nevada Legislature's Motion to Intervene as Defendant, filed on September 30, 2020, by the
15 Legislative Counsel Bureau, Legal Division ("LCB Legal")¹.

16 This Opposition is made and based on the following Memorandum of Points and Authorities,
17 the papers and pleadings on file, and any oral argument permitted at the hearing of this matter.

18 Dated this 14th day of October, 2020.

19 **FOX ROTHSCHILD LLP**

20 By: /s/ Deanna L. Forbush

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Attorneys for Plaintiff

Nevada Policy Research Institute

27 ¹ On September 25, 2020, NPRI filed a Motion to Disqualify the Official Attorneys from Representing Defendants
28 Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal ("Motion to Disqualify"), which is currently pending a hearing on
December 17, 2020. To the extent the Legislature's intervention would effectively give all Defendants representation by
LCB Legal at taxpayers' expense, exactly what NPRI asserts is improper, NPRI incorporates same by reference herein.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The Court is likely familiar with the expression “separate the wheat from the chaff.” This is
5 the unenviable task LCB Legal has forced on the Court in order for it to properly review the
6 Legislature’s request to intervene as a 12th named Defendant². What should have been a simple
7 motion to ask the Court to consider a request under NRCP 24(b) for permissive intervention has
8 instead been posed, without legal basis, as a request for intervention as of right under NRCP 24(a),
9 with permissive intervention a mere alternative. This straw person argument for intervention as of
10 right under NRCP 24(a) immediately fails, however, where the statute the Legislature invokes does
11 not apply. And, the potential for the Court to exercise its discretion to allow permissive intervention
12 under NRCP 24(b) also fails upon any fair application of the rule to the facts of the case.

13 LCB Legal spends a full 14 pages of its 16-page brief asserting the wholly inapposite
14 argument for the Legislature’s intervention as of right under NRCP 24(a)(1) and (2), when the very
15 statute it cites as conveying that right, i.e. NRS 281F.720, contains language that unambiguously
16 precludes its application, and, with three motions to dismiss pending before the Court already, the
17 existing parties are clearly representing any tangential interest the Legislature may have in the
18 instant case. Specifically, with regard to the applicability of NRCP 24(a)(1), LCB Legal’s motion
19 conspicuously ignores the entirety of NRS 281F.720, which contains the conditions precedent for
20 intervention as of right. NRS 281F.720 plainly limits intervention to those lawsuits containing
21 either: (a) a challenge to an action (or inaction) of the Legislature itself, which allegation is not
22 present here, or (b) a challenge to a law “on grounds that it is ambiguous, unclear, imprecise,
23 indefinite, or vague, is preempted by federal law, or is otherwise inapplicable, invalid,
24 unenforceable, or unconstitutional.” See NRS 281F.720(2)(a) and (b) (emphasis added).

25 NPRI gives LCB Legal the benefit of the doubt that it is not intentionally seeking to mislead
26

27 ² In its Amended Complaint, NPRI named 13 Defendants known to be simultaneously holding elected offices in the
28 Legislature and paid positions in State or local governments. NPRI subsequently entered Notices of Voluntary Dismissal
for Teresa Benitez-Thompson and Kasina Douglass-Boone upon notification that they were no longer engaging in dual
employment, leaving 11 remaining Defendants as parties to the instant action.

1 the Court in this regard, but not once does the language quoted and emphasized above appear in the
2 Legislature's motion. And, the reason is obvious: NPRI is clearly seeking through its Amended
3 Complaint to enforce the Separation of Powers clause of the Nevada Constitution as written, not
4 challenge it such that the Legislature's defense is necessary. To be more precise, NPRI's allegations
5 make clear that its case is premised on the fact that the Separation of Powers clause is unambiguous,
6 clear, precise, definite, not vague, not preempted by federal law, and not in any way otherwise
7 inapplicable, invalid, unenforceable, or unconstitutional. For these reasons, as detailed more fully
8 herein, intervention as of right is simply not available to the Legislature.

9 In the absence of a basis to consider intervention as of right under NRCP 24(a), the Court is
10 left to determine only whether permissive intervention under NRCP 24(b) is warranted, and it is not.
11 The Legislature's argument for permissive intervention is limited to 31 lines in the last 2 pages of the
12 motion, and, as LCB counsel admits from the outset, the Court's decision is entirely discretionary.
13 See Motion at 16:7-10. More importantly, NRCP 24(b) is limited in its application to non-parties
14 with either a conditional right to intervene or a defense in common with the primary case, or, in the
15 case of a non-party governmental entity, to lawsuits that are based on a statute administered by the
16 entity or a regulation, order, requirement or agreement issued under such a statute. Not one of these
17 scenarios is present in the instant case. NPRI purely seeks a determination by the Court, and
18 ultimately by the Nevada Supreme Court, that certain individual Legislators are engaging in dual
19 employment in violation of the Separation of Powers clause of the Nevada Constitution. The
20 Legislature is a branch of government that carries out its duties through individual legislators acting
21 in their official capacities as constituent members, no matter who occupies those seats, and the
22 Legislature pays their statutory salaries and allowances regardless. Thus, in no way is the
23 Legislature directly affected by who serves therein, and the Legislature is in no way called upon to
24 administer the Nevada Constitution in this regard.

25 For these additional reasons, there is no legal basis for the Legislature to intervene in the
26 instant case under any provision of NRCP 24. The Court's denial of LCB Legal's request does not
27 leave the Legislature without possible recourse, however. Should the Court rule in favor of NPRI
28 and those individual Defendants aggrieved by the decision appeal, the Legislature may seek approval

1 from the appellate court to file an *amicus curiae* brief. But allowing the Legislature to insert itself as
2 a party at this stage of the proceedings would appear to be a clear abuse of this Court’s discretion.

3 II.

4 ARGUMENT

5 A. The Nevada Legislature Does Not Have the Right to Intervene in the Instant 6 Litigation Under NRCP 24(a).

7 NRCP 24(a) provides the mechanism by which a non-party is permitted to intervene as a
8 matter of right. NRCP 24(a)(1) requires intervention when a state or federal statute gives a non-
9 party the unconditional right to intervene. NRCP 24(a)(2) applies where the non-party claims an
10 interest in the litigation that is not adequately represented by existing parties. Taking each provision
11 in turn, it is clear the Legislature does not have the right to intervene.

12 I. No Right to Intervene Under NRCP 24(a)(1).

13 The statute the Legislature relies on for its NRCP 24(a)(1) argument is NRS 218F.720(2)(a)
14 and (b). *See* Motion at 2:9, 5:1-3, 6:7-8, and 8:12-17. The Legislature first attempts to assert NRS
15 218F.720(2)(a) is applicable because NPRI is alleging that the Legislature itself, by its own actions
16 or failure to act, has violated the Nevada Constitution. *See* Motion at 8:12-13. The Amended
17 Complaint on file herein, however, contains no such allegation. Indeed the entirety of the Amended
18 Complaint takes aim solely at individual legislators who are “simultaneously holding elected offices
19 in the Nevada State Legislature and paid positions with Nevada State or local governments in
20 violation of the Separation of Powers requirement of Nevada Const. Art. 3, § 1, ¶ 1.” *See* Amended
21 Complaint at ¶¶ 23, 27. NPRI seeks both declaratory and injunctive relief against these individuals,
22 and only these individuals, to resolve this controversy and stop these ongoing violations. *See*
23 Amended Complaint at ¶¶ 24, 29. And, NPRI asserts in regard to its claim for injunctive relief
24 specifically that, “[w]ithout the Court’s intervention, legislative expenditures or appropriations and
25 taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1, and
26 irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
27 Constitution.” *See* Amended Complaint at ¶ 28.

28 The Legislature would have the Court believe that the mere reference to the Defendants’

1 actions resulting in the payment of “legislative expenditures or appropriations and taxpayer monies”
2 in ¶ 28 of its Amended Complaint is tantamount to NPRI alleging that “the Legislature has violated
3 the Nevada Constitution by authorizing legislative expenditures or appropriations,” such that NRS
4 218F.720(2)(a) would apply. *See* Motion at 9:8-13. This argument is both nonsensical and contrary
5 to Nevada law. The Court may take judicial notice that legislators are compensated by Legislative
6 expenditure, per statutory requirement. Specifically, legislators are paid a minimum daily salary of
7 \$130 for the first 60 days of a regular session and up to 20 days of a special session. NRS
8 218A.630(1)(a) and (b); *see also* https://www.leg.state.nv.us/General/AboutLeg/General_Short.html
9 (last visited Sept. 29, 2020). Legislators also receive a per diem allowance, paid each day the
10 Legislature is in session, which is intended to cover, among other things, lodging, meals and
11 incidental expenses. NRS 218A.635, *et seq.* While in session, Legislators are also entitled to
12 allowances for communications, postage, stationery and travel. *Id.* And, while the Legislature is
13 not in session, each Senator and Assembly member is entitled to receive a salary and the per diem
14 allowance and travel expenses for each day of attendance at a conference, training session, meeting,
15 seminar, or other gathering at which the Legislator officially represents the State or its Legislature.
16 *Id.* Each of the aforementioned statutory requirements exists independent of which persons hold
17 these elected offices, and NPRI is in no way challenging the Legislature’s carrying out of or
18 compliance with these requirements.

19 Where the Legislature is truly wrong-footed, however, is when it attempts to rely on NRS
20 218F.720(2)(b) for its argument under NRCP 24(a)(1). The Legislature selectively quotes the statute
21 as providing it the unconditional right to intervene because NPRI:

22 “[c]hallenges, contests or raises as an issue, either in law or in equity, in
23 whole or in part, or facially or as applied, the **meaning, intent, purpose,**
24 **scope, applicability,** validity, **enforceability** or constitutionality of any
25 law, resolution, initiative, referendum or other legislative or
constitutional measure.”

26 *See* Motion at 9:20-23 (citation omitted) (emphasis in original). In reality, when cited in its entirety,
27 this statutory provision would provide the Legislature the unconditional right to intervene only if
28 NPRI:

1 “[c]hallenges, contests or raises as an issue, either in law or in equity, in
2 whole or in part, or facially or as applied, the meaning, intent, purpose,
3 scope, applicability, validity, enforceability or constitutionality of any law,
4 resolution, initiative, referendum or other legislative or constitutional
5 measure on the grounds that it is ambiguous, unclear, imprecise indefinite,
6 or vague, is preempted by federal law, or is otherwise inapplicable,
7 invalid, unenforceable or unconstitutional.”

8 NRS 281F.720(2)(b) (emphasis added). This additional language is determinative of the statute’s
9 application, and it is never once acknowledged by the Legislature in its motion. Tellingly, this
10 language is also conspicuously absent from the Resolution of the Legislative Commission that LCB
11 Legal obtained on September 18, 2020 and touts as directing it to intervene in the instant action. *See*
12 Motion at 3:17-20 and Exhibit B to the Motion at 3:14-17.

13 As any fair reading of the Amended Complaint makes clear, NPRI is seeking to enforce the
14 Separation of Powers clause of the Nevada Constitution, not challenge it on any grounds. Contrary
15 to the language in the preceding paragraph, NPRI’s entire case is premised on the fact that the
16 Separation of Powers clause is unambiguous, clear, precise, definite, not vague, not preempted by
17 federal law, and not in any way otherwise inapplicable, invalid, unenforceable, or unconstitutional.
18 And, certainly, NPRI’s efforts to enforce the Nevada Constitution will in no way invoke the need for
19 the Legislature to provide a defense to the Separation of Powers clause itself. For these reasons,
20 intervention as of right under NRCP 24(a)(1) is not available to the Legislature in the instant case,
21 and its motion should be denied on this basis.

22 **2. No Right to Intervene Under NRCP 24(a)(2).**

23 To intervene under NRCP 24(a)(2), a non-party must meet four requirements: (1) that it has a
24 sufficient interest in the litigation’s subject matter; (2) that it could suffer an impairment of its ability
25 to protect that interest if it does not intervene; (3) that its interest is not adequately represented by
26 existing parties; and (4) that its application is timely. *See Am. Home Assurance Co. v. Eighth*
27 *Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). Further, determining
28 whether an applicant has met these four requirements is within the district court’s discretion. *Id.*
(citations omitted).

NPRI has addressed in the preceding section why the Legislature has no legitimate interest in

1 the instant action, let alone an interest sufficient to meet the first two requirements stated above. But
2 even if the Court were to find that some protectable interest is held by the Legislature in this case,
3 the Legislature still has no right to intervene if its interest is adequately represented by the existing
4 Defendants. *Am. Home Assurance Co.*, 122 Nev. at 1241, 147 P.3d at 1128. It is the Legislature's
5 burden to prove its interest is not adequately represented, and although the burden is described as
6 "minimal," it cannot be met where the Legislature's interest or ultimate objective in the litigation is
7 the same as the existing Defendants or subsumed within the Defendants' objective. *Id.* (citation
8 omitted).

9 Whether an existing party's interest adequately represents an intervenor's interest is, in fact,
10 crucial to the analysis of a proposed intervention. *See Hairr v. First Judicial Dist. Ct.*, 132 Nev.
11 Adv. Op. 16, 368 P.3d 1198 (2016). In *Hairr*, the State of Nevada was defending litigation
12 regarding the constitutionality of an education grant program instituted by law. *Id.*, 368 P.3d at
13 1199. Parents of students seeking grants sought to intervene in the matter. *Id.* The court ultimately
14 found the parents seeking to intervene had the same interest as the State in having the program
15 declared constitutional. *Id.*, 368 P.3d at 1199-1200. "The most important factor in determining
16 adequacy of representation is how the interest compares with the interests of existing parties...[and]
17 when an applicant for intervention and an existing party have the same ultimate objective, a
18 presumption of adequacy of representation arises." *Id.*, 368 P.3d at 1201. The State's representation
19 was therefore presumptively adequate in representing the interests of the parents, and the parents
20 were not permitted to intervene as a matter of right under NRCP 24(a)(2). *Id.*

21 Here, the requesting intervenor is the Nevada Legislature, and there is no question it has the
22 same interest and ultimate objective as the Defendants in this litigation, which is to first seek
23 dismissal of NPRI's Amended Complaint, and, when that is not successful, to obtain a ruling from
24 this Court that the Separation of Powers clause of the Nevada Constitution does not prohibit state
25 legislators from holding positions of public employment with the State executive branch or with
26 local governments. The Legislature, in fact, references this exact determination by the Legislative
27 Commission as a key factual underpinning of its motion. *See Motion at 4:5-9.* More importantly,
28 the Legislature presents no argument or allegation that Defendants' representation of its interests or

1 carrying out of its objective to obtain the same ruling as LCB Legal obtained from the Legislative
2 Commission is deficient or lacking.

3 The Legislature’s only attempt to differentiate its interests from that of the Defendants is to
4 claim it has “independent legal interests in defending the validity of its legislative actions in
5 exercising the constitutional power of appropriation.” *See* Motion at 13:11-12. As addressed by
6 NPRI in the preceding section, its Amended Complaint is devoid of any challenge to the
7 Legislature’s compliance with any of its requirements, appropriations or otherwise, which exist
8 independent of the persons holding elected offices as its constituent members. And, even if NPRI
9 were engaging in such a challenge, which it is not, no less that six of the eleven existing Defendants
10 have either filed or joined a total of three motion to dismiss, which seek to attack from every
11 conceivable angle NPRI’s sincere efforts to obtain a definitive ruling on their dual employment.³
12 While NPRI is amazed that Defendants have chosen this approach, rather than seeking to advance
13 their position for final appellate review in the most expeditious way possible, the fact remains that
14 their representation is entirely aligned with the Legislature, and the Legislature’s interest is more
15 than adequately protected. Because the Legislature fails to meet this essential prong for the right to
16 intervene under NRCP 24(a)(2), the Court should deny its motion on this basis as well.

17 **B. The Nevada Legislature Does Not Qualify for Permissive Intervention in the**
18 **Instant Litigation Under NRCP 24(b).**

19 Under the NRCP 24(b), as amended effective March 1, 2019, Nevada courts may grant
20 permissive intervention to non-parties with either a conditional right to intervene or a defense in
21 common with the primary case, or, in the case of a non-party governmental entity, in lawsuits that
22 are based on a statute administered by the entity or a regulation, order, requirement or agreement
23 issued under such a statute. *See* NRCP 24(b)(1) and (2). It is axiomatic that permissive intervention
24 is wholly discretionary with the court, and the Legislature acknowledges as much in its motion. *See*
25 Motion at 16:7-10.

27 ³ Although eleven Defendants remain as parties to this litigation, NPRI notes three of those Defendants—Nicole
28 Cannizzaro, James Ohrenschall, and Melanie Scheible—have so far evaded service and are the subject of a pending
motion for order to serve by publication. In fact, the number seeking dismissal is six of eight, or 75%, of the named
Defendants.

1 As demonstrated above, not one of the above scenarios is present in the instant case. NPRI is
2 purely seeking a determination by this Court, and ultimately by the Supreme Court, that certain
3 individual Legislators are engaging in dual employment in violation of the Separation of Powers
4 clause of the Nevada Constitution. The Legislature is a branch of government that carries out its
5 duties through individual legislators acting in their official capacities as constituent members,
6 regardless of who is sitting in those seats. And, the Legislature pays its constituent members daily
7 salaries and per diem and other allowances as set forth in statute. In no way would the Legislature
8 be directly affected by who its constituent members are, and the Legislature is not called upon to
9 defend the Separation of Powers clause of the Nevada Constitution when certain constituent
10 members are accused of violating its dual employment prohibition.

11 Indeed, the Legislature's participation in the case will add nothing to the merits of the
12 defense because the existing Defendants already represent any interest the Legislature may have in
13 the outcome of the litigation. The Legislature's intervention would needlessly multiply the
14 litigation. Its involvement would undoubtedly cause delay and increase costs through additional sets
15 of written discovery, additional schedules to accommodate; and additional attorneys conducting voir
16 dire, opening statements, direct and cross examinations, and closing arguments at trial. Increased
17 costs and potential for delay, which come with no measurable benefit, are sufficient reasons alone to
18 deny permissive intervention. *See Hairr*, 368 P.3d at 1202. Here, the Legislature's intervention
19 would only prolong the litigation and serve no other purpose, and the Court should exercise its
20 considerable discretion to maintain the status quo and deny permissive intervention.

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III.

CONCLUSION

NPRI respectfully asserts that the Nevada Legislature fails to qualify for intervention under either NRCP 24(a) or (b) and requests that its motion to intervene be denied in its entirety.

Dated this 14th day of October, 2020.

FOX ROTHSCHILD LLP

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Nevada Policy Research Institute

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 14th day of October, 2020, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO NEVADA LEGISLATURE'S MOTION TO INTERVENE AS DEFENDANT** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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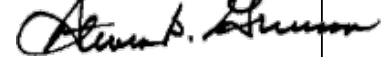
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and Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the Nevada
State Senate and Clark County District Attorney;
KASINA DOUGLAS-BOONE, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County School
District; JASON FRIERSON, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County Public
Defender; OSVALDO FUMO, an individual
engaging in dual employment with the Nevada
State Assembly and University of Nevada, Las

Case No.: A-20-817757-C

Dept. No.: 24

**DEFENDANTS OSVALDO FUMO,
HEIDI SEEVERS GANSERT, AND
DINA NEAL'S REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS AND TO
PLAINTIFF'S OPPOSITION TO
JOINDER IN DEFENDANT
MILLER'S MOTION TO DISMISS**

Date of Hearing: December 17, 2020
Time of Hearing: 9:00 a.m.

1 Vegas; HEIDI SEEVERS GANSERT, an
2 individual engaging in dual employment with
3 the Nevada State Senate and University of
4 Nevada Reno; GLEN LEAVITT, an individual
5 engaging in dual employment with the Nevada
6 State Assembly and Regional Transportation
7 Commission; BRITTNEY MILLER, an
8 individual engaging in dual employment with
9 the Nevada State Assembly and Clark County
10 School District; DINA NEAL, an individual
11 engaging in dual employment with the Nevada
12 State Assembly and Nevada State College;
13 JAMES OHRENSCHALL, an individual
14 engaging in dual employment with the Nevada
15 State Senate and Clark County Public Defender;
16 MELANIE SCHEIBLE, an individual engaging
17 in dual employment with the Nevada State
18 Senate and Clark County District Attorney;
19 TERESA BENITEZ-THOMPSON, an
20 individual engaging in dual employment with
21 the Nevada State Assembly and University of
22 Nevada, Reno; JILL TOLLES, an individual
23 engaging in dual employment with the Nevada
24 State Assembly and University of Nevada,
25 Reno; and SELENA TORRES, an individual
26 engaging in dual employment with the Nevada
27 State Assembly and Clark County School
28 District,

Defendants.

**DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL'S
REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS AND TO PLAINTIFF'S
OPPOSITION TO JOINDER IN DEFENDANT MILLER'S MOTION TO DISMISS**

Defendant Heidi Seevers Gansert ("Gansert"), sued herein as an employee of the University of Nevada, Reno, an institution of the Nevada System of Higher Education ("NSHE"), Defendant Dina Neal ("Neal"), sued herein as an employee of Nevada State College, also an NSHE institution, and Defendant Osvaldo Fumo ("Fumo"), sued herein as an employee of the University of Nevada, Las Vegas, also an NSHE institution, (Gansert, Neal and Fumo, collectively the "NSHE Defendants") hereby file their Reply ("Reply") to Plaintiff's Opposition to the NSHE Defendants' Motion to Dismiss and to Plaintiff's Opposition to NSHE Defendants' Joinder in Defendant Miller's Motion to Dismiss ("Opposition"). This Reply is based upon the following Memorandum of Points and Authorities and upon all of the pleadings and papers on file herein.

1 **I. INTRODUCTION**

2 NPRI is grasping for straws. It does not have standing. It omitted indispensable parties. And
3 the NSHE Defendants are not proper defendants.

4 NPRI has cited cases that do not apply to the facts here. NPRI has not suffered an actual,
5 recognizable injury. It has no general taxpayer standing. As a result, it does not have standing.

6 Caselaw confirms that only public officers or officials are proper parties in this type of litigation.
7 The NSHE Defendants are neither and NPRI therefore fails to state a claim upon which relief can be
8 based.

9 Additionally, NPRI's speculative harm may be addressed in other avenues thus depriving NPRI
10 of the right to move forward with its injunctive relief request.

11 Finally, NPRI does not provide sufficient explanation as to its reasons for omitting parties who
12 are not present to defend their interests – the judiciary. Accordingly, it has failed to join indispensable
13 parties.

14 For any one pr all of these reasons, NPRI's Amended Complaint should be dismissed.

15 **II. LEGAL ANALYSIS**

16 **A. NPRI Lacks Standing or a Legally Protectable Interest.**

17 NPRI has incorporated by reference its arguments on standing set forth in its opposition to
18 Defendant Miller's Motion to Dismiss and specifically references arguments in Sections IV (A) and (B)
19 of that opposition as applicable to the NSHE Defendants' Motion to Dismiss. Therein, NPRI relies on
20 *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016) to suggest that it indeed has standing under the
21 public-importance analysis. However, the reliance is misplaced.

22 *Schwartz* was a challenge to a legislative appropriations bill that created educational savings
23 accounts, which the Court acknowledged "allows millions of dollars of public funds to be diverted from
24 public school districts to private schools...". *Id.* at 743. The plaintiffs in *Schwartz* were tax-paying
25 parents of children who attended public schools. They had a direct and identifiable interest in that their
26 tax dollars were to be diverted to private accounts, rather than being used to benefit the public schools
27 their children attended. The three elements *Schwartz* required for establishing the exception to the
28 requirement that personal injury, not just general interest, be shown for standing were easily met in that

1 case. The public importance element was met due to the potential to divert millions of public dollars to
2 the educational savings accounts; the element that the challenge must be to a legislative expenditure or
3 appropriation was met because the bill that was challenged was an appropriations bill; the appropriate
4 party element was also met because no one was more affected by the bill than the taxpayer parents
5 whose tax dollars were to be diverted from their children's schools.

6 In the instant case, NPRI's effort to establish standing under the *Schwartz* case fails because
7 NPRI cannot meet the *Schwartz* elements. The "public importance" exception to the injury requirement
8 for standing is narrow and only available if all elements are met. *Id.* at 743.

9 With respect to the public importance element, NPRI has not presented a single factual allegation
10 to move this matter from the realm of philosophical discussion to practical concern. NPRI merely offers
11 conclusory allegations that conflicts of interest, lack of transparency and accumulation of power might
12 result from simultaneous employment in the executive and legislative branches of state government.
13 There are no allegations of past misconduct or probable future misconduct, merely speculation that
14 undefined issues may arise. Such is insufficient to demonstrate the type of public importance
15 contemplated by *Schwartz*.

16 Moreover, NPRI has failed to demonstrate that its challenge to dual employment involves a
17 challenge to legislative expenditures or appropriations beyond the mere mention that legislators are paid.
18 This hardly compares to the situation in *Schwartz* where millions of taxpayer dollars were at risk.
19 Significantly, unlike the taxpayer parents who were plaintiffs in *Schwartz*, by its own admission, NPRI
20 is a nonprofit organization. (Opposition, 11:1.) As such, NPRI is not even a taxpayer and a comparison
21 to the circumstances in *Schwartz* fails.

22 The third element for standing, that a plaintiff must be an appropriate party, is also missing here.
23 NPRI points to two prior cases that were dismissed for different reasons. *Pojunis v. Denis*, First Judicial
24 District Court Case No. 11 OC 00394 (2011) was dismissed as moot because Defendant Denis resigned
25 his public employment. *French v. Gansert*, First Judicial District Court Case No. 17- OC 00231B (2017)
26 was dismissed because the plaintiff failed to join indispensable parties. Because those two prior cases
27 failed for unrelated reasons, and because no one else has filed a current challenge, NPRI argues, "It is
28 not reasonably in dispute therefore that there is no one else in a better position than NPRI to bring this

1 type of action and that NPRI is fully capable of advocating its position in the instant case.” (Opposition,
2 9:17-19.) This conclusory statement is a non sequitur, completely lacking in substance, and it falls fall
3 short of meeting the third element of the *Schwartz* analysis.

4 Perhaps recognizing that it cannot meet the *Schwartz* elements for standing, NPRI attempts to
5 forestall dismissal by alleging that by bringing this suit, NPRI has diverted time and resources from
6 other NPRI projects. (Opposition, 11:2-4.) This is an effort to establish that NPRI has suffered injury-
7 in-fact. However, NPRI voluntarily chose to file this suit, and such self-inflicted injury is not the type
8 of damage contemplated by Nevada decisional law.

9 Notably, the cases cited by NPRI in its opposition strongly suggest that NPRI lacks standing. In
10 *Commission on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009), in the context of a conflict of
11 interest complaint lodged against a State Senator, the Nevada Supreme Court was emphatic in
12 concluding that to the extent a legislator’s misconduct involves core legislative functions, such as voting
13 and disclosing potential conflicts of interest prior to voting, only the Legislature has power to discipline,
14 and that power may not be delegated to another branch of the government. *Id.* at 287. Here, NPRI
15 improperly seeks to establish standing to ask this Court to intrude on the Legislature’s exclusive
16 jurisdiction to manage its affairs and discipline its members, even without any showing of actual past
17 misconduct or probable future misconduct.

18 NPRI’s Opposition also notes the *Schwarz* decision’s citation to *Secretary of State v. Nevada*
19 *State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). That case involved the same
20 constitutional challenge to dual employment. However, it was dismissed specifically on the basis that
21 standing had not been established. *Id.* at 459. The Court stated that standing must be based upon a
22 demonstration of a “beneficial interest” in the outcome. *Id.* at 460-461. Citing to the California case of
23 *Waste Management v. County of Alameda*, 79 Cal.App.4th 1223, 94 Cal.Rptr.2d 740 (2000), the Nevada
24 Supreme Court wrote as follows: “Stated differently, the writ must be denied if the petitioner will gain
25 no direct benefit from its issuance and suffer no direct detriment if it is denied.” *Secretary*, 120 Nev.
26 461.

27 Importantly, the Nevada Supreme Court noted that the Nevada Constitution “expressly reserves
28 to the Senate and Assembly the authority to judge their members’ qualifications.” *Id.* at 458-459. This

1 observation by the Court is profound: “Thus, by asking us to declare that dual service violates separation
2 of powers, the Secretary urges our own violation of separation of powers. We necessarily decline the
3 invitation.” *Id.* at 459.

4 Related to the standing issue, it is clear that the instant case is not ripe for decision. As the Court
5 observed in *Secretary*, “And until executive branch employees are actually seated in the 73d Legislature,
6 this court has no concrete controversy to resolve, given that the voters might reject such candidates,
7 those candidates and incumbents might resign their executive branch employment before the legislative
8 session begins, or the Senate and Assembly might find that dual service constitutes a disqualification.
9 Thus, this matter is not yet ripe for review.” *Id.* at 750-751. That is precisely the case here. The matter
10 is not ripe.

11 **B. The Amended Complaint Fails to State a Claim.**

12 As discussed at length in the NSHE Defendants’ Motion to Dismiss, there is a distinction
13 between public officials and other state employees. Judge Russell’s reasoning in *French v. Gansert*,
14 First Judicial District Court Case No. 17- OC 00231B (2017) clearly differentiates between the two
15 types of state employee and persuasively argues for the application of Article III, §1, cl. 1 of the Nevada
16 Constitution only to public officers or officials. NPRI opposes this view by arguing that *Secretary of*
17 *State v. Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004) “endorses” bringing this
18 type of action against state employees who do not exercise sovereign power. However, a careful reading
19 of *Secretary* does not support NPRI’s argument.

20 As discussed above, *Secretary* dismissed the constitutional challenge due to lack of standing. It
21 did not hold that the separation of powers provision of the Nevada Constitution applies to all state
22 employees, but merely discussed the different legal mechanisms that must be used, depending upon the
23 relief sought.

24 In *Secretary*, the plaintiff was attempting to use a writ of mandamus to disqualify legislators who
25 held other state employment from serving in the legislature. The Court observed that the proper vehicle
26 to challenge an elected official’s qualifications to hold office is quo warranto. *Id.* at 463-464. While
27 the Court recognized in passing that declaratory relief could be sought against other employees to whom
28 quo warranto does not apply (*Id.* at 472), there was certainly no holding that all state employees, no

1 matter their level of employment, are subject to the separation of powers provisions in the Nevada
2 Constitution. *Id.* Other than its tortured interpretation of the *Secretary* holding, NPRI offers no authority
3 to support its expansive and overreaching view of Article III, §1, cl. 1.

4 NPRI argues that general language in *Galloway v. Truesdell*, 83 Nev. 13, 422 P. 2d 237 (1967)
5 suggests that there be no distinction between state employees who exercise constitutional powers and
6 those who exercise ministerial duties. However, *Galloway* did not interpret Article III, §1, cl. 1 in that
7 fashion. *Galloway* involved a challenge to a Nevada statute in which the Legislature attempted to
8 impose upon the Judicial branch the obligation to qualify, issue and revoke certificates of permission to
9 perform marriages. The Court found that those duties properly belong to the legislative branch and that
10 the legislation imposing those duties on the Judicial branch was unconstitutional. *Galloway* was not a
11 dual employment case, and is not authority for NPRI's view of the reach of Article III, §1, cl. 1.

12 Despite NPRI's attempts, there is only one case that is squarely on point – *French v. Gansert*.
13 The court carefully and meticulously analyzed the relationships of employees with the Nevada System
14 of Higher Education and determined that only presidents and members of the board of regents exercised
15 sufficient power to bring them within the realm of the separation of powers clause. *French* applies here
16 and NPRI's Opposition is without merit.

17 **C. Adequate Remedies are Available to Address the Speculative Harm NPRI Fears.**

18 NPRI argues that it has no adequate remedy at law because it cannot participate in administrative
19 proceedings brought under the state ethics laws. However, the Nevada Supreme Court has recognized
20 that the Nevada Commission on Ethics' "authority to investigate and take action regarding alleged
21 violations of the ethic laws may be initiated by an individual". *Commission on Ethics v. Hardy*, 125
22 Nev. 285, 289, 212 P.3d 1098 (2009). NPRI clearly has the right to invoke the Commission's
23 jurisdiction if it were ever to identify an alleged violation.

24 Moreover, as stressed by the Court in *Hardy*, each chamber of the Legislature has the power to
25 determine the qualifications of its respective members and to issue discipline for misconduct related to
26 core legislative functions. *Id.* at 287. Because there are multiple avenues available to address conflicts
27 of interest or other ethical issues that might arise in the dual employment context, intervention by this
28 Court is unnecessary, and as the Nevada Supreme Court stated in *Secretary*, such intervention would

1 itself be a violation of separation of powers.

2 NPRI's reference to *Dixon v. Thatcher*, 103 Nev. 414, 742 P.2d 1029 (1987) is unhelpful here.
3 *Dixon* involved foreclosure on real property to which the plaintiffs held an interest. Irreparable harm
4 was shown because the unique nature of real property made monetary damages alone inadequate.
5 Nothing about *Dixon* pertains to the instant case and the case does not represent authority for NPRI's
6 position here.

7 **D. The Court Should Not Proceed Without Required Parties**

8 The point the NSHE Defendants are making on this issue is that the relief NPRI seeks will
9 necessarily affect members of the Judiciary who hold employment positions in NSHE institutions, but
10 who are not currently present to defend their interests. NPRI does not deny that the absent members of
11 the Judiciary have an interest in the outcome of this matter. However, citing *Rose, LLC, v. Treasure*
12 *Island, LLC*, 135 Nev. 145, 445 P.3d 860 (2019), NPRI, with wild speculation, implies that those
13 members of the Judiciary know of the litigation and their lack of effort to intervene demonstrates that
14 they are unconcerned with their rights. "Where, as here, the party raising the issue is already in the
15 litigation, and the absent party presumably knows about the litigation by has made no effort to intervene,
16 the lack of interest of the absent party suggests it does not fear the impairment of its rights." (Opposition,
17 12: 9-12 (emphasis added).) While NPRI purports to cite to *Rose*, and while the language is almost
18 identical to that in *Rose*, the manner in which this statement is presented as argument implies that the
19 Judicial officers here in fact know of this litigation and have voluntarily declined to participate.
20 However, NPRI has offered nothing to demonstrate that there is actual knowledge and a voluntary
21 decision not to intervene, and the implication that such is the case here is misleading.

22 It should be noted that *Rose* involved a dispute between a landlord and its prime tenant, where
23 the failure to join the sub-tenant was challenged. The issue was whether the prime tenant had breached
24 the lease, and the rights between the landlord and the prime tenant could be adjudicated without the
25 presence of the sub-tenant. In that case, the sub-tenant was well aware of the litigation and its attorney
26 notified the parties that the sub-tenant would not be affected by the prime tenant's alleged default and
27 that the litigation would not affect the sub-tenant adversely. *Rose*, 135 Nev. at 151. Accordingly, the
28 *Rose* case is quite different than the instant case, as the relief NPRI seeks here will clearly affect the

absent required parties, and there is no indication whatsoever that any of them know of this proceeding. The Court should order NPRI to join the required parties or face dismissal.

III. CONCLUSION

NPRI has failed to establish standing. It cannot show a sufficient interest in the litigation, nor can it show personal injury or damage. The argument that it has suffered injury because it is spending resources on this litigation is absurd. A lawsuit is a process for addressing damages suffered, not a vehicle to create damages to establish standing. NPRI has also failed to meet the elements of the “public importance” exception to the injury requirement as set forth in the *Schwartz* case. It has failed to show any past misconduct or probable future misconduct to demonstrate that this is an issue of substance as opposed to a philosophical issue. It has failed to show the existence of an issue over public expenditures or appropriations, and it has failed to show that it is the appropriate party to bring this action. Most importantly, NPRI has failed to demonstrate why this Court should invade the exclusive Constitutional authority of the Legislature to determine the qualifications of its elected members. The Amended Complaint should be dismissed on the basis of NPRI’s lack of standing, which divests this Court of jurisdiction.

Even were standing established, NPRI’s Amended Complaint fails to state a claim because it is rife with conclusory and speculative allegations and devoid of sufficient factual allegations. Even under Nevada’s notice pleading standards the Amended Complaint is wholly deficient.

In addition to the pleading defects, the Amended Complaint fails to state a claim against any of the NSHE Defendants because they are not, nor has NPRI alleged that they are, Constitutional officers or officials who exercise sovereign powers so as to be subject to the separation of powers language of Article III, §1. cl. 1. The Constitutional prohibition should not be read to apply to every level of state employee, especially those who have no sovereign duties.

The case should also be dismissed because there are other remedies available to address the speculative concerns NPRI asserts as a basis for this litigation. The Legislature has exclusive authority to address improprieties by its members, including specifically failure to disclose conflicts of interest or voting in the face of such conflicts. The Nevada Commission on Ethics has jurisdiction to address other ethical violations that are not within the jurisdiction of the Legislature. NPRI may request an

1 investigation by the Commission at any time it becomes aware of an actual or suspected violation.

2 Members of the Judiciary who teach at NSHE institutions are required parties, as this litigation
3 will clearly affect their secondary employment rights. Their lack of intervention should not be
4 interpreted as lack of concern over their rights, as NPRI has presented this Court with nothing to show
5 that those individuals are aware of this litigation and have made a voluntary choice not to participate.
6 This litigation should not proceed without the presence of those required parties.

7 For all of the above reasons, the NSHE Defendants respectfully request that NPRI's Amended
8 Complaint be dismissed.

9 **AFFIRMATION**

10 The undersigned hereby affirm that this document does not contain "personal information
11 about any person" as defined in NRS 239B.030 and 603A.040.

12 Respectfully submitted this 16th day of October, 2020

13 /s/ Berna L. Rhodes-Ford

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*Attorneys for Defendants
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State
3 College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party
4 to the within cause. Pursuant to NRCP 5, I further certify that on October 16, 2020, I caused the
5 following document, **DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND**
6 **DINA NEAL'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS AND TO**
7 **PLAINTIFF'S OPPOSITION TO JOINDER IN DEFENDANT MILLER'S MOTION TO**
8 **DISMISS** to be served as follows:

9 ☒

10 **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to
11 be electronically served through the Eighth Judicial District Court's electronic filing system,
12 with the date and time of the electronic service substituted for the date and place of deposit in the
13 mail to the attorneys listed below at the address indicated below.

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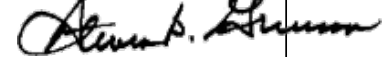
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Opposed Intervenor

25 ☐

26 **BY MAIL** I caused such envelope(s) with first class postage thereon fully prepaid to be
27 placed in the U.S. Mail in Henderson, Nevada.

28 *Nita Armendariz*
An employee of the Office of General Counsel
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13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

AFFIDAVIT OF SERVICE

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

1 AFFIDAVIT OF SERVICE

2 DISTRICT COURT CLARK COUNTY
3 CLARK COUNTY, STATE OF NEVADA

4 NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

5 Plaintiff(s)

6 v.

7 NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

8 Defendant(s)
9

Case No.:A-20-817757-C
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Client File# 189864.00021

10 I, Sean Keseday, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

11 That on 9/26/2020 at 9:51 AM at 8851 Vegas Drive, Las Vegas, NV 89128 I served Nicole Cannizzaro with the
above-listed documents by personally delivering a true and correct copy of the documents by leaving with Nicole
12 Cannizzaro.

13 That the description of the person actually served is as follows:

14 Gender: Female, Race: Caucasian, Age: 40 yrs., Height: 5'10", Weight: 160 lb., Hair: Blonde, Eyes:Blue, Marks: Baseball
Cap

15
16
17
18
19 I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

20 Date: 9/30/20
21
22

23 Sean Keseday
Registered Work Card# R-065975
24 State of Nevada

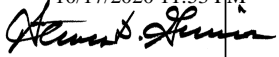
(No Notary Per NRS 53.045)

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JA000315


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EXPR

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Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

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NICOLE J. CANNIZZARO, an individual engaging
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DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: ~~XVIII~~ 24

**PLAINTIFF'S EX PARTE
APPLICATION FOR ORDER
SHORTENING TIME TO:**

**1) HEAR MOTION TO DISQUALIFY
THE OFFICIAL ATTORNEYS FROM
REPRESENTING DEFENDANTS
OSVALDO FUMO, HEIDI SEEVERS
GANSERT AND DINA NEAL, AND**

**2) RE-SET ALL OTHER PENDING
MATTERS TO THE COURT'S
EARLIEST AVAILABLE OFFSET
CALENDAR**

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Nevada Policy Research Institute ("NPRI"), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby submits its Ex Parte Application for Order and Order Shortening Time, pursuant to EDCR 2.26, as good cause exists to shorten the time for the Court to hear the Motion to Disqualify the Official Attorneys From Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal ("Motion to Disqualify"), as well as to re-set all other pending motions to the Court's earliest available calendar. This Ex Parte Application is based on the Court's record and Declaration of Deanna L. Forbush, Esq.

Dated this 16th day of October, 2020.

FOX ROTHSCHILD LLP

By: /s/ Deanna L. Forbush

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Attorneys for Plaintiff

Nevada Policy Research Institute

**DECLARATION OF DEANNA L. FORBUSH ESQ. IN SUPPORT OF
ORDER SHORTENING TIME**

I, Deanna L. Forbush, hereby declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada, and I am a partner of the law firm of Fox Rothschild LLP, attorneys for Plaintiff, Nevada Policy Research Institute ("NPRI").

2. I have personal knowledge of the facts stated in this Declaration. If called upon to testify to the same, I am competent to do so.

3. The instant litigation seeks injunctive and declaratory relief in the public interest to address the alleged ongoing constitutional violations of the Separation of Powers requirement of the Nevada Constitution by 13 individually named Defendants, each of whom are engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local government.¹

4. Because of the issues and parties involved, the case has been reassigned several times, most recently to the Hon. Jim Crockett on October 14, 2020. As a result of the reassignment, all pending matters were moved by the Clerk's office to the Court's next available hearing date in the normal course, which date was more than 60 days away on December 17, 2020. This date is problematic for any number of reasons, not the least of which is the proximity to the next regularly scheduled session of the Nevada Legislature starting on February 1, 2021.

5. There are five substantive motion practice matters currently pending in the Department², and they include: (i) a motion to disqualify official counsel from representing three Defendants who engage in dual employment with the Nevada System of Higher Education; (ii) a motion to intervene by the Nevada Legislature, filed on its behalf by the Legislative Counsel Bureau's Legal Division; and (iii) as of the date of this filing, a total of three motions to dismiss and

¹ In its Amended Complaint, NPRI named 13 Defendants known to be simultaneously holding elected offices in the Legislature and paid positions in State or local governments. NPRI subsequently entered Notices of Voluntary Dismissal for Teresa Benitez-Thompson and Kasina Douglass-Boone upon notification that they were no longer engaging in dual employment, leaving 11 Defendants still named as parties in the instant action.

² A sixth motion, NPRI's request to serve three unreachable Defendants by publication, is unopposed and the order granting same is pending review and entry by the Court.

1 joinders thereto filed by six Defendants.

2 6. Each of these pending matters have been on file since September, with the exception
3 of one motion to dismiss filed early last week, and the last response briefings under the prior district
4 court's schedule would have been due November 5, 2020. And, with absolute candor to the tribunal,
5 NPRI does not believe the Court will find any of these matters particularly fact-intensive or
6 complicated to resolve. NPRI also believes all parties would agree it is imperative for these matters
7 to be resolved as soon as possible, so that they may have the clarity they need to advance their
8 interests thereafter.

9 7. Particularly time-sensitive is NPRI's motion to disqualify the NSHE counsel from
10 their representation of three Defendants at taxpayer's expense. On September 24, 2020, the General
11 Counsel for Nevada State College, Berna Rhodes-Ford, Esq., and the Assistant General Counsel for
12 the University of Nevada, Reno, Gary A. Cardinal, Esq., caused to be filed a Motion to Dismiss
13 Pursuant to NRCP 12(b)(5) and NRCP 12(b)(6) ("Motion to Dismiss") on behalf of Defendants
14 Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal.

15 8. As asserted in an email I received from Mr. Cardinal on September 4, 2020, he and
16 Ms. Rhodes-Ford believe their representation of the Defendants is permitted under NRS Chapter 41.
17 Specifically, in his introductory email, Mr. Cardinal invoked NRS 41.0341, which permits a state
18 employee "for whom the official attorney is required to provide a defense pursuant to NRS 41.0339"
19 to file their responsive pleading in 45 days, as opposed to the standard 21 days. *See* NRS 41.0341(1)
20 (emphasis added). NRS 41.0339, in turn, sets forth the circumstance in which the official attorney is
21 to provide a defense to a state employee, and it plainly requires that the defendant be named in the
22 civil action "solely because of an alleged act or omission relating to the public duties or
23 employment" of the employee and that "the act or omission on which the action is based appears to
24 be within the course and scope of public duty or employment and appears to have been performed or
25 omitted in good faith." *See* NRS 41.0339(1)(b).

26 9. NPRI respectfully asserts the threshold issue of whether the NSHE counsel are not
27 authorized to represent the Defendants and must be disqualified should be decided at the Court's
28 earliest available opportunity. NPRI already filed its Opposition to the Motion to Dismiss as

1 required on October 8, 2020, with all rights reserved, and simply seeks a resolution of the matter
2 prior to additional representation being undertaken by the attorneys in dispute. This matter was
3 scheduled to be heard by the prior district court department on October 29, 2020, and NPRI
4 respectfully requests the matter be re-set in this Department on Order Shortening Time as close to
5 that date as possible.

6 10. As far as the four other pending motion practice matters, NPRI also respectfully
7 requests they be heard together at or near the date previously set by the prior district court
8 department, which date was November 12, 2020. The standard briefing periods would have been
9 met, so no prejudice from a truncated schedule would occur to any party. And, the resolution of
10 these matters, which are all interrelated, would give time for pursuit of either injunctive or appellate
11 relief well prior to the next legislative session, depending on how the matters are ultimately resolved.

12 11. In sum, NPRI is respectfully requesting for good cause shown that all five pending
13 motion practice matters be re-set as follows: (i) NPRI's Motion to Disqualify the Official Attorneys
14 from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal to be re-set as
15 close to the prior setting of October 29, 2020 as possible; and (ii) all other pending motions to be re-
16 set as close to the prior setting of November 12, 2020 as possible. And, finally, NPRI believes it
17 makes the most sense for the matters to be offset and heard separately from the Court's regular
18 calendar, if at all possible, in the interest of judicial and party economy.

19 12. This Order Shortening Time is made in good faith and without dilatory motive.

20 I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045)³ that
21 the foregoing is true and correct.

22 Dated this 16th day of October, 2020.

23 /s/ Deanna L. Forbush
24 DEANNA L. FORBUSH

25 ///

26
27 ³ NRS 53.045. Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence
28 or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an
unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially
the prescribed form.

ORDER SHORTENING TIME

GOOD CAUSE APPEARING, it is hereby ORDERED that the time for the hearing of the following matters be shortened and proceed as follows:

Plaintiff's Motion to Disqualify Official Attorneys from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal will be shortened and heard in the above-entitled Court on the 5th day of November, 2020 at 9:00 a.m./p.m., or as soon thereafter as the matter may be heard.

The separate **Motions to Dismiss filed by Defendant Brittney Miller; Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal; and Defendant Jason Frierson, respectively, and all Joinders thereto**, as well as the **Nevada Legislature's Motion to Intervene as Defendant**, will all be shortened and heard in the above-entitled Court on the 5th day of November, 2020 at 9:00 a.m./p.m., or as soon thereafter as the matter may be heard.

OPPOSITION DUE: 10/22/20
REPLY DUE: 10/29/20


JIM CROCKETT
District Court Judge

Respectfully submitted by:

FOX ROTHSCHILD LLP

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Jim Crockett
District Court Judge

By: /s/ Deanna L. Forbush
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Nevada Policy Research Institute

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Nevada Policy Research
7 Institute, Plaintiff(s)

CASE NO: A-20-817757-C

8 vs.

DEPT. NO. Department 24

9 Nicole Cannizzaro, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Ex Parte Order was served via the court's electronic eFile system to all
14 recipients registered for e-Service on the above entitled case as listed below:

Service Date: 10/17/2020

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**DISTRICT COURT
CLARK COUNTY, NEVADA****Other Civil Matters****COURT MINUTES****October 19, 2020**

A-20-817757-C Nevada Policy Research Institute, Plaintiff(s)
vs.
Nicole Cannizzaro, Defendant(s)

October 19, 2020 03:00 AM Minute Order

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor 116

COURT CLERK: Lord, Rem

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

The Court finds that the 9/29/20 Plaintiff s Motion for Order to Serve by Publication Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible cannot be granted as Plaintiff s Motion is not accompanied by the requisite Motion for Enlargement of Time. The attempted Publication would conclude beyond the 120 day time period in which to effectuate personal service. Plaintiff's new Motion must also include a discussion of the Scrimmer factors and good cause why the Amended Complaint was not timely served. Lastly, the attached Affidavits of Due Diligence are titled Affidavits, but do not include a Notary Seal, and instead, appear to be Declarations. The titles of the attached Exhibits should all be corrected upon resubmission as part of Plaintiff's new Motion. Therefore, it is hereby ordered, 9/29/20 Plaintiff's Motion for Order to Serve by Publication Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible is denied. COURT ORDERED, status check SET for the filing of the Order.
11/19/2020 STATUS CHECK: FILING OF ORDER (CHAMBERS)

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /rl 10/19/2020

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE,

Appellant,

vs.

NICOLE J. CANNIZZARO, an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; JASON FRIERSON, an individual engaging in dual employment with the Nevada State Assembly and Clark County Public Defender; HEIDI SEEVERS GANSERT, an individual engaging in dual employment with the Nevada State Senate and University of Nevada, Reno; GLEN LEAVITT, an individual engaging in dual employment with the Nevada State Assembly and Regional Transportation Commission; BRITTNEY MILLER, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; DINA NEAL, an individual engagement in dual employment with the Nevada State Senate and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defendant; MELANIE SCHEIBLE, an individual engagement in dual employment with the Nevada State Senate and Clark County District Attorney; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno;

Supreme Court Case No.: 82341

[District Court Case No.:
A-20-817757-C]

and SELENA TORRES, an individual
engaging in dual employment with the
Nevada State Assembly and Clark County
School District,

Respondents,

and Legislature of the State of Nevada,

Intervenor-Respondent.

JOINT APPENDIX VOLUME 3 of 7

Appeal from the Eighth Judicial District Court,
Orders Granting Motions to Dismiss and Joinders Thereto;
Order Granting Motion to Intervene; and Order Denying Motion to Disqualify
The Honorable Jim Crockett (Ret.), District Court Judge

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73	Notice of Posting Bond	1/19/2021	7	JA000755 – JA000759

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 2021, I caused the foregoing to be served on all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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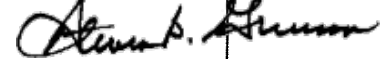
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12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 NEVADA POLICY RESEARCH
15 INSTITUTE, a Nevada domestic nonprofit
16 corporation,

17 Plaintiff,

18 vs.

CASE NO: A-20-817757-C

DEPT. NO: 24

**DEFENDANT NICOLE
CANNIZZARO'S MOTION TO
DISMISS**

[HEARING REQUESTED]

19 NICOLE J. CANNIZZARO, an individual
20 engaging in dual employment with the
21 Nevada State Senate and Clark County
22 District Attorney; KASINA
23 DOUGLASSBOONE,
24 an individual engaging in dual
25 employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA

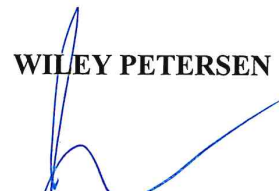
1 NEAL, an individual engaging in dual
2 employment with the Nevada State Assembly
3 and Nevada State College; JAMES
4 OHRENSCHALL, an individual engaging in
5 dual employment with the Nevada State
6 Senate and Clark County Public Defender;
7 MELANIE SCHEIBLE an individual
8 engaging in dual employment with the
9 Nevada State Senate and Clark County
10 District Attorney; TERESA
11 BENITEZTHOMPSON,
12 an individual engaging in dual
13 employment with the Nevada State Assembly
14 and University of Nevada, Reno; JILL
15 TOLLES, an individual engaging in dual
16 employment with the Nevada State Assembly
17 and University of Nevada, Reno; and
18 SELENA TORRES, an individual engaging
19 in dual employment with the Nevada State
20 Assembly and Clark County School District,

21
22 Defendants.

23 Defendant NICOLE CANNIZZARO (hereinafter "Senator Cannizzaro") by and through
24 her counsel of record, WILEY PETERSEN, hereby moves this Court to dismiss the Amended
25 Complaint for Declaratory and Injunctive Relief, filed by Plaintiff Nevada Policy Research
26 Institute ("NPRI"), pursuant to NRCP 12(b)(5) and NRCP 12(b)(6).

27 DATED this 19 day of October, 2020.

28
WILEY PETERSEN



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I. INTRODUCTION

Nicole Cannizzaro is the current Majority Leader of the Nevada Senate. She also holds the position of Deputy District Attorney for Clark County. Plaintiff's most recent attempt to invoke the Separation of Powers doctrine of Article 3, Section 1 of the Nevada Constitution fails for at least four distinct reasons. As such, the Amended Complaint should be dismissed.

The issue presented in the Amended Complaint has been asserted in numerous lawsuits, both modern and historic, in Nevada and throughout the country. As set forth below, and in other motions to dismiss currently pending in this case, the law on this subject makes clear that this latest attempt to preclude the citizen legislature as it has historically operated should fail as well. Plaintiff's position, taken to the logical conclusion, would preclude someone employed as a maintenance worker in the Clark County School District from eligibility to serve in our citizen legislature. While the concept of separation of powers is fundamental to the government of this country and this state, such a result is not the intent of the provision, nor has it been interpreted as such in the past.

Senator Cannizzaro will separately file formal joinders to the Motions to Dismiss filed already in this case. The first such motion was filed by Defendant Miller on September 18, 2020 (the "First MTD") and the second was filed by Defendants Fumo, Seever Gansert, and Neal on September 28, 2020¹ (the "Second MTD"). Some of the arguments, however, are referred to below, rather than quoting at length.

Plaintiff asserts two claims, and seeks two remedies:

1. For a declaration that Defendants simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments violates the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1; and,
2. For an injunction against Defendants prohibiting each and every one of them from continuing to simultaneously hold elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments in violation of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1;

¹ This motion was initially filed on September 24, 2020, and then refiled.

See Amended Complaint, p. 7.

If such relief is granted, Senator Cannizzaro would have to decide whether she wants to continue with her distinguished career of public service, currently serving in the gang unit of the Clark County District Attorney's office, or continue to serve in the Nevada Senate. Under the Nevada Constitution, and as set forth below, she should not face this decision.

II. LEGAL STANDARD

Pursuant to NRCp 12(b)(5), dismissal of a claim is appropriate if it appears with certainty that a plaintiff can prove no set of facts which would entitle him or her to relief under the claim. *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985). In making this determination, all factual allegations pled must be accepted as true. *Capital Mortgage Holding v. Hahn*, 101 Nev. 314, 705 P.2d 126 (1985). However, a “court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted.” *Brelian v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). It is requisite that the court construe the pleading liberally and draw every fair inference in favor of the non-moving party. *Squires v. Sierra Nev. Educ. Found.*, 107 Nev. 902, 905, 823 P.2d 256, 257 (1991). The sole issue presented before the court is whether a complaint states a claim upon which relief may be granted. *Merluzzi v. Larson*, 96 Nev. 409, 411, 610 P.2d 739, 741 (1980), *overruled on other grounds by Smith v. Clough*, 106 Nev. 568, 796 P.2d 592 (1990).

The test for determining whether the allegations are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested. *See Riviera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984). A lack of standing is grounds for dismissal under NRCP 12(b)(1). *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 122 Nev. 621 (2006). “A shareholder's failure to sufficiently plead compliance with the demand requirement deprives the shareholder of standing and justifies dismissal of the complaint for failure to state a claim upon which relief may be granted.” (reversed in part on other grounds). Finally, with regard to the failure to join required parties, it can be raised by a

1 motion to dismiss under NRCP 12(b)(6), failure to join a party under Rule 19. *Rose, LLC v.*
2 *Treasure Island, LLC*, 135 Nev. 145, 155, 445 P.3d 860, 868 (Ct. App. 2019).

3 As will be demonstrated below, Plaintiff's Complaint fails as a matter of law as it fails to
4 state a claim upon which relief can be granted and thus requires dismissal under NRCP 12(b)(5)
5 and 12(b)(6).

6 III. ARGUMENT

7 A. PLAINTIFF LACKS STANDING

8 As articulated at length in the First MTD, Plaintiff lacks standing to assert its claims. The
9 arguments set forth in that motion are incorporated herein by reference. Specifically, Plaintiff
10 does not have standing as it cannot show actual or threatened injury in fact and cannot satisfy the
11 *Schwartz* exception regarding issues of significant public importance. Further, Plaintiff failed to
12 name the appropriate political subdivision(s) as required under NRS 41.0337. Thus, the
13 Amended Complaint should be dismissed pursuant the NRCP 12(b)(1) for lack of subject matter
14 jurisdiction.

15 B. THE NEVADA CONSTITUTION'S SEPARATION OF POWERS CLAUSE IS NOT 16 APPLICABLE TO LOCAL GOVERNMENT

17 NPRI's prior attempts to invoke the separation of powers doctrine against legislators is
18 well summarized in the First MTD and the Second MTD. A great deal of litigation has ensued
19 regarding this matter over many years. There are several key points from such prior cases which
20 support dismissal.

21 1. Nevada's Separation of Powers Doctrine does not Apply to Local Government 22 Employees

23 The entire basis of the Amended Complaint rests on the following provision from the
24 Nevada Constitution:

25 Section 1. **Three separate departments; separation of powers;** legislative
review of administrative regulations.

26 1. The powers of the **Government of the State of Nevada** shall be divided into
27 **three separate departments**, — the Legislative, — the Executive and the
28 Judicial; and no persons charged with the exercise of **powers properly belonging**

1 **to one of these departments** shall exercise any functions, appertaining to either
2 of the others, except in the cases expressly directed or permitted in this
3 constitution.

4 Nev. Const. Art. 3, §1. (emphasis added).

5 As discussed below, the Government of the State of Nevada is separate and distinct from the
6 government of Clark County, as well as any local government in the state. This language is
7 deliberate and important. By using “Government of the State of Nevada”, and not any of the
8 more inclusive terms it could have chosen, the Framers of the Constitution expressed a clear
9 intent that this provision applies only to the three departments of the state government it lists
10 thereafter. Neither Clark County, nor any of its departments, are part of these three departments

11 The Nevada Supreme Court recently stated, “[T]he language of the separation of powers
12 provision in the Constitution does not extend any protection to political subdivisions.”

13 *City of Fernley v. State*, 132 Nev. 32, 43 n.6, 366 P.3d 699, 707 (2016). Prior cases are
14 consistent with this finding. The Nevada Supreme Court in *DR Partners*, addressed in detail in
15 the Second MTD, states, “Neither state-owned institutions, **nor state departments**, nor public
16 corporations are synonymous with political subdivisions of the state. *Univ. & Cmty. Coll. Sys. v.*
17 *DR Partners*, 117 Nev. 195, 203-04 (2001) (emphasis added). As such, these distinct bodies
18 must not be conflated. The Nevada Supreme Court has expressed this on numerous occasions
19 applied to various subdivisions.

20 [M]unicipal courts are primarily city, not state entities. Although municipal courts
21 are created by the legislature pursuant to authority vested in that body by the
22 Nevada Constitution, these courts are separate branches of their respective city
23 governments. ... the municipal courts of this state are separate branches of their
24 respective municipal governments. ... they are not state governmental entities
25 *Nunez v. City of N. Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000)

26 The same can be said of County governments and their respective departments. See also *City of*
27 *Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 362 n.5 (2013) (“While municipal courts are included
28 within the state constitutional judicial system, they are nonetheless primarily city entities, rather
29 than an extension of the state.”).

30 ///

1 As such, because political subdivisions are not part of one of the three departments of
2 state government, their local officers² generally are not considered to be state officers who are
3 subject to the separation-of-powers provision. *See State ex rel. Mason v. Bd. of Cnty. Comm'rs*, 7
4 Nev. 392, 396-97 (1872) (noting that the exercise of certain powers by a board of county
5 commissioners was not limited by the doctrine of separation of powers).

6 As discussed in more detail below in the context of Attorney General Opinion AGO
7 2004-03, it is not disputed that the Nevada Constitution was modeled on the original California
8 Constitution. *State ex rel. Harvey v. Second Judicial Dist. Ct.*, 117 Nev. 754, 763, 32 P.3d 1263,
9 1269 (2001) (“[S]ince Nevada relied upon the California Constitution as a basis for developing
10 the Nevada Constitution, it is appropriate for us to look to the California Supreme Court’s
11 interpretation of the [specific provision] in the California Constitution.”) Because the provisions
12 of the Nevada Constitution were taken from the California Constitution of 1849, those provisions
13 “may be lawfully presumed to have been taken with the judicial interpretation attached.” *State ex*
14 *rel. Mason v. Bd. of Cnty. Comm'rs*, 7 Nev. 392, 397 (1872).

15 Construing the separation of powers provision in the California Constitution of 1849,
16 the California Supreme Court held that **it did not apply to local governments and their**
17 **officers and employees.** *People ex rel. Att’y Gen. v. Provines*, 34 Cal. 520 (1868). In *Provines*,
18 the court stated,

19 We understand the Constitution to have been formed for the purpose of
20 establishing a State Government; and we here use the term ‘State Government’ in
contradistinction to local, or to county or municipal governments. *Id.* at 532.

21 After examining the history and purpose of the separation of powers provision, the court
22 concluded that “the Third Article of the Constitution means that **the powers of the State**
23 **Government, not the local governments** thereafter to be created by the Legislature, shall be
24 divided into three departments.” *Id.* at 534 (emphasis added). Thus, the court held that the
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26
27 ² As addressed below, a Deputy District Attorney is not a public officer.
28

1 separation of powers provision had no application to the functions performed by a person at the
2 local governmental level. *Id.* at 523-40.

3 In later cases, the California Supreme Court reaffirmed that under California law, "it is
4 settled that the separation of powers provision of the constitution; art. 3, § 1, **does not apply to**
5 **local governments** as distinguished from departments of the state government." *Mariposa*
6 *County v. Merced Irrig. Dist.*, 196 P.2d 920, 926 (Cal. 1948)(emphasis added). This
7 interpretation of the separation-of-powers doctrine is followed by a majority of other
8 jurisdictions. *See, e.g., Poynter v. Walling*, 177 A.2d 641, 645 (Del. Super. Ct. 1962); *La*
9 *Guardia v. Smith*, 41 N.E.2d 153, 156 (N.Y. 1942); 16 *C.J.S. Constitutional Law* § 112, at 377
10 (1984).

11 Consequently, it is well settled that "a local government unit, though established under
12 state law, funded by the state, and ultimately under state control, with jurisdiction over only a
13 limited area, is not a 'State.'" *United States ex rel. Norton Sound Health Corp. v. Bering Strait*
14 *Sch. Dist.*, 138 F.3d 1281, 1284 (9th Cir. 1998). Furthermore, "a local government with authority
15 over a limited area, is a different type of government unit than a state-wide agency that is part of
16 the organized government of the state itself." *Wash. State Dep't of Transp. v. Wash. Natural Gas*
17 *Co.*, 59 F.3d 793, 800 n.5 (9th Cir. 1995). Thus, "[w]hile local subdivisions and boards created
18 by the state may have some connection with one of the departments of the state government as
19 defined by the Constitution, they are not 'departments of state government' within the intent and
20 meaning of the [law]." *State v. Coulon*, 3 So. 2d 241,243 (La. 1941). In turn, courts have
21 consistently found that cities, counties, school districts and other local governmental entities are
22 not included within one of the three departments of state government. *See, e.g., Dermott Special*
23 *Sch. Dist. v. Johnson*, 32 S.W.3d 477, 480-81 (Ark. 2000); *Dunbar Blee. Supply, Inc. v. Sch Bd.*,
24 690 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1997); *Stokes v. Harrison*, 115 So. 2d 373, 377-79
25 (La. 1959); *Coulon*, 3 So. 2d at 243.

26 Federal courts interpreting Nevada law have consistently found that cities, counties,
27 school districts and other local governmental entities in this state are not included within one of
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1 the three departments of state government and that these local political subdivisions are not
2 entitled to Nevada's sovereign immunity in federal court. *See, e.g., Lincoln County v. Luning*,
3 133 U.S. 529, 530 (1890); *Eason v. Clark Cnty. Sch. Dist.*, 303 F.3d 1137, 1144 (9th Cir. 2002);
4 *Herrera v. Russo*, 106 F. Supp. 2d 1057, 1062 (D. Nev. 2000). These federal cases are important
5 because when a federal court determines whether a political subdivision is part of state
6 government for the purposes of the Eleventh Amendment, the federal court makes its
7 determination based on state law. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S.
8 274, 280-81 (1977); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 678-79 (9th Cir. 1991).

9 Thus, because local political subdivisions in this state are not included within one
10 of the three departments of state government, their officers and employees also are not part of
11 one of the three departments of state government. Therefore, legislators, such as Senator
12 Cannizzaro, who hold positions of public employment with local governments do not hold such
13 positions within one of the three departments of state government. Thus, the separation of
14 powers provision does not prohibit legislators from holding positions of public employment with
15 local governments because local governments, such as Clark County, are not part of one of the
16 three departments of state government. This ends the inquiry with regard to Senator Cannizzaro
17 and warrants dismissal.

18 **a. The Nevada Attorney General Opined that Nevada's Separation of Powers**
19 **Doctrine does not Apply to Local Government Employees**

20 While not binding on this Court, it is notable that on March 1, 2004, Attorney General
21 Brian Sandoval issued AGO 2004-03.³ That Opinion, which spans 27 pages, states in relevant
22 part:

23 In light of the absence of Nevada authority on the subject of the applicability of
24 the separation of powers to local governments and Nevada's adoption of the
25 California separation of powers provision into the Nevada Constitution, the
26 findings in *Provines* provide strong support for the contention that Article 3,
27 Section 1 of the Nevada Constitution **does not apply to local governments.**

28 ³ Attorney General Opinions are not binding legal authority.

1 Based upon the foregoing legal precedent, historical practice of this state,
2 and the relevant Nevada Attorney General opinions, this office concludes that
3 the constitutional requirement of separation of powers **does not prohibit a local
government employee from also serving in the Nevada Legislature.**
(emphasis added).

4 The Attorney General reaches such conclusion after a review of numerous prior AG opinions, as
5 well as case law, including but not limited to *Provines*. After noting that the Nevada constitution
6 was modeled after California's constitution, and that the provision in questions were identical.⁴

7 The Attorney General goes on to state,

8 Simply put, the court found that the framers of the California Constitution did not
9 contemplate that the state government executive branch included local
10 government. Therefore, California's separation of powers doctrine did not apply
11 to local governments or its employees.
Id. at 35.

12 The conclusion of the Attorney General, based on the cited law and historical precedent, reiterate
13 the conclusion noted above, and should be the conclusion of this Court as well.

14 C. A DEPUTY DISTRICT ATTORNEY IS NOT A PUBLIC OFFICIAL OR OFFICER
UNDER NEVADA LAW

15 Assuming the Separation of Powers doctrine even applies to local government
16 employees, only public officers, as opposed to public employees, are potentially implicated
17 under the separation of powers provision.⁵ Public officers are the only persons who exercise the
18 sovereign functions of state government and, therefore, only public officers can be in violation of
19 Article 3 and the separation of powers clause. See NEV. CONST. art. III, §1, cl. 1; *State ex rel.*
20 *Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder*
21 *City*, 94 Nev. 735, 737, 587 P.2d 39,41.

22 1. Nevada Statutes Regarding the County Elections of District Attorneys
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25 ⁴ "As previously noted, this California distinction is critical to the instant analysis because it is well
26 settled that the framers of the Nevada Constitution modeled the Nevada Constitution after the California
27 Constitution. Aftercare of Clark County v. Justice Court of Clark County, 120 Nev. ___, 82 P.3d 931 935
(Adv. Op. 2 at 5, January 23, 2004)." *Id.* at 35-36.

27 ⁵ Nothing stated in this section negates Senator Cannizzaro's position that local government as a whole is
28 not implicated, as set forth above.

1 Pursuant to NRS 252.020(1), "District Attorneys shall be elected by the qualified electors
2 of their respective counties." As such, the District Attorney is a local, elected position. It is not
3 a state-wide or state-appointed position. However, Senator Cannizzaro is not the elected District
4 Attorney, currently Steve Wolfson.⁶ Rather, she is merely a Deputy District Attorney, with less
5 authority than her immediate supervisors, and significantly less authority than her ultimate boss,
6 Mr. Wolfson.⁷ This is not merely a matter of hierarchy, but the structure pursuant to statute.

7 NRS 252.070 Deputies; clerical, investigational and operational staff.

8 1. All district attorneys **may appoint deputies**, who are authorized to transact
9 all official business relating to those duties of the office set forth in NRS 252.080⁸
10 and 252.090 to the same extent as their principals and perform such other duties
11 as the district attorney may from time to time direct. **The appointment of a
12 deputy district attorney must not be construed to confer upon that deputy
13 policymaking authority for the office of the district attorney or the county by
14 which the deputy district attorney is employed.**
15 (emphasis added).

16 Thus, this statute not only makes clear that deputy district attorneys are merely appointed
17 positions, serving at the whim of the elected District Attorney, such deputies have no
18 policymaking authority.

19 So, to the extent any local government position within the District Attorney's office is
20 implicated by the separation of power doctrine, it is clear that Deputy District Attorneys such as
21 Senator Cannizzaro are statutorily different than the elected District Attorney him or herself, as
22 she has no policymaking authority as a mere unelected employee.⁹ This is important in
23 connection with the interpreting case law, analyzed below.

24 ⁶[https://www.clarkcountynv.gov/government/elected_officials/county_district_attorney/steven_b_wolfson](https://www.clarkcountynv.gov/government/elected_officials/county_district_attorney/steven_b_wolfson.php)
25 [.php](https://www.clarkcountynv.gov/government/elected_officials/county_district_attorney/steven_b_wolfson.php)

26 ⁷ Senator Cannizzaro's direct supervisor is known as a "Team Chief" who in turn is under one of two Assistant
27 District Attorneys. Under this hierarchy, Speak Cannizzaro is at least two levels below the elected District Attorney,
28 Steve Wolfson. Senator Cannizzaro does not choose her assignment, which is currently to the Gang Unit, nor the
cases she works on, all of which are decided by her supervisors.

⁸ NRS 252.080 is entitled, "Public prosecutor", and states, "The district attorney in each county shall be public
prosecutor therein."

⁹ The subordinate nature of Deputy District Attorneys is confirmed by NRS 252.070(2) which states, "District
attorneys are responsible on their official bonds for all official malfeasance or nonfeasance of the deputies."

1 2. Senator Cannizzaro Has no Sovereign Duties as a Deputy District Attorney

2 The Amended Complaint is completely devoid of any factual allegations describing the
3 job duties and responsibilities of the individual defendants. To the extent Senator Cannizzaro's
4 position as a member of local government is not dispositive, this lack of allegations is fatal,
5 because, as set forth below and in the Second MTD, the separation of powers provision
6 application hinges on whether the individual defendant exercises sovereign functions. However,
7 permitting amendment in order to add such allegations in this case would be futile since Senator
8 Cannizzaro has no such duties or responsibilities, not only as a matter of fact, but also pursuant
9 to statute. NRS 252.070.

10 As a Deputy District Attorney, Senator Cannizzaro serves at the whim of the Clark
11 County District Attorney, currently Steven Wolfson, and is an employee of Clark County. Mr.
12 Wolfson, in turn, is elected by the Clark County electorate. Senator Cannizzaro is subject to
13 termination by the District Attorney. She is not elected. Rather, her job description and duties
14 are contractual. In short, Senator Cannizzaro is a public employee; an employee of local
15 government, and not a public officer.¹⁰

16 3. Public Employees and Public Officials are Different Under Nevada Law; Senator
17 Cannizzaro is a Public Employee, Does not Exercise Sovereign Functions, and is
 therefore not Subject to the Separation of Powers Doctrine

18 In evaluating a claim challenging the right of the defendant to hold the position of
19 director of the drivers' license division of the public service commission of Nevada at the time
20 he was serving as a state senator, the Nevada Supreme Court established the distinction between
21 a public office and mere employment.

22 The nature of a public office as distinguished from mere employment is the
23 subject of a considerable body of authority, and many criteria of determination
24 are suggested by the courts. Upon one point at least the authorities uniformly
appear to concur. A public office is distinguishable from other forms of

25 ¹⁰ It is also worth noting the sacrifices made by Senator Cannizzaro to serve in the citizen legislature.
26 Pursuant to Clark County policy, during Nevada's legislative sessions, Senator Cannizzaro is put on leave
27 without pay. Not only does she not receive pay, but all of her benefits are frozen, including health
insurance and retirement benefits. She is not permitted to use vacation or sick leave during sessions. For
all intents and purposes, she is not employed during the legislative sessions.

1 employment in that its holder has by the sovereign been invested with some
2 portion of the sovereign functions of government.

3 *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953)
4 (internal citations omitted).

5 First, the Court notes, "All public offices must originally have been created by the sovereign as
6 the foundation of government." *State ex rel. Mathews v. Murray*, 70 Nev. 116, 121 (Nev. June
7 15, 1953), citation omitted. It goes on to state,

8 [T]his court, in **definition of a public office**, quoted Wyman on Public Offices,
9 sec. 44, as follows: 'The right, authority and duty conferred by law by which, for
10 a given period, either fixed by law or through the pleasure of the creating power
11 of government, an individual **is invested with some portion of the sovereign
functions of the government**, to be exercised by him for the benefit of the public.
The warrant to exercise powers is conferred, not by contract, but by law.
12 *Id.* (emphasis added).

13 Here, with respect to the position of the Deputy District Attorney, there is no investment of
14 sovereign function of government, as explicitly stated in NRS 252.070. Further, while the
15 position itself is contemplated by statute under Title 20 of the Nevada Revised Statutes, entitled
16 Counties and Townships: Formation, Government and Officers, the duties and "warrant to
17 exercise powers" in the case of Senator Cannizzaro, are contractual. Said another way, her day
18 to day duties are determined by what her boss, District Attorney Wolfson, tells her are her duties.
Further, the fact that her employment is at the will or pleasure of another cannot be disputed.

19 The fact that a public employment is held at the will or pleasure of another, as a
20 **deputy** or servant, who holds at the will of his principal, **is held to distinguish a
mere employment from a public office; for in such cases no part of the state's
21 sovereignty is delegated to such employees.'**

22 *Murray* at 121-22 (emphasis added, citations omitted).

23 The situation in *Murray* with regard to the defendant's subordinate position is analogous to
24 Senator Cannizzaro's subordinate position.

25 Nowhere are duties imposed or authority granted save to the department and to its
26 administrator. It appears clear that the position of director was created not by the
27 act but by the administrator and may as easily by him be discontinued or
28 destroyed. It appears clear that the duties of the position are fixed not by law but
by the administrator and may as easily by him be modified from time to time. No

1 tenure attaches to the position save as may be fixed from time to time by the
2 administrator. The director, then, is wholly subordinate and responsible to the
3 administrator. It cannot, then, be said that that position has been created by law;
4 or that the duties which attach to it have been prescribed by law; or that, subject
5 only to the provisions of law the holder of such position is independent in his
6 exercise of such duties. **It cannot, then, be said that he has been invested with
any portion of the sovereign functions of the government.**

Id. at 123.

6 By this logic and reasoning, the Nevada Supreme Court makes clear that a Deputy District
7 Attorney is not a public officer and is therefore not subject to the separation of powers doctrine.¹¹
8 *See also, Univ. & Cmty. Coll. Sys. v. DR Ptnrs*, 117 Nev. 195, 200, 18 P.3d 1042, 1045-46
9 (2001). For this reason, too, the claims against Senator Cannizzaro fail.

10 D. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR DECLARATORY
11 RELIEF

12 Aside from the legal analysis regarding the constitutional issue set forth above, as set
13 forth in the Second MTD, the Amended Complaint fails to state a claim for declaratory relief.
14 *Id.* at 10-13. Specifically, there is no justiciable controversy, the parties are not adverse,
15 plaintiff does not have a legally protectable interest, and the issue is not ripe for judicial
16 determination. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (citing *Kress v.*
17 *Corey*, 65 Nev. 1, 25-26, 189 P.2d 352, 364 (1948)). The arguments set forth in the Second
18 MTD are incorporated herein by reference.

19 E. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR INJUNCTIVE
20 RELIEF

21
22
23 ¹¹ Notably, this decision was reached at the motion to dismiss stage. The Court commented on the lack of
24 factual evidence regarding the defendant's duties, but noted that such inquiry was not necessary. "The
25 state asserts that since the record now before this court does not contain any showing as to the nature of
26 the duties which now attach to the position, we cannot at this stage of the proceedings determine that the
27 position is not an office. For the reasons discussed, however, **it is apparent that the specific character
of those duties cannot affect our decision. Regardless of the extent of responsibility which at any
given time might be delegated by the administrator to the defendant, the functions of sovereignty
which are involved continue to repose in the administrator to whom they have been assigned by
sovereign act.**" *Id.* at 123-124 (emphasis added).

Additionally, and again as set forth in the Second MTD, the Amended Complaint fails to state a claim for injunctive relief. *Id.* at 13-14. The arguments set forth in the Second MTD are incorporated herein by reference.

F. PLAINTIFF FAILED TO JOIN REQUIRED PARTIES

Finally, as set forth in the Second MTD, Plaintiff has failed to join required parties. fails to state a claim for injunctive relief. *Id.* at 14-15. The arguments set forth in the Second MTD are incorporated herein by reference.

IV.CONCLUSION

Plaintiff's Amended Complaint should be dismissed on multiple grounds. If Plaintiff can overcome the initial standing issues, it is clear that Article 3, Section 1 of the Nevada Constitution does not apply to local government employees like Senator Cannizzaro. If somehow it does apply to some local government employees, it does not apply to positions such as Deputy District Attorneys that are not public officers or officials, and do not exercise sovereign powers. Finally, both of the asserted claims for relief are also fatally deficient. Based on the foregoing, the Amended Complaint should be dismissed.

DATED this 17 day of October, 2020.

WILEY PETERSEN

JONATHAN D. BLUM, ESQ.
Nevada Bar No. 09515
WILEY PETERSEN
1050 Indigo Dr., Suite 200B
Las Vegas, Nevada 89145

*Attorney for Defendant,
Jason Frierson and Nicole Cannizzaro*

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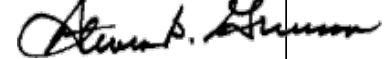
CERTIFICATE OF SERVICE

I hereby certify that I an employee of WILEY PETERSEN. On the 19th day of October, 2020, I caused to be served a true and correct copy of foregoing **DEFENDANT NICOLE CANNIZZARO'S MOTION TO DISMISS** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.



An Employee of WILEY PETERSEN



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Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FILED BY
DEFENDANT JASON FRIERSON
AND JOINDERS THERETO FILED
BY BRITTNEY MILLER AND
SELENA TORRES**

Date of Hearing: November 5, 2020¹

Time of Hearing: 9:00 a.m.

¹ Immediately prior to this filing, the Court signed the Order Shortening Time submitted by NPRI, which re-set all pending matters from December 17, 2020 to November 5, 2020. Although extremely grateful for the consideration, lead counsel for NPRI had not requested November 5, 2020 as an option because of required travel out of the jurisdiction on the date in question. NPRI's respectful request for an alternative hearing date is pending as of the time of this filing.

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna
13 L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Opposition
14 to the Motion to Dismiss filed on October 5, 2020 by Defendant, Jason Frierson (“Defendant
15 Frierson”), and the Joinders adopting the same arguments therein by reference filed by Defendants,
16 Brittney Miller and Selena Torres on October 6, 2020 (the “Joinder Defendants”).

17 This Opposition is made and based on the following Memorandum of Points and Authorities,
18 the papers and pleadings already on file, and any oral argument the Court may permit at the hearing
19 of this matter.

20 Dated this 19th day of October, 2020.

FOX ROTHSCHILD LLP

21
22
23 By: /s/ Deanna L. Forbush

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Attorneys for Plaintiff

Nevada Policy Research Institute

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Uncertain in which order the Court will review the three motions to dismiss and joinders
5 thereto currently on file, NPRI will address Defendant Frierson's motion, filed third in time, on its
6 own merits and make comparisons and incorporate prior arguments by reference where appropriate
7 in the interest of judicial and party economy.

8 As with NSHE Defendants, Defendant Frierson premises the majority of his dismissal
9 argument under NRCP 12(b)(5) on a legal conclusion for which there is no legal precedent. In their
10 motion to dismiss, the NSHE Defendants asserted, without any legal support, that the Separation of
11 Powers clause applies only to public officials or officers, and not public employees. This assertion
12 ran completely contrary to the holding in *Secretary of State (Heller) v. Nevada State Legislature*, 120
13 Nev. 456, 472, 93 P.3d 746, 757 (2004), where the Nevada Supreme Court gave clear instruction for
14 challenging the dual employment of executive branch employees, separate and apart from those
15 employees invested with sovereign power. Similarly, Defendant Frierson's assertion that the
16 Separation of Powers clause applies only to employees of "the three departments of state
17 government" and not to local government employees is belied by *Secretary of State (Heller)*, where
18 the right of legally interested persons to seek declaratory and injunctive relief is stated without any
19 distinction being made between state and local government employees. *See* Motion at 6:7-10; *see*
20 *also Id.* Defendant Frierson ignores this holding, like the NSHE Defendants did before him, but that
21 renders it no less binding on this Court. Further, the motion conflates the prohibition against a
22 political subdivision itself invoking separation of powers with NPRI's challenge to legislators
23 engaging in dual executive branch employment, which is specifically authorized.

24 Alternatively, Defendant Frierson and the Joinder Defendants seek dismissal of NPRI's
25 Amended Complaint under NRCP 12(b)(6), by incorporating by reference the NSHE Defendants'
26 argument that NPRI failed to join required parties in violation of NRCP 19. *See* Motion at 5:1-3,
27 15:10-13. Specifically, the NSHE Defendants asserted in their motion to dismiss that NPRI was
28 required to sue 4 sitting judges who also serve as adjunct professors or instructors with NSHE

1 institutions. As is plain from the face of the Amended Complaint, however, NPRI currently seeks to
2 address the Separation of Powers violations of legislators engaging in impermissible dual
3 employment with the executive branch. NPRI may choose to initiate future litigation against judicial
4 branch violators, but there is no requirement that it do so now, and there is no legal basis to request
5 dismissal because it has not done so. On the contrary, dismissal in this regard is only available when
6 joinder of an indispensable party is not feasible, which is not the case here, and, even then, it is still
7 well within a district court's discretion to proceed regardless. *See Humphries v. Eighth Jud. Dist.*
8 *Ct.*, 129 Nev. 788, 792, 312 P.3d 484, 487 (2013) (citing NRCP 19(b)). This limited focus in NRCP
9 19(a) in the joinder argument, to the exclusion of the required analysis under NRCP 19(b), is fatal to
10 Defendant Frierson's incorporation of the NSHE Defendants' request for dismissal under NRCP
11 12(b)(6).

12 Finally, Defendant Frierson also seeks to incorporate by reference the argument for dismissal
13 based on lack of standing first asserted by Defendant Miller in her motion to dismiss. This argument
14 is equally unavailing. As NPRI made clear in its first filed opposition, the Court cannot make any of
15 the key factual determinations to determine if NPRI is a legally interested party that enjoys standing
16 without the parties putting forward evidence, and this is fatal to a request for dismissal under NRCP
17 12(b)(1). More importantly, NPRI has clearly alleged facts in its Amended Complaint that provide
18 standing to sue under the public importance exception set forth in *Schwartz v. Lopez*, 132 Nev. 732,
19 743, 382 P.3d 886, 894 (2016), which alone requires this case to be adjudicated on the merits.

20 For all of these reasons, and those set forth in opposition to the other two motions to dismiss
21 before the Court, Defendant Frierson's motion to dismiss and the Joinders thereto should be denied,
22 and NPRI should be permitted to proceed with litigation in the normal course.

23 II.

24 **FACTUAL ALLEGATIONS**

25 The facts properly at issue with regard to the motion and joinders thereto are those set forth
26 in NPRI's Amended Complaint filed on July 28, 2020, a copy of which was previously attached as
27 **Exhibit 1** to the opposition to Defendant Brittney Miller's motion to dismiss filed on October 2,
28 2020. In the interest of judicial and party economy, NPRI will not reattach the Amended Complaint

1 here and will only repeat those facts herein as necessary to support the arguments that follow.

2 III.

3 STANDARDS OF REVIEW

4 A. NRCP 12(b)(5) Dismissals Are Subject to Rigorous Review.

5 Defendant Frierson first seeks dismissal under NRCP 12(b)(5). *See* Motion at 2:18, 4:6-18.
6 His brief acknowledges that such dismissal is only appropriate where NPRI could prove no set of
7 facts which would entitle it to relief. *Id.* at 4:6-8. A district court's decision to dismiss a complaint
8 for failure to state a claim, then, will be subject to rigorous, de novo appellate review. *See Buzz*
9 *Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227, 181 P.3d 670, 672 (2008). Further, Nevada
10 remains a notice-pleading jurisdiction, where all that is required is that a pleading provide fair notice
11 to the adverse party of the nature of the claims stated therein, and the basis or grounds for such
12 claims. *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Western States*
13 *Constr. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). In turn, "notice pleading" only
14 requires a claimant to set forth a general recitation of facts that support a cognizable legal theory.
15 *See Liston v. Las Vegas Metropolitan Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995)
16 (citing *Swartz v. Adams*, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977)).

17 B. NRCP 12(b)(6) Dismissals Also Require De Novo Review.

18 As Defendant Frierson next points out, his request for dismissal under NRCP 12(b)(6) seeks
19 to incorporate by reference the NSHE Defendants' argument made in the second motion to dismiss
20 that NPRI failed to join required parties pursuant to NRCP 19. *See* Motion at 2:18, 5:1-3. The
21 Supreme Court will also review de novo a district court's interpretation of the NRCP 19, including
22 NRCP 19. *Humphries*, 129 Nev. at 792, 312 P.2d at 487 (citations omitted). "Whether a party is
23 necessary does not depend on upon broad labels or general classifications, but rather compromises a
24 highly fact-specific inquiry." *Rose, LLC v. Treasure Island, LLC*, 135 Nev. 145, 150, 445 P.3d 860,
25 865 (Ct. App. 2019). Further, "[t]here is no precise formula for determining whether a particular
26 nonparty must be joined under Rule 19(a)." *Id.* (citation omitted). When the question of whether a
27 nonparty must necessarily be joined is raised by another party already present in the action, rather
28 than by the missing party itself, the court's inquiry will primarily focus on whether complete relief is

1 available among the parties already present. *Id.*, 135 Nev. at 158, 445 P.3d at 870. “[T]he court
2 must decide if complete relief is possible among those already parties to the suit. This analysis is
3 independent of the question whether relief is available to the absent party.” *Id.* (citing *Humphries*,
4 129 Nev. at 796, 312 P.3d at 490). Finally, even if a party is determined to be indispensable, only if
5 joinder of that party is not feasible must the court determine, in equity and good conscience, whether
6 the action should proceed or be dismissed. *Humphries*, 129, Nev. at 792, 312 P.2d at 487 (citing
7 NRCP 19(b)).

8 **C. NRCP 12(b)(1) Dismissals Held to the Same High Standards as the Other NRCP**
9 **12(b) Motions.**

10 As a final basis to seek dismissal, although not specifically listed in its introductory
11 paragraph, Defendant Frierson incorporates by reference the argument for dismissal due to lack of
12 standing under NRCP 12(b)(1), which Defendant Brittney Miller asserted in the first motion to
13 dismiss. *See* Motion at 2:18; 5:8-15. As discussed in its opposition thereto, however, NPRI is
14 clearly a legally interested party, which precludes the Court granting dismissal on the basis of
15 standing. The Supreme Court reviews dismissal of a complaint for lack of standing under the same
16 rigorous, de novo standard as dismissal for failure to state a claim upon which relief may be granted.
17 *See Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009). With
18 regard to legal standing specifically, under Nevada law an action commenced by a real party in
19 interest is not generally subject to dismissal. *See, e.g., El Rancho, Inc. v. First Nat. Bank of Nev.*, 406
20 F.2d 1205, 1209 (9th Cir. 1968). A real party in interest with standing to sue is one who possesses
21 the right to enforce the claim and has a significant interest in the litigation. *Arguello v. Sunset*
22 *Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) (citation omitted). And, as such, it is
23 axiomatic that, if a party has standing to assert its claims, the court has subject matter jurisdiction to
24 hear those claims. *See, e.g., Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C.App. 110,
25 113, 574 S.E.2d 48, 51 (2002) (holding defendants’ standing argument implicates Rule 12(b)(1)
26 (citation omitted).

27 By any fair reading of the legal standards stated above, Defendant Frierson and the Joinder
28 Defendants are not entitled to dismissal of NPRI’s Amended Complaint, and their respective motion

1 to dismiss and joinders thereto should each be denied in their entirety.

2 IV.

3 **ARGUMENT**

4 A. **The Entirety of Defendant Frierson's Motion to Dismiss Under NRCP 12(b)(5)**
5 **Is Legally Unsupported and Must Fail.**

6 The gravamen of the NRCP 12(b)(5) dismissal request made by Defendant Frierson and the
7 Joinder Defendants rests on the false premise that the Nevada Supreme Court has declared the
8 Separation of Powers clause in the Nevada Constitution to be applicable only to executive branch
9 employees working directly for the state, as opposed to a local government, and then only to those
10 employees who also serve as public officials or officers. Simply put, the Nevada Supreme Court has
11 not yet rendered a decision on these ultimate issues, let alone one that mandates dismissal of the
12 instant case. If such a decision existed, NPRI would never have filed the instant litigation.
13 Regardless of what Defendants believe to be NPRI's agenda, the truth is that it is precisely for the
14 purpose—and only for the purpose—of having the Supreme Court settle these matters that NPRI
15 filed its Amended Complaint for both declaratory and injunctive relief in the district court seeking to
16 exclude legislators from employment with the executive branch, which again the holding in
17 *Secretary of State (Heller)* expressly approved.

18 1. ***The Nevada Supreme Court Approves Using Actions for Declaratory and***
19 ***Injunctive Relief Bring a Separation of Powers Challenge Against***
20 ***Legislators Working as Executive Branch Employees.***

21 In *Secretary of State (Heller)*, then Secretary of State, Dean Heller, sought by writ of
22 mandamus to challenge state and local government employees' service in the Legislature as violating
23 the Nevada Constitution's Separation of Powers doctrine. In the end, the Supreme Court denied the
24 requested writ relief after determining, among other things, that the Secretary of State did not have a
25 discernable beneficial interest to confer standing to bring a writ of mandamus action and that he sued
26 the wrong party, i.e. the Legislature as a whole, to prevent service therein by executive branch
27 employees. *Id.*, 120 Nev. at 462-63, 93 P.3d at 750. But in so doing, the Supreme Court also
28 provided a clear path for a legally interested party to seek to exclude a legislator from executive

1 branch employment, which is exactly what NPRI is seeking to do in the instant case.

2 Specifically, the Court recognized two mechanisms for challenging what it deemed the “dual
3 service issue.” *Secretary of State (Heller)*, 120 Nev. at 472, 93 P.3d at 756. It held that, “[t]he dual
4 service issue may be raised as a separation-of-powers challenge to legislators working in the
5 executive branch, as the qualifications of legislators employed in the executive branch are not
6 constitutionally reserved to that branch.” *Id.*, 120 Nev. at 472, 93 P.3d at 757 (citation omitted). It
7 went on to opine that, “[s]uch a challenge might be well suited for quo warranto or a declaratory
8 relief action filed in the district court.” *Id.* Most telling, and particularly relevant to the instant case,
9 however, is the distinction the Court draws between how each of the two types of actions might be
10 employed, and by whom, stating clearly that:

11 A quo warranto action could be used to challenge any executive branch
12 employees invested with sovereign power, who thereby occupy public
13 offices within quo warranto’s exclusive reach. And, declaratory relief,
14 possibly coupled with injunctive relief, could be sought against other
executive branch employees.

15 The party with the clearest standing to bring the quo warranto action
16 would be the attorney general, and declaratory relief could be sought by
17 someone with a “legally protectable interest,” such as a person seeking the
18 executive branch position held by the legislator. Individual legislators
would need to be named as either quo warranto respondents or declaratory
relief defendants.

19 *Id.*, 120 Nev. at 472-73, 93 P.3d at 757 (citations omitted) (emphasis added).

20 In sum, the Nevada Supreme Court in its *Secretary of State (Heller)* holding unequivocally
21 endorses the declaratory and injunctive relief actions alleged by NPRI against executive branch
22 employees without sovereign power, such as Defendant Frierson and Joinder Defendants named
23 herein. There are no restrictions stated by the Supreme Court for such a suit as between state or
24 local government employees, even though the Secretary of State clearly posed the question. And,
25 there are no restrictions for such a suit based on the functions engaged in by the executive branch
26 employees. In this regard, the decision squares completely with the Supreme Court’s
27 acknowledgment of the ultimate importance of the Separation of Powers doctrine, as previously
28 stated in *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). The Supreme Court also

1 recognized in *Galloway* that it is precisely in the area of non-sovereign, ministerial functions that
2 Separation of Powers violations most frequently occur. *Galloway*, 83 Nev. at 22, 422 P.2d at 243.

3 Thus, the only condition precedent to NPRI bringing the instant action is claiming a legally
4 protectable interest. The example of a legally protectable interest being a person seeking the
5 executive branch position held by the legislator, as identified in *Secretary of State (Heller)*, is in fact
6 just that, an example. 120 Nev. at 473, 93 P.3d at 757. NPRI has clearly alleged an alternative legal
7 interest through the standing it enjoys via the public-importance exception. As such, any argument
8 that NPRI is not properly before this court because it did not limit its lawsuit to state-level public
9 officials and officers fails in its entirety and dismissal on that basis is improper.

10 **2. *The Non-Binding Attorney General Opinion Relied on by Defendants Only***
11 ***Confirms the Lack of Existing Supreme Court Precedent.***

12 Save for 2 wholly inapposite cases, i.e. *City of Fernley v. State*, 132 Nev. 32, 366 P.3d 699
13 (2016) and *City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 302 P.3d 1118 (2013)², the case law
14 cited by Defendant Frierson and Joinder Defendants for the proposition that “the law on this subject
15 makes clear” that the Separation of Powers clause does not apply to local government employees
16 significantly predates the Attorney General Opinion (“AGO”) 2004-03 on which they also rely. *See*
17 *Motion* at 3:7-10. This is vitally important because, as admitted in the motion, the Attorney General
18 undertook a thorough review of all prior cases before declaring, in the very first sentence of the
19 introduction to his 2004 opinion, that “[t]he question of whether executive branch and local
20 government employees can dually serve as members of the Nevada State Legislature, in
21 conformance with Article 3, Section 1 of the Nevada Constitution, has never been reviewed by the
22 Nevada Supreme Court.” AGO 2004-03 at p. 18 (emphasis added); *see also* *Motion* at 10:4-5.

23
24 It is also admitted in the motion that the AGO is not binding authority on this Court. *See*
25 *Motion* at 9:20-21, n. 3. This is another reason why the Court’s determination in this case is
26 imperative to secure the necessary appellate review. The AGO’s conclusion that the Separation of

27
28

 ² Neither case brought by the named municipality discusses the issue of dual employment as a possible violation of the
Separation of Powers clause. Each merely addresses the legality of a limitation of authority imposed on the political
subdivision itself, which has no bearing on NPRI’s claims in the instant litigation.

1 Powers clause of the Nevada Constitution “bars any employee from serving in the executive branch
2 of government and simultaneously serving as a member of the Nevada State Legislature,” while
3 contemporaneously finding that “the constitutional requirement of separation of powers is not
4 applicable to local governments,” only perpetuates the concern that this matter remains unsettled.
5 The Supreme Court’s lack of review and clarification of these issues remains true as of the date of
6 this filing, 16 years after AGO 2004-03 and the decision in *Secretary of State (Heller)* were issued,
7 and this Court has the power through its substantive handling of this case to correct this error.

8 **3. *NPRI Has Met Its Burden to State Claims for Declaratory and Injunctive***
9 ***Relief Upon Which Relief May Be Granted.***

10 As a final matter regarding the arguments for dismissal under NRCp 12(b)(5), Defendant
11 Frierson and the Joinder Defendants incorporate by reference the NSHE Defendants’ claim in their
12 motion to dismiss that NPRI failed to properly state either of its claims for declaratory or injunctive
13 relief. *See* Motion at 14:19-15:9. First, the NSHE Defendants sought to challenge NPRI’s claims for
14 declaratory and injunctive relief on the grounds that NPRI does not have a legally protectable
15 interest and lacks standing to sue as a result. As it did in its response to the NSHE Defendants’
16 motion, NPRI opposes these arguments in their entirety by adopting by reference and incorporating
17 herein Sections IV(A) and (B) of its opposition to Defendant Miller’s motion and joinder. *See*
18 *Opposition to Motion to Dismiss Filed by Defendant Brittney Miller at 6:3-11:13, filed October 2,*
19 *2020.* A summary of these arguments is also stated in Section IV(C), below.

20 Second, the NSHE Defendants further challenged NPRI’s injunctive relief claim specifically
21 on the ground that NPRI has an adequate remedy at law. The purported remedy, however, was
22 simply an administrative remedy to be rendered, if at all, by the State’s Commission on Ethics.
23 NPRI would have no legal rights in the process, no ability to conduct any discovery, and no ability to
24 advocate for a particular outcome. Generally, too, when courts contemplate finding an adequate
25 remedy at law as preclusive to injunctive relief, it is because there is monetary compensation
26 available that is sufficient to redress the harm. *See, e.g. Dixon v. Thatcher*, 103 Nev. 414, 415, 742
27 P.2d 1029 (1987) (holding irreparable harm is an injury “for which compensatory damage is an
28 inadequate remedy”). On the contrary, NPRI alleged in the Amended Complaint each of the

1 elements for injunctive relief, including its likelihood of success on the merits and irreparable harm
2 for which there is no adequate monetary remedy. As such, any determination of whether NPRI can
3 factually meet these elements should only be made after a full evidentiary hearing, not upon a
4 motion to dismiss.

5 **B. Defendant Frierson’s Dismissal Request under NRCP 12(b)(6) Is Equally**
6 **Unavailing Where NPRI Did Not Fail to Join a Necessary Party, and Dismissal**
7 **May Not Occur Regardless, Where Joinder of Any Necessary Party Is Feasible.**

8 Defendant Frierson and the Joinder Defendants additionally seek dismissal under NRCP
9 12(b)(6) by incorporating by reference the NSHE Defendants’ argument that NPRI failed to include
10 members of the judicial branch who simultaneously hold NSHE positions in its lawsuit. *See* Motion
11 at 15:10-13. To reach this conclusion, however, the Court must review the matter under both NRCP
12 19(a) and NRCP 19(b), the latter provision of which the NSHE Defendants neglected to address.

13 Indeed, the argument posed by the NSHE Defendants, and adopted by Defendant Frierson
14 and the Joinder Defendants, focuses solely on whether the 4 judicial branch members in question are
15 necessary parties and reaches the summary conclusion that NRCP 19(a) requires their joinder
16 because they may be interested in the outcome of the litigation. This oversimplified analysis,
17 however, is contrary to Nevada law stated by the Court of Appeals which recently clarified that
18 “NRCP 19 asks whether complete relief can be accorded to all current parties without the absent
19 party and/or whether the absent party claims an interest in the action.” *Rose, LLC*, 135 Nev. 145,
20 157, 445 P.3d 860, 869 (Ct. App. 2019) Where, as here, the party raising the issue is already in the
21 litigation, and the absent party presumably knows about the litigation but has made no effort to
22 intervene, the lack of interest of the absent party suggests it does not fear the impairment of its
23 rights. *Id.* Completeness, however, is ultimately determined based on those persons who are already
24 parties, and not whether relief is also available to the absent party. *Id.*, 135 Nev. at 158, 445 P.3d at
25 870.

26 Even if NPRI assumes for purposes of this argument only that the judicial branch employees
27 engaging in dual employment with NSHE are necessary parties to the instant case, their joinder is
28 entirely feasible, and dismissal would improper. While NPRI did not join these parties and chose to

1 focus this lawsuit on only those legislators engaging in dual employment with the executive
2 branches, the Court could order these parties joined if it deemed it a necessity pursuant to NRCP
3 19(a)(2). But it is only if joinder of a necessary party is not feasible that a court must determine, in
4 equity and good conscience, whether the action may proceed or should be dismissed. *Humphries*,
5 129, Nev. at 792, 312 P.2d at 487 (citing NRCP 19(b)).

6 Here, complete relief may be accorded between NPRI and legislators who are engaging in
7 executive branch employment, so joinder of members of the judicial branch who may be similarly
8 situated is not necessary. Should the Court disagree, it may still exercise one of two options: join
9 the judicial branch employees by court order or permit this matter to proceed without them. The one
10 option not available, however, is outright dismissal.

11 **C. Finally, Defendant Frierson’s Dismissal Request Under NRCP 12(b)(1) Also Fails**
12 **Where NPRI Has Properly Asserted Standing Pursuant to the Public-Importance**
13 **Exception.**

14 As a final matter, Defendant Frierson and the Joinder Defendants seek to incorporate by
15 reference Defendant Miller’s challenge to NPRI’s standing on the grounds that it cannot show a
16 particularized injury and otherwise fails to meet the public importance exception to the injury
17 requirement, as set forth in *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). *See*
18 Motion at 5:8-15. As with all other claimed bases for dismissal, the Court obviously cannot make
19 any of the key factual determinations necessary to reach such a conclusion without ascertaining
20 additional facts, which is fatal to a request for dismissal. That said, NPRI has clearly alleged in its
21 Amended Complaint that this matter is of significant public importance, that legislative
22 appropriations or expenditures are implicated, and that no party is in a better position than NPRI to
23 bring the instant case. Accordingly, NPRI is deemed to have met the public importance exception to
24 the injury requirement set forth in *Schwartz v. Lopez* for purposes of the motion, and dismissal for
25 lack of standing is not appropriate.

26 NPRI also does not lack standing for failing to name the State or a political subdivision as a
27 party defendant. *See* Motion at 5:12-13. The provision of NRS Chapter 41 cited in the motion does
28 not apply in the instant case because the case is not based on any alleged act or omission in

1 furtherance of the Defendants' public duties or employment. On the contrary, Defendants were sued
2 solely as a result of their individual actions to hold simultaneous positions as legislators and
3 executive branch employees, in violation of Article 3, Section 1 of the Nevada Constitution, and not
4 in any official capacity that would constitute a circumstance under which an official government
5 attorney would be permitted to provide a defense or the State or political subdivision itself is
6 required to be named. Therefore, dismissal on this basis must also be denied.

7 **V.**

8 **CONCLUSION**

9 Based on the foregoing, there is no legitimate dispute that NPRI has adequately pled its
10 claims for declaratory and injunctive relief, that Defendant Frierson and the Joinder Defendants are
11 on notice of the nature of these claims, and that NPRI should now be permitted to proceed
12 substantively with its case. Accordingly, NPRI respectfully requests this Honorable Court deny
13 Defendant Frierson's Motion to Dismiss and the Joinder thereto on all grounds stated therein.

14 Dated this 19th day of October, 2020.

15 **FOX ROTHSCHILD LLP**

16
17 By: /s/ Deanna L. Forbush

18 DEANNA L. FORBUSH

19 Nevada Bar No. 6646

20 COLLEEN E. MCCARTY

21 Nevada Bar No. 13186

22 1980 Festival Plaza Drive, Suite 700

23 Las Vegas, Nevada 89135

24 Telephone: (702) 262-6899

25 Attorneys for Plaintiff

26 Nevada Policy Research Institute
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 19th day of October, 2020, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT JASON FRIERSON AND JOINDERS THERETO FILED BY DEFENDANTS BRITTNEY MILLER AND SELENA TORRES** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu

Gary A. Cardinal, Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street/MS 0550
Reno, Nevada 89557-0550
Email: gcardinal@unr.edu

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

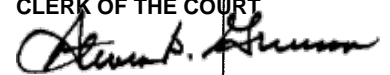
Bradley Schrager, Esq.
Daniel Bravo, Esq.
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Attorneys for Defendant Jason Frierson

*Attorneys for Defendants Brittney Miller,
Kasina Douglas-Boone, and Selena Torres*

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP



1 **JOIN**

2 JONATHAN D. BLUM, ESQ.

3 Nevada Bar No. 09515

4 **WILEY PETERSEN**

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9 E-Mail: jblum@wileypetersenlaw.com

10 *Attorneys for Defendants,*

11 *Jason Frierson and Nicole Cannizzaro*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 NEVADA POLICY RESEARCH
15 INSTITUTE, a Nevada domestic nonprofit
16 corporation,

17 Plaintiff,

18 vs.

19 NICOLE J. CANNIZZARO, an individual
20 engaging in dual employment with the
21 Nevada State Senate and Clark County
22 District Attorney; KASINA
23 DOUGLASSBOONE,
24 an individual engaging in dual
25 employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly

CASE NO: A-20-817757-C

DEPT. NO: 24

**DEFENDANT NICOLE
CANNIZZARO'S JOINDER TO
DEFENDANT BRITTNEY MILLER'S
MOTION TO DISMISS COMPLAINT**

1 and Clark County School District; DINA
2 NEAL, an individual engaging in dual
3 employment with the Nevada State Assembly
4 and Nevada State College; JAMES
5 OHRENSCHALL, an individual engaging in
6 dual employment with the Nevada State
7 Senate and Clark County Public Defender;
8 MELANIE SCHEIBLE an individual
9 engaging in dual employment with the
10 Nevada State Senate and Clark County
11 District Attorney; TERESA
12 BENITEZTHOMPSON,
13 an individual engaging in dual
14 employment with the Nevada State Assembly
15 and University of Nevada, Reno; JILL
16 TOLLES, an individual engaging in dual
17 employment with the Nevada State Assembly
18 and University of Nevada, Reno; and
19 SELENA TORRES, an individual engaging
20 in dual employment with the Nevada State
21 Assembly and Clark County School District,
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Defendants.

Defendant NICOLE CANNIZZARO ("Cannizzaro") by and through her counsel of record, WILEY PETERSEN, hereby join, incorporate, and adopt the factual allegations and authorities asserted in Defendant Brittney Miller's Motion to Dismiss Complaint, filed on September 18, 2020.

DATED this 19 day of October 2020.

WILEY PETERSEN

JONATHAN D. BLUM, ESQ.
Nevada Bar No. 09515
WILEY PETERSEN
1050 Indigo Dr., Suite 200B
Las Vegas, Nevada 89145
*Attorneys for Defendant,
Jason Frierson and Nicole
Cannizzaro*

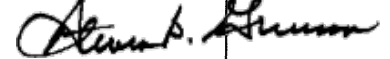
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CERTIFICATE OF SERVICE

I hereby certify that I an employee of WILEY PETERSEN. On the 19th day of October 2020, I caused to be served a true and correct copy of foregoing **DEFENDANT NICOLE CANNIZZARO'S JOINDER TO DEFENDANT BRITTNEY MILLER'S MOTION TO DISMISS COMPLAINT** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.


An Employee of WILEY PETERSEN



JOIN

JONATHAN D. BLUM, Esq.

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Telephone: (702) 910-3329

Facsimile: (702) 553-3467

E-Mail: jblum@wileypetersenlaw.com

Attorneys for Defendants,

Jason Frierson and Nicole Cannizzaro

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA
DOUGLASSBOONE,
an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly

CASE NO: A-20-817757-C

DEPT. NO: 24

**DEFENDANT NICOLE
CANNIZZARO'S JOINDER TO
DEFENDANTS OSVALDO FUMO,
HEIDI SEEVERS GANSERT, AND
DINA NEAL'S MOTION TO DISMISS
PURSUANT TO NRCP 12(b)(5) AND
NRCP 12(b)(6)**

1 and Clark County School District; DINA
2 NEAL, an individual engaging in dual
3 employment with the Nevada State Assembly
4 and Nevada State College; JAMES
5 OHRENSCHALL, an individual engaging in
6 dual employment with the Nevada State
7 Senate and Clark County Public Defender;
8 MELANIE SCHEIBLE an individual
9 engaging in dual employment with the
10 Nevada State Senate and Clark County
11 District Attorney; TERESA
12 BENITEZTHOMPSON,
13 an individual engaging in dual
14 employment with the Nevada State Assembly
15 and University of Nevada, Reno; JILL
16 TOLLES, an individual engaging in dual
17 employment with the Nevada State Assembly
18 and University of Nevada, Reno; and
19 SELENA TORRES, an individual engaging
20 in dual employment with the Nevada State
21 Assembly and Clark County School District,
22
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Defendants.

Defendant NICOLE CANNIZZARO ("Cannizzaro") by and through her counsel of record, WILEY PETERSEN, hereby join, incorporate, and adopt the factual allegations and authorities asserted in Defendants Osvaldo Fumo. Heidi Seevers Gansert, and Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5) and NRCP 12(b)(6) filed on September 24, 2020.
DATED this 19 day of October 2020.

WILEY PETERSEN

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1050 Indigo Dr., Suite 200B
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Jason Frierson and Nicole
Cannizzaro*

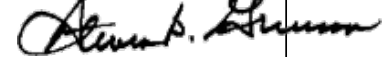
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of WILEY PETERSEN. On the 19th day of October 2020, I caused to be served a true and correct copy of foregoing **DEFENDANT NICOLE CANNIZZARO'S JOINDER TO DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP (b)(5) AND NRCP 12(b)(6)** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.


An Employee of WILEY PETERSEN



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3 Nevada Bar No. 6646

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5 COLLEEN E. MCCARTY, ESQ.

6 Nevada Bar No. 13186

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9 1980 Festival Plaza Drive, Suite 700

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11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XVIII

HEARING REQUESTED

**PLAINTIFF'S EX PARTE MOTION
FOR ENLARGEMENT OF TIME TO
SERVE AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF AND FOR AN
ORDER ALLOWING SERVICE BY
PUBLICATION OF DEFENDANTS
GLEN LEAVITT, JAMES
OHRENSCHALL, AND MELANIE
SCHEIBLE**

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 Nevada Policy Research Institute (“Plaintiff” or “NPRI”), through its attorneys of record,
13 Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby submits
14 Plaintiff’s Ex Parte Motion for Enlargement of Time to Serve Amended Complaint for Declaratory
15 and Injunctive Relief and for an Order Allowing Service by Publication of Defendants Glen Leavitt,
16 James Ohrenschall and Melanie Scheible (“Ex Parte Motion”).

17 NPRI seeks the Order for an extension of time to serve, and to serve by publication on the
18 grounds that for good cause and after due diligence it has been unable to effectuate service on the
19 said Defendants. This Ex Parte Motion follows NPRI’s original Motion for Order to Serve by
20 Publication Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible, which was filed on
21 September 29, 2020 and subsequently unopposed. NPRI has addressed herein the original motion’s
22 deficiencies, which were identified in the Court’s Minute Order entered October 19, 2020, and
23 respectfully requests an Order to extend time and serve by publication be issued at the Court’s
24 earliest convenience.

25 ///

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1 This Ex Parte Motion is made and based on the following Memorandum of Points and
2 Authorities; the Declaration of Colleen E. McCarty, Esq. included therein and the exhibits attached
3 thereto; the papers and pleadings already on file; and any oral argument the Court may permit should
4 a hearing of this matter be required.

5 Dated this 20th day of October, 2020.

6 **FOX ROTHSCHILD LLP**

7
8 By: /s/ Colleen E. McCarty

9 DEANNA L. FORBUSH

10 Nevada Bar No. 6646

11 COLLEEN E. MCCARTY

12 Nevada Bar No. 13186

13 1980 Festival Plaza Drive, Suite 700

14 Las Vegas, Nevada 89135

15 Telephone: (702) 262-6899

16 Attorneys for Plaintiff

17 Nevada Policy Research Institute

18 **DECLARATION OF COLLEEN E. MCCARTY, ESQ. IN SUPPORT OF EX PARTE**
19 **MOTION FOR ENLARGMENT OF TIME TO SERVE BY PUBLICATION**

20 I, Colleen E. McCarty, hereby declare as follows:

21 1. I am an attorney licensed to practice law in the State of Nevada, and I am an
22 Associate of the law firm of Fox Rothschild LLP, attorneys for Plaintiff, Nevada Policy Research
23 Institute ("NPRI").

24 2. I have personal knowledge of the facts stated in this Declaration. If called upon to
25 testify to the same, I am competent to do so.

26 3. NPRI filed its operative Amended Complaint for Declaratory and Injunctive Relief
27 ("Amended Complaint") on July 28, 2020. By way of the instant litigation, NPRI seeks injunctive
28 and declaratory relief in the public interest to address the alleged ongoing constitutional violations of
the Separation of Powers requirement of the Nevada Constitution by the named Defendants, each of
whom are alleged to be engaging in dual employment by simultaneously holding elected offices in

1 the Nevada State Legislature and paid positions with the State or local government.

2 4. Over the two-month period preceding the instant filing, NPRI was successful in
3 personally serving 10 of the 13 Defendants, with the most recent personal service taking place on
4 September 27, 2020. Despite its due diligence, however, NPRI has been unable to effectuate service
5 on 3 of the Defendants: Glen Leavitt, James Ohrenschall and Melanie Scheible.

6 5. In addition to repeated service attempts made at each Defendant's last known address,
7 Plaintiff's process server made repeated telephone calls to arrange for a convenient time for service,
8 leaving messages for both Glen Leavitt and James Ohrenschall and speaking directly to Melanie
9 Scheible, but these efforts were ultimately unsuccessful.

10 6. Attached hereto as **Exhibit 1** are true and correct copies of three (3) Declarations of
11 Due Diligence executed by licensed process server Sean Keseday with Nationwide Legal Nevada,
12 LLC, which attest to a total of thirteen (13) personal service and/or call attempts made at the last
13 known address of Defendant Glen Leavitt. These personal service and/or call attempts were made
14 between the dates of August 28, 2020 and September 15, 2020, at varying times throughout the day.

15 7. Attached hereto as **Exhibit 2** are true and correct copies of two (2) Declarations of
16 Due Diligence executed by licensed process server Judith Mae All with Nationwide Legal Nevada,
17 LLC, which attest to a total of seven (7) personal service and/or call attempts made at the last known
18 address of Defendant James Ohrenschall. These personal service and/or call attempts were made
19 between the dates of September 1, 2020 and September 22, 2020, at varying times throughout the
20 day.

21 8. Attached hereto as **Exhibit 3** are true and correct copies of two (2) Declarations of
22 Due Diligence executed by licensed process server Tyler Trewet with Nationwide Legal Nevada,
23 LLC, which attest to a total of nine (9) personal service and/or call attempts made at the last known
24 address of Defendant Melanie Scheible. These personal service and/or call attempts were made
25 between the dates of August 29, 2020 and September 23, 2020, at varying times throughout the day.

26 9. It appears Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible are
27 attempting to evade service. Therefore, service by publication is needed, pursuant to NRCP 4.4(c).

28 10. The period of time to effectuate personal service on said Defendants will run on or

1 about November 6, 2020. If service by publication is ordered, service of the Summons and
2 Amended Complaint will not be deemed completed until four (4) weeks from the first publication,
3 which date will conclude beyond this date.

4 11. In order to allow this litigation to move forward with all parties in the case, it is
5 therefore necessary for NPRI to request that the Court extend, at its first available opportunity, the
6 period of time for service of process by an additional sixty (60) days. Otherwise, the delayed service
7 of process on the said Defendants will effectively delay the course of these proceedings.

8 12. I, my client, and my process server have attempted to locate and serve the said
9 Defendants to the best of our ability, using due diligence, and we were not successful. The instant
10 litigation has received press coverage and is very active, with multiple motions to dismiss and a
11 motion to disqualify official counsel pending hearing. It is not credible to believe the said
12 Defendants are unaware of these proceedings, and, in fact, my process server spoke directly to
13 Defendant Melanie Scheible about arranging for service. As it appears said Defendants are evading
14 service, personal service of process of the Amended Complaint is not possible at this time.

15 I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045)¹ that
16 the foregoing is true and correct.

17 Dated this 20th day of October, 2020.

18 /s/ Colleen E. McCarty
19 COLLEEN E. MCCARTY
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27 ¹ NRS 53.045. Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence
28 or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an
unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially
the prescribed form.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **STATEMENT OF RELEVANT FACTS**

4 The facts relevant to the instant Ex Parte Motion are contained within the Declaration of
5 Colleen E. McCarty, Esq., supra, and are incorporated by reference herein.

6 **II.**

7 **ARGUMENT**

8 **A. Service by Publication is Warranted Where Defendants Cannot, After Due**
9 **Diligence, Be Personally Served and Are Likely Evading Service.**

10 Under NRCP 4, parties are required to personally serve the summons and complaint upon a
11 defendant. When personal service proves impossible, however, NRCP 4.4(c) provides that service
12 by publication may be ordered when the defendant cannot, after due diligence, be found or when by
13 concealment defendant seeks to avoid service of the summons and complaint. *See* NRCP
14 4.4(c)(1)(A) and (B). A party moving for service by publication must, among other requirements,
15 support the request by filing an affidavit demonstrating it diligently attempted to serve the defendant.
16 NRCP 4.4(c)(2).

17 There are several factors courts consider to evaluate a party's due diligence, including the
18 number of attempts made to serve the defendant at his or her residence. *See Abreu v. Gilmer*, 115
19 Nev. 308, 713, 985 P.2d 746, 749 (1999) ("due diligence measured by the qualitative efforts of a
20 specific plaintiff seeking to locate and serve a specific defendant); *McNair v. Rivera*, 110 Nev. 463,
21 464, 874 P.2d 1240, 1241 (1994); *Price v. Dunn*, 106 Nev. 100, 103, 787 P.2d 785, 786-87 (1990).

22 Here, NPRI has provided the Court with a Declaration of its attorney of record, Colleen E.
23 McCarty, Esq., demonstrating that a cause of action exists against Defendants Glen Leavitt, James
24 Ohrenschall, and Melanie Scheible, that said Defendants are necessary and proper parties to the
25 action, and that specific facts showing the diligent efforts it made to locate and serve said
26 Defendants. As detailed above, NPRI engaged three (3) different process servers, each of whom
27 attempted to serve Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible, respectively,
28 on numerous occasions. This matter has been well publicized, and so far, four (4) motions to

1 dismiss filed by one or more colleagues of these Defendants are pending, all of which are strong
2 indicators Defendants are aware of the instant litigation and purposefully evading service.

3 As a result, this Court has authority to grant NPRI's motion and enter an Order directing that
4 service by publication may be made against Defendants Glen Leavitt, James Ohrenschall, and
5 Melanie Scheible according to the procedures set forth in NRCP 4.4(c)(4), namely that publication
6 "be made in one or more newspapers or other periodicals published in Nevada....at least once a
7 week for a period of four weeks." NRCP 4.4(c)(4)(A). Further, where the individual Defendant's
8 last known addresses are known, a copy of the summons and complaint must also be mailed. NRCP
9 4.4(c)(4)(B). Finally, "[s]ervice by publication is complete four weeks from the later of: (i) the date
10 of the first publication; or the mailing of the summons of complaint, if mailing is ordered." NRCP
11 4.4(c)(4)(C).

12 **B. Enlargement of the 120-Day Service Rule is Appropriate.**

13 NRCP 6 states in pertinent part as follows:

14 (b) **Extending Time.**

15 (1) **In General.** When an act may or must be done within a specified
time:

16

(B) the court may, for good cause, extend the time:

17 (i) with or without motion or notice if the court acts, or of a
request is made, before the original time or its extension expires; or

18 (ii) on motion made after the time has expired if the party
failed to act because of excusable neglect.

19
20 NRCP 4(e)(1) provides that summons and complaint must be served with 120 days of the
21 filing of the complaint, "unless the court grants an extension of time under this rule." A motion to
22 extend time can be made within the 120 days, and such motion will be granted upon a showing of
23 good cause. NRCP 4(e)(3). In *Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 516-17, 998
24 P.2d 1190, 1195-96 (2000), the Nevada Supreme Court announced ten (10) factors to be used in
25 determining whether good cause exists to extend time:

- 26 (1) difficulties in locating the defendant,
27 (2) the defendant's efforts at evading service or concealment of
improper service,
28 (3) the plaintiff's diligence in attempting to serve the defendant,

- (4) difficulties encountered by counsel,
- (5) the running of the applicable statute of limitations,
- (6) the parties' good faith attempts to settle the litigation during the 120-day period,
- (7) the lapse of time between the end of the 120-day period and the actual service of process on the defendant,
- (8) the prejudice to the defendant caused by the plaintiff's delay in serving process,
- (9) the defendant's knowledge of the existence of the lawsuit, and
- (10) any extensions of time for service granted by the district court.

"Underlying these considerations is the policy behind Rule 4(i) [the former rule] – to encourage the diligent prosecution of complaints." *Id.* "Rule 4(i) was not adopted, however, to become an automatic sanction when a plaintiff fails to serve the complaint within 120 days of filing. *Id.* (emphasis added). When making a determination under NRCP 4(i), the district court should recognize that 'good public policy dictates that cases be adjudicated on their merits.'" *Id.* (citations omitted).

Here, good cause exists for the Court to grant Plaintiff's motion to extend time. The deadline for Plaintiff to effectuate personal service has not yet expired. Plaintiff has been diligently attempting to serve each of the Defendants in question, engaging three different process servers and making multiple attempts at varying times over varying days. *See Exhibits 1-3* attached hereto. Plaintiff's process server even left messages, and in one case made personal contact with a Defendant, in an effort to arrange for a convenient time for service. These efforts were ultimately unsuccessful.

In addition, as discussed in the preceding section, there can be no doubt Defendants have knowledge of the existing lawsuit based. And, where they have purposefully chosen not to come forward to join their colleagues in defense of their individual dual service violations, they certainly cannot claim prejudice. On the contrary, NPRI will be greatly prejudiced by the expense incurred to obtain an extension and serve by publication, and by the filing of any additional motions to dismiss that cannot be addressed contemporaneous with those already on file.

Accordingly, applying the *Scrimmer* factors above, Plaintiff respectfully asserts that it has shown good cause to extend the time to serve Defendants for an additional sixty (60).

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III.

CONCLUSION

For the reasons stated above, NPRI respectfully requests that the Court enter an Order extending the time to serve Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible for an additional sixty (60) days, until Tuesday, January 5, 2021, and allowing service by publication according to the requirements of NRCP 4.4.

Dated this 20th day of October, 2020.

FOX ROTHSCHILD LLP

By: /s/ Colleen E. McCarty
DEANNA L. FORBUSH, ESQ.
Nevada Bar No. 6646
COLLEEN E. MCCARTY, ESQ.
Nevada Bar No. 13186
1980 Festival Plaza Dr., Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Attorneys for Plaintiff
Nevada Policy Research Institute

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 20th day of October, 2020, I caused the foregoing document entitled **PLAINTIFF'S EX PARTE MOTION FOR ENLARGEMENT OF TIME TO SERVE AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR AN ORDER ALLOWING SERVICE BY PUBLICATION OF DEFENDANTS GLEN LEAVITT, JAMES OHRENSCHALL, AND MELANIE SCHEIBLE** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu

Gary A. Cardinal, Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street/MS 0550
Reno, Nevada 89557-0550
Email: gcardinal@unr.edu

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

Bradley Schrager, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP
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Las Vegas, NV 89102
(702) 639-5102
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Email: dbravo@wrslawyers.com

Jonathan D. Blum, Esq.
Wiley Petersen
1050 Indigo Drive, Suite 200B
Las Vegas, Nevada 89145
Email: jblum@wileypetersenlaw.com

*Attorneys for Defendant Jason Frierson and
Nicole Cannizzaro*

*Attorneys for Defendants Brittney Miller,
Kasina Douglas-Boone, and Selena Torres*

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP

Exhibit 1

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DECLARATION OF DUE DILIGENCE

**CLARK COUNTY DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA**

Nevada Policy Research Institute, a Nevada domestic
nonprofit corporation,

Plaintiff(s)

v.

Nicole Cannizzaro, an individual ending in dual
employment with the Nevada State Senate and Clark
County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Sean Keseday, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint for Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That attempts were made to serve Glen Leavitt with Summons-Civil; Amended Complaint for Declaratory And Injunctive Relief, at:

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 8/28/2020 at 5:42 PM
Results: No answer, quiet, 1 car in driveway


Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 8/29/2020 at 8:23 AM
Results: No answer, No activity, No cars parked in driveway

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 8/29/2020 at 7:41 PM
Results: No answer, No activity

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/3/2020 at 1:00 PM
Results: Called subject left voicemail

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/20/2020



Sean Keseday
Registered Work Card# R-065975
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230874
Reference: 189864.00021

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DECLARATION OF DUE DILIGENCE

**CLARK COUNTY DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA**

Nevada Policy Research Institute, a Nevada domestic
nonprofit corporation,

Plaintiff(s)

v.

Nicole Cannizzaro, an individual ending in dual
employment with the Nevada State Senate and Clark
County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Sean Keseday, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint for Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That attempts were made to serve Glen Leavitt with Summons-Civil; Amended Complaint for Declaratory And Injunctive
Relief, at:

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/4/2020 at 9:00 AM
Results: Called subject left voicemail

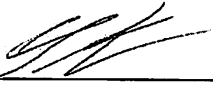
Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/5/2020 at 10:00 AM
Results: Called subject left voicemail

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/6/2020 at 2:00 PM
Results: Called subject left voicemail

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/11/2020 at 1:32 PM
Results: Called work number subject not available

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/20/2020


Sean Keseday
Registered Work Card# R-065975
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230874
Reference: 189864.00021

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DECLARATION OF DUE DILIGENCE

**CLARK COUNTY DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA**

Nevada Policy Research Institute, a Nevada domestic
nonprofit corporation,

Plaintiff(s)

v.

Nicole Cannizzaro, an individual ending in dual
employment with the Nevada State Senate and Clark
County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Sean Keseday, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of
the Summons-Civil; Amended Complaint for Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That attempts were made to serve Glen Leavitt with Summons-Civil; Amended Complaint for Declaratory And Injunctive
Relief, at:

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/15/2020 at 9:30 AM
Results: Called work number subject not available

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/15/2020 at 5:04 PM
Results: Called to schedule time to meet. no answer from subject


Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/15/2020 at 5:10 PM
Results: Called work number and subject left for day

Attempted at 101 E. Bonneville Las Vegas, NV 89101 On 9/17/2020 at 3:05 PM
Results: Attempted service at business address. was told by security, you need to schedule an appointment to meet with
office personal. called 702 875 9288, phone went unanswered.

Attempted at 1540 Sandra Drive Boulder City, NV 89005 On 9/18/2020 at 2:33 PM
Results: Tried subject on phone says call cannot be completed as dialed.

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in
the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/20/2020


Sean Keseday
Registered Work Card# R-065975
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230874
Reference: 189864.00021

Exhibit 2

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DECLARATION OF DUE DILIGENCE

DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.: A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Judith Mae All, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That attempts were made to serve James Ohrenschall with Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, at:

Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/1/2020 at 5:48 PM

Results: Property fenced all the way around, walk-thru gate is locked. No access to front. Banged on gate, no activity. No cars in driveway.

Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/3/2020 at 7:48 PM

Results: No access. Two large dogs in yard barking. No response. No cars parked in driveway.

Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/4/2020 at 9:06 AM

Results: No access. Banged on gate, no response. Dogs not in yard. No cars parked in the driveway.

Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/8/2020 at 6:03 PM

Results: Called number and it went to voicemail. Unable to leave message, mailbox full.

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/19/2020

Judith Mae All
Registered Work Card# R-040570
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #: NV230856
Reference: 189864.00021

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DECLARATION OF DUE DILIGENCE

DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Judith Mae All, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That attempts were made to serve James Ohrenschall with Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, at:

Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/15/2020 at 4:42 PM

Results: Called number 702-277-3378 received voicemail for a Lois but I was unable to leave a message as mailbox is full. Called work number 702-455-4685 and spoke with Devon in Clark County Public Defender's Office who states subject does not work here.

Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/18/2020 at 10:48 AM

Results: Called corrected work number, the juvenile public defender's office for subject at 702-455-5475 and was told he was not in. Transferred to his voicemail, left message and number.

Attempted at 7215 Linden Avenue, Las Vegas, NV 89110 On 9/22/2020 at 11:31 AM

Results: I called number 702-523-4766 received voicemail, unable to leave a message as mailbox is full. Called work number 702-455-5475 and call went to voicemail, left message.

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/19/2020

Judith Mae All
Judith Mae All
Registered Work Card# R-040570
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230856
Reference: 189864.00021

Exhibit 3

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DECLARATION OF DUE DILIGENCE

**DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Tyler Trewet, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That attempts were made to serve Melanie Scheible with Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, at:

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 8/29/2020 at 5:10 PM
Results: No response or activity. Leasing shut down.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 8/30/2020 at 3:44 PM
Results: No response. No activity. No answer with neighbor.


Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/3/2020 at 11:00 AM
Results: No response. Leasing confirmed subject is a resident.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/6/2020 at 9:22 AM
Results: No response. No change.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/7/2020 at 4:10 PM
Results: No response. No activity. No change from prior attempt. Called phone number provided, no answer, left voicemail.

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/20/20


Tyler Trewet
Registered Work Card# R201904184
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #:NV230853
Reference: 189864.00021

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DECLARATION OF DUE DILIGENCE

DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.: A-20-817757-C
DEANNA L. FORBUSH, ESQ., Bar No. 6646
FOX ROTHCHILD, LLP
1980 Festival Plaza Drive Suite 700
Las Vegas, NV 89135
(702) 262-6899
Attorneys for the Plaintiff(s)
Client File# 189864.00021

I, Tyler Trewet, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That attempts were made to serve Melanie Scheible with Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, at:

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/9/2020 at 7:04 PM
Results: No response. No answer with neighbor below.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/10/2020 at 3:40 PM
Results: Spoke with subject at number provided. Subject was unwilling to arrange delivery of documents or coordinate with server a convenient time to return to her address. Subject stated she would confer with her counsel and get back to me if she was willing to accept documents.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/15/2020 at 3:45 PM
Results: The phone number given is for the District Attorney's office, generic voicemail with information of who to call, does not lists names.

Attempted at 4355 S. Durango Drive, Apt. 260, Las Vegas, NV 89147 On 9/23/2020 at 11:32 AM
Results: Called number went to generic voicemail, no names provided.

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/20/20

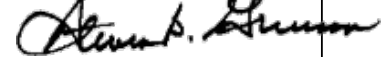

Tyler Trewet
Registered Work Card# R201904184
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:
Nationwide Legal Nevada, LLC
626 S. 7th Street
Las Vegas, NV 89101
(702) 385-5444
Nevada Lic # 1656



Control #: NV230853
Reference: 189864.00021



OPPS

Berna L. Rhodes-Ford
Nevada Bar No. 7879
General Counsel
Nevada State College
1300 Nevada State Dr., RSC 374
Henderson, Nevada 89002
Tel: (702) 992-2378
Fax: (702) 974-0750
berna.rhodes-ford@nsc.edu

Gary A. Cardinal
Nevada Bar No. 76
Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street/MS 0550
Reno, Nevada 89557-0550
Tel: (775) 784-3495
Fax: (775) 327-2202
gcardinal@unr.edu

*Attorneys for Defendants
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the Nevada
State Senate and Clark County District Attorney;
KASINA DOUGLAS-BOONE, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County School
District; JASON FRIERSON, an individual
engaging in dual employment with the Nevada
State Assembly and Clark County Public
Defender; OSVALDO FUMO, an individual
engaging in dual employment with the Nevada
State Assembly and University of Nevada, Las

Case No.: A-20-817757-C

Dept. No.: 24

**DEFENDANTS OSVALDO FUMO,
HEIDI SEEVERS GANSERT, AND
DINA NEAL'S OPPOSITION TO
PLAINTIFF'S EX PARTE
APPLICATION FOR ORDER
SHORTENING TIME TO HEAR
MOTION TO DISQUALIFY
OFFICIAL ATTORNEYS AND TO RE-
SET ALL OTHER PENDING
MATTERS**

Date of Hearing: November 19, 2020
Time of Hearing: 9:00 a.m.

1 Vegas; HEIDI SEEVERS GANSERT, an
2 individual engaging in dual employment with
3 the Nevada State Senate and University of
4 Nevada Reno; GLEN LEAVITT, an individual
5 engaging in dual employment with the Nevada
6 State Assembly and Regional Transportation
7 Commission; BRITTNEY MILLER, an
8 individual engaging in dual employment with
9 the Nevada State Assembly and Clark County
10 School District; DINA NEAL, an individual
11 engaging in dual employment with the Nevada
12 State Assembly and Nevada State College;
13 JAMES OHRENSCHALL, an individual
14 engaging in dual employment with the Nevada
15 State Senate and Clark County Public Defender;
16 MELANIE SCHEIBLE, an individual engaging
17 in dual employment with the Nevada State
18 Senate and Clark County District Attorney;
19 TERESA BENITEZ-THOMPSON, an
20 individual engaging in dual employment with
21 the Nevada State Assembly and University of
22 Nevada, Reno; JILL TOLLES, an individual
23 engaging in dual employment with the Nevada
24 State Assembly and University of Nevada,
25 Reno; and SELENA TORRES, an individual
26 engaging in dual employment with the Nevada
27 State Assembly and Clark County School
28 District,

Defendants.

**DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL'S
OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR ORDER SHORTENING
TIME TO HEAR MOTION TO DISQUALIFY OFFICIAL ATTORNEYS AND TO RE-SET
ALL OTHER PENDING MATTERS**

Defendant Heidi Seevers Gansert ("Gansert"), sued herein as an employee of the University of Nevada, Reno, an institution of the Nevada System of Higher Education ("NSHE"), Defendant Dina Neal ("Neal"), sued herein as an employee of Nevada State College, also an NSHE institution, and Defendant Osvaldo Fumo ("Fumo"), sued herein as an employee of the University of Nevada, Las Vegas, also an NSHE institution, (Gansert, Neal and Fumo, collectively the "NSHE Defendants") hereby file their Opposition ("Opposition") to Plaintiff's Ex Parte Application For Order Shortening Time to Hear Motion to Disqualify Official Attorneys and to Re-Set All Other Pending Matters

1 (“Application”). This Opposition is based upon the following Memorandum of Points and Authorities
2 and upon all of the pleadings and papers on file herein.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 After suing the NSHE Defendants because of their dual employment status, NPRI then sought
6 to disqualify the attorneys representing them *because of* their employment. NPRI cannot have it both
7 ways.

8 Now, NPRI seeks to hear the Motion to Disqualify prior to the many Motions to Dismiss that
9 have been filed in the case which could unnecessarily delay the proceedings. There is no basis for
10 hearing the Motion to Disqualify first other than to game the system, harass the NSHE Defendants or
both. The NSHE Defendants, therefore, request that the Court deny Plaintiff’s Application.

11 **II. FACTUAL AND PROCEDURAL POSTURE**

12 Plaintiff has sued the NSHE Defendants on the basis of their employment with various NSHE
13 institutions, and as a result, NSHE has assigned attorneys employed by NSHE (the “Official Attorneys”)
14 to represent the interests of these NSHE employees, as it was required to do by NRS 41.0339. The
15 NSHE Defendants responded to Plaintiff’s Amended Complaint by filing a Motion to Dismiss on
16 September 24, 2020. Plaintiff filed its Opposition on October 8, 2020 and the NSHE Defendants filed
their Reply on October 16, 2020. The Motion to Dismiss is fully briefed and ready for disposition.

17 In addition to opposing the NSHE Defendants’ Motion to Dismiss, Plaintiff pursued a parallel
18 attack by filing a Motion to Disqualify Official Attorney from Representing Defendants Fumo, Gansert
19 and Neal on September 29, 2020. The NSHE Defendants filed their Opposition on October 9, 2020. As
20 of this date, Plaintiff has not filed a Reply.

21 Meanwhile, other defendants have filed motions to dismiss and joinders to the motions filed by
22 others. Additionally, the Nevada Legislature has filed a Motion to Intervene.

23 Dates for hearings on the motions have been set and rescheduled, as this case was reassigned
24 some six times, now reaching its seventh department. (Note that the reassignment to this department
25 was accomplished through an invalid *second* peremptory challenge filed on October 13, 2020 by
26 Plaintiff in violation of Rule 48.1(1) of the Nevada Supreme Court Rules.) After reaching this
27 department, an initial hearing date for motions submitted on or before October 14, 2020 was set for
28 December 17, 2020. Thereafter, Plaintiff filed its *ex parte* application for order shortening time,
specifically requesting that its Motion to Disqualify the Official Attorneys be heard first and that all

1 other matters be reset. The Court thereafter reset the hearing date for November 5, 2020 and then
2 rescheduled to November 19, 2020. This Opposition is filed in response to Plaintiff's *Ex Parte*
3 Application.

4 **III. ANALYSIS**

5 The NSHE Defendants do not object to the November 19, 2020 hearing date ordered by this
6 Court for the hearing on pending motions. However, the NSHE Defendants object to Plaintiff's attempt
7 to manipulate the proceedings by its request that the Motion to Disqualify be heard first. From the
8 outset, Plaintiff has attempted to prevent NSHE counsel from representing its employees, despite the
9 fact that Plaintiff has sued them on the very basis that they are, in fact, NSHE employees. Plaintiff is
10 thereby interfering with the attorney-client relationship so as to cause the NSHE Defendants the expense
of hiring private counsel to defend a meritless lawsuit, thus chilling their right to seek public office.

11 This latest motion by Plaintiffs is further evidence of this interference. Although the NSHE
12 Defendants' Motion to Dismiss is fully briefed and ready for consideration, Plaintiff seeks to have
13 defense counsel disqualified before the Motion to Dismiss is heard. In the unlikely event Plaintiff is
14 successful in having the Official Attorneys removed from the case, then the NSHE Defendants would
15 be left unrepresented during the remaining motions currently scheduled for hearing on the same date,
16 including the NSHE Defendants' Motion to Dismiss. Alternatively, the Court would need to continue
17 the hearing on the other motions, pending the NSHE Defendants retaining private counsel and pending
18 those counsel coming up to speed on the case. This would cause a substantial delay in the proceedings,
exactly what Plaintiff claims to be trying to avoid with its *ex parte* motion.

19 A more efficient method for addressing these issues is for the Court to hear the NSHE
20 Defendants' Motion to Dismiss before hearing the Motion to Disqualify. The Motion to Dismiss is fully
21 briefed and ready for resolution. It is most efficiently argued by the attorneys who drafted it. Resolution
22 of the Motion to Dismiss in favor of the NSHE Defendants will render the Motion to Disqualify moot
23 and will also eliminate the need to hear separate motions filed by defendants who have joined in the
24 NSHE Defendant's Motion to Dismiss. Likewise, it is most efficient to hear the other motions to dismiss
25 filed in this case for the same reasons.

26 **IV. CONCLUSION**

27 Addressing the NSHE Defendants' Motion to Dismiss first will obviate the need to consider all
28 other motions directed at the NSHE Defendants if the motion is granted. Likewise, it will eliminate the
need to treat separately motions filed by other defendants who joined in the NSHE Defendants' motion,

1 if granted. Moreover, NSHE Defendants' Motion to Dismiss first will ensure that the NSHE
2 Defendants' Motion to Dismiss is resolved early on, addressing Plaintiff's concern that later resolution
3 would encroach on the commencement of the next legislative session. Hearing the Motion to Disqualify
4 first will only result in delay, if granted. It will also result in imposing unwarranted and unnecessary
5 financial expense on the NSHE Defendants if the Motion to Dismiss is later granted. To the extent
6 Plaintiff's Ex Parte Motion for Order Shortening Time seeks to dictate the order of hearing, it should be
7 denied, and the Court should take up these matters in the order that will produce the greatest efficiency
8 and earliest resolution.

8 **AFFIRMATION**

9 The undersigned hereby affirm that this document does not contain "personal information
10 about any person" as defined in NRS 239B.030 and 603A.040.

11
12 Respectfully submitted this 21st day of October, 2020.

13
14 /s/ Berna L. Rhodes-Ford
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of General Counsel for Nevada State College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party to the within cause. Pursuant to NRCP 5, I further certify that on October 21, 2020, I caused the following document, **DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL'S OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR ORDER SHORTENING TIME TO HEAR MOTION TO DISQUALIFY OFFICIAL ATTORNEYS AND TO RE-SET ALL OTHER PENDING MATTERS**, to be served as follows:

☒

BY ELECTRONIC SERVICE Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail to the attorneys listed below at the address indicated below.

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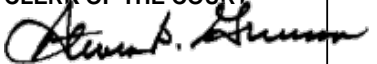
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☐

BY MAIL I caused such envelope(s) with first class postage thereon fully prepaid to be placed in the U.S. Mail in Henderson, Nevada.

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada,
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an
individual engaging in dual employment with the
Nevada State Assembly and Nevada State College;
JAMES OHRENSCHALL, an individual engaging
in dual employment with the Nevada State Senate
and Clark County Public Defender; MELANIE
SCHEIBLE, an individual engaging in dual
employment with the Nevada State Senate and Clark
County District Attorney; TERESA BENITEZ-

**Case No. A-20-817757-C
Dept. No. 24**

**NEVADA LEGISLATURE'S REPLY
IN SUPPORT OF MOTION TO
INTERVENE AS DEFENDANT**

Date of Hearing: December 17, 2020
Time of Hearing: 9:00 a.m.

1 THOMPSON, an individual engaging in dual
2 employment with the Nevada State Assembly and
3 University of Nevada, Reno; JILL TOLLES, an
4 individual engaging in dual employment with the
5 Nevada State Assembly and University of Nevada,
6 Reno; and SELENA TORRES, an individual
7 engaging in dual employment with the Nevada State
8 Assembly and Clark County School District,
9
10 Defendants.

11
12 **REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT**

13 The Legislature of the State of Nevada (Legislature), by and through its counsel the Legal
14 Division of the Legislative Counsel Bureau (LCB Legal) under NRS 218F.720, hereby files its Reply in
15 Support of Motion to Intervene as Defendant pursuant to NRCP 24 and NRS 218F.720.¹ This Reply is
16 made under EDCR 2.20 and is based upon the attached Memorandum of Points and Authorities, all
17 pleadings, documents and exhibits on file in this case and any oral arguments the Court may allow.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. Argument.**

20 **A. The Legislature qualifies for intervention as of right under NRCP 24(a)(1) because**
21 **NRS 218F.720(2)(b) gives the Legislature an unconditional right and standing to intervene in this**
22 **action in order to defend against NPRI's constitutional challenge which involves allegations**
23 **concerning the meaning, intent, purpose, scope, applicability and enforceability of the separation-**
24 **of-powers provision.**

25 In its Opposition, NPRI contends that the Legislature's motion to intervene "conspicuously
26 ignores the entirety of NRS 218F.720, which contains the conditions precedent for intervention as of
27 right." (*NPRI's Opp'n at 3.*) In particular, NPRI contends that NRS 218F.720(2)(b) "plainly limits" the
28 Legislature's intervention as of right to those lawsuits containing a challenge to a constitutional measure

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¹ NRCP 24 and NRS 218F.720 are reproduced in the Addendum following the Memorandum of Points and Authorities. All references to NRS 218F.720 are to the most recent version of the statute as amended by section 23 of Assembly Bill No. 2, 2020 Nev. Stat., 32nd Spec. Sess., ch. 2, § 23, at 16 (effective Aug. 2, 2020).

1 “on grounds that it is ambiguous, unclear, uncertain, imprecise, indefinite or vague, is preempted by
2 federal law or is otherwise inapplicable, invalid, unenforceable or unconstitutional.” (*NPRI’s Opp’n at*
3 3.) NPRI then states that “NPRI gives LCB Legal the benefit of the doubt that it is not intentionally
4 seeking to mislead the Court in this regard, but not once does the language [from NRS 218F.720(2)(b)]
5 quoted and emphasized above appear in the Legislature’s motion.” (*NPRI’s Opp’n at 3-4.*)

6 Contrary to NPRI’s contentions, the Legislature’s motion thoroughly discusses the **relevant parts**
7 of NRS 218F.720(2)(b) and—as the Legislature’s motion plainly makes clear on page 2, footnote 1—the
8 Legislature reproduces NRS 218F.720, **in its entirety**, in the addendum that is part of the Legislature’s
9 motion. This is consistent with well-established standards for legal brief-writing. For example, when
10 drafting legal briefs for Nevada’s appellate courts, the Nevada Supreme Court directs that “[i]f the
11 court’s determination of the issues presented requires the study of statutes, rules, regulations, etc., **the**
12 **relevant parts shall be reproduced in the brief or in an addendum at the end**, or they may be
13 supplied to the court in pamphlet form.” NRAP 28(f) (emphasis added). The Legislature’s motion
14 clearly meets the standards for legal brief-writing because the motion discusses the relevant parts of
15 NRS 218F.720(2)(b) and it also reproduces NRS 218F.720, in its entirety, in the addendum. Therefore,
16 even though NPRI was apparently unable to complete the task of reading all the language included in
17 the Legislature’s motion in its entirety, there is no question that the Legislature’s motion included all the
18 language from NRS 218F.720 in its entirety. As a result, NPRI’s opposition is plainly inaccurate when
19 it contends that all the language from NRS 218F.720(2)(b) does not appear in the Legislature’s motion.

20 More importantly, though, NPRI’s opposition is plainly inaccurate because NPRI fabricates a
21 version of NRS 218F.720(2)(b) that does not exist, and NPRI relies completely on that nonexistent
22 version of the statute to oppose the Legislature’s motion to intervene under NRS 218F.720(2)(b).
23 Specifically, in its entirety, NRS 218F.720(2)(b) states that the Legislature may elect to intervene in any
24 action or proceeding when a party:

1 (b) Challenges, contests or raises as an issue, either in law or in equity, in whole or in
2 part, or facially or as applied, the meaning, intent, purpose, scope, applicability, validity,
3 enforceability or constitutionality of any law, resolution, initiative, referendum or other
4 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,

5 NRS 218F.720(2)(b) (emphasis added).

6 In its opposition, NPRI omits the words “**including, without limitation,**” from its block quotation
7 of NRS 218F.720(2)(b), yet NPRI does not use an ellipsis or other mark to indicate that it is omitting
8 those words from the statute. (*NPRI’s Opp’n at 6-7.*) NPRI’s omission of the words “**including,**
9 **without limitation,**” from its block quotation of NRS 218F.720(2)(b) distorts and perverts the meaning
10 of the statute and results in NPRI’s erroneous argument that the statute would provide the Legislature
11 with the unconditional right to intervene “only” if NPRI’s claims involved a challenge to the separation-
12 of-powers provision “on grounds that it is ambiguous, unclear, uncertain, imprecise, indefinite or vague,
13 is preempted by federal law or is otherwise inapplicable, invalid, unenforceable or unconstitutional.”
14 (*NPRI’s Opp’n at 3-4, 6-7.*)

15 Based on the well-established meaning of the words “**including, without limitation,**” this
16 provision of NRS 218F.720(2)(b) is not a limitation on the Legislature’s broad authority to intervene as
17 of right under the statute. Instead, because this provision is preceded by the words “**including, without**
18 **limitation,**” it merely serves as an illustrative—but not exhaustive—list of examples which “strongly
19 indicates that the categories listed in the statute were not intended to be exclusive.” *People v. Williams*,
20 108 Cal. Rptr. 3d 772, 775 (Cal. Ct. App. 2010). As such, this provision places no limitation on the
21 Legislature’s broad authority to intervene as of right under NRS 218F.720(2)(b).

22 Under the rules of statutory construction, when words such as “including, without limitation,” and
23 “including, but not limited to,” are used in a statute, they are not words of limitation. *In re Yochum*, 89
24 F.3d 661, 668 (9th Cir. 1996) (“[I]n terms of statutory construction, use of the word ‘includes’ does not

1 connote limitation.”); Argosy Ltd. v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968) (“‘The word ‘includes’
2 is usually a term of enlargement, and not of limitation.’ It therefore conveys the conclusion that there
3 are other items includable, though not specifically enumerated by the statutes.” (quoting United States v.
4 Gertz, 249 F.2d 662, 666 (9th Cir. 1957))); Oracle USA, Inc. v. Rimini St., Inc., 191 F. Supp. 3d 1134,
5 1146 (D. Nev. 2016) (“[U]nder the rules of statutory construction, the word ‘includes’ is a word of
6 enlargement, not limitation.”). Thus, the U.S. Supreme Court has found that in “statutes and other
7 writings, ‘include’ is frequently, if not generally, used as a word of extension or enlargement rather than
8 as one of limitation or enumeration.” Am. Sur. Co. of N.Y. v. Marotta, 287 U.S. 513, 517 (1933).
9 Consequently, the High Court has stated that “the term ‘including’ is not one of all-embracing
10 definition, but connotes simply an illustrative application of the general principle.” Fed. Land Bank of
11 St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941).

12 Accordingly, it is a well-established rule of statutory construction that “[t]he phrase ‘including, but
13 not limited to,’ indicates that what follows is a nonexhaustive list of examples. Examples are typically
14 intended to provide illustrations of a term defined in the statute, but do not act as limitations on that
15 term.” Colbert v. Cleveland, 790 N.E.2d 781, 784 (Ohio 2003) (internal quotations, emphasis and
16 citations omitted). As a result, “[t]he phrase ‘including, but not limited to’ is a term of enlargement, and
17 signals the Legislature’s intent that [a statute] applies to items not specifically listed in the provision.”
18 In re D.O., 201 Cal. Rptr. 3d 642, 649 (Cal. Ct. App. 2016) (quoting Major v. Silna, 36 Cal. Rptr. 3d
19 875, 882 (Cal. Ct. App. 2005)); In re Forfeiture of \$5,264, 439 N.W.2d 246, 252 (Mich. 1989) (“[W]e
20 do not view the proviso, ‘including but not limited to,’ to be one of limitation. Rather, we believe the
21 phrase connotes an illustrative listing, one purposefully capable of enlargement.”).

22 With regard to NRS 218F.720(2)(b), the statute contains a broadly worded grant of authority
23 which gives the Legislature an unconditional right and standing to intervene whenever a party
24 “[c]hallenges, contests or raises as an issue, either in law or in equity, in whole or in part, or facially or

1 as applied, the **meaning, intent, purpose, scope, applicability**, validity, **enforceability** or
2 constitutionality of any law, resolution, initiative, referendum or other legislative or **constitutional**
3 **measure.**” NRS 218F.720(2)(b) (emphasis added). Following the statute’s broadly worded grant of
4 authority, the statute also contains the “**including, without limitation,**” provision. However, under the
5 rules of statutory construction, this provision places no limitation on the Legislature’s broad authority to
6 intervene as of right under the statute. Instead, this provision merely serves as an illustrative—but not
7 exhaustive—list of examples which describe some—but not all—of the circumstances under which the
8 Legislature may exercise its broad authority to intervene as of right under the statute.

9 Thus, by omitting the words “**including, without limitation,**” from its block quotation of
10 NRS 218F.720(2)(b), NPRI invents a nonexistent limitation on the Legislature’s broad authority to
11 intervene as of right under the statute. (*NPRI’s Opp’n at 6-7.*) Furthermore, NPRI’s opposition to the
12 Legislature’s intervention as of right under NRS 218F.720(2)(b) is based entirely on NPRI’s fabricated
13 version of the statute and its nonexistent limitation on the Legislature’s broad authority to intervene as of
14 right under the statute. (*NPRI’s Opp’n at 6-7.*) Consequently, because there is no basis in the law for
15 NPRI’s opposition to the Legislature’s intervention as of right under NRS 218F.720(2)(b), NPRI’s
16 opposition must be rejected as a matter of law.

17 In its amended complaint, NPRI has alleged that “[t]here is an actual controversy between [NPRI],
18 acting in the public interest, and the Defendants and each of them, as to the **meaning** of the Separation
19 of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and its **application** to Defendants and their
20 conduct.” (*Am. Compl. ¶ 23*) (emphasis added). Therefore, under NRS 218F.720(2)(b), the Legislature
21 has an unconditional right and standing to intervene in this action because NPRI “[c]hallenges, contests
22 or raises as an issue, either in law or in equity, in whole or in part, or facially or as applied, the **meaning,**
23 **intent, purpose, scope, applicability**, validity, **enforceability** or constitutionality of any law,
24 resolution, initiative, referendum or other legislative or **constitutional measure.**” NRS 218F.720(2)(b)

1 (emphasis added). Accordingly, the Legislature is entitled to intervene as of right under
2 NRS 218F.720(2)(b), and the Legislature's motion to intervene should be granted.

3 Finally, because NPRI's opposition to the Legislature's intervention under NRS 218F.720(2)(b) is
4 based on NPRI's fabricated version of the statute, NPRI's opposition was filed in violation of
5 NRCP 11(b), NRS 7.085(1) and EDCR 7.60(b) as a matter of law. First, because NPRI's opposition
6 relied on a fabricated version of NRS 218F.720(2)(b) that does not exist, NPRI's opposition was
7 frivolous and made in bad faith as a matter of law given that it was baseless and made without a
8 reasonable and competent inquiry into the law. NRCP 11(b)(2); NRS 7.085(1)(a); EDCR 7.60(b)(1);
9 Bergmann v. Boyce, 109 Nev. 670, 676 (1993) ("NRCP 11 sanctions should be imposed for frivolous
10 actions. A frivolous claim is one that is both baseless and made without a reasonable and competent
11 inquiry." (internal quotations and citations omitted) (superseded by statute on other grounds)).

12 Second, because NPRI's opposition relied on a fabricated version of NRS 218F.720(2)(b) that
13 does not exist, NPRI's opposition was filed without just cause and for an improper purpose, including,
14 without limitation: (1) to harass, cause unnecessary delay and needlessly increase the cost of litigation;
15 (2) to unreasonably and vexatiously extend this action; and (3) to so multiply the proceedings in this
16 action as to increase costs unreasonably and vexatiously. NRCP 11(b)(1); NRS 7.085(1)(b); EDCR
17 7.60(b)(3).

18 Because NPRI's opposition was filed in violation of NRCP 11(b), NRS 7.085(1) and
19 EDCR 7.60(b) as a matter of law, the Legislature is entitled to file a separate motion for sanctions
20 against NPRI and its counsel. NRCP 11(c); EDCR 7.60(b); Watson Rounds v. Eighth Jud. Dist. Ct., 131
21 Nev. 783, 787 (2015). However, NRCP 11 contains a 21-day "safe harbor" period, which provides that
22 such a motion for sanctions "must not be filed or be presented to the court if the challenged paper, claim,
23 defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or
24 within another time the court sets." NRCP 11(c)(2); Watson Rounds, 131 Nev. at 787 ("NRCP 11's safe

1 harbor provisions prevent attorneys from being sanctioned until they have the opportunity to cure the
2 sanctionable conduct or appear at an order to show cause hearing.”).

3 Therefore, the Legislature hereby notifies NPRI and its counsel that it will file a motion for
4 sanctions under NRCP 11, NRS 7.085 and EDCR 7.60 against NPRI and its counsel at an appropriate
5 time following the 21-day “safe harbor” period, unless NPRI’s counsel files and serves an appropriate
6 document withdrawing NPRI’s frivolous opposition to the Legislature’s intervention as of right under
7 NRS 218F.720(2)(b).

8 **B. The Legislature qualifies for intervention as of right under NRCP 24(a)(1) because**
9 **NRS 218F.720(2)(a) gives the Legislature an unconditional right and standing to intervene in this**
10 **action in order to defend against NPRI’s constitutional challenge which involves allegations**
11 **concerning the Legislature’s appropriation of public money in violation of the separation-of-**
12 **powers provision.**

13 In the amended complaint, NPRI has alleged that “**legislative expenditures or appropriations**
14 **and taxpayer monies** will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1, and
15 irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
16 Constitution.” (*Am. Compl.* ¶ 28) (emphasis added). In its opposition, NPRI also acknowledges that
17 “[t]he Court may take judicial notice that legislators are compensated by Legislative expenditure, per
18 statutory requirement.” (*NPRI’s Opp’n at 6.*) Nevertheless, NPRI argues that it “is in no way
19 challenging the Legislature’s carrying out of or compliance with these [statutory] requirements.”
20 (*NPRI’s Opp’n at 6.*)

21 NPRI’s arguments make no sense. The Legislator-Defendants are not paid magically under the
22 existing statutory requirements without any involvement by the Legislature. Instead, they are paid
23 directly by the Legislature from the Legislative Fund through “appropriations made by law.” Nev.
24 Const. art. 4, § 19; NRS 218A.150; State ex rel. Davis v. Eggers, 29 Nev. 469, 484-85 (1907)
(explaining that “all appropriations must be within the legislative will.”). Under the existing statutory
requirements, the Legislature has created the Legislative Fund “as a special revenue fund for the use of

1 the Legislature,” and the Legislature has directed that monetary “[s]upport for the Legislative Fund must
2 be provided by legislative appropriation from the State General Fund.” NRS 218A.150(1)-(2). The
3 Legislature has also provided that the payment of necessary expenses of the Senate and Assembly must
4 be made from the Legislative Fund, which requires legislative appropriations to the Legislative Fund.
5 NRS 218A.150(1)-(3). Finally, the Legislature has provided that the payment of compensation,
6 allowances and expenses for Legislators must be made from the Legislative Fund, which requires
7 legislative appropriations to the Legislative Fund. NRS 218A.150(1)-(3); NRS 218A.630-218A.670.
8 Thus, without the Legislature’s actions to authorize legislative appropriations of taxpayer monies to the
9 Legislative Fund, there would be no payment of **“legislative expenditures or appropriations and**
10 **taxpayer monies”** to the Legislator-Defendants.

11 In the amended complaint, NPRI has alleged that the payment of **“legislative expenditures or**
12 **appropriations and taxpayer monies”** to the Legislator-Defendants is unconstitutional in violation of
13 the separation-of-powers provision. (*Am. Compl.* ¶ 28) (emphasis added). Because the Legislature is
14 the only constitutional body in Nevada whose actions can authorize the payment of those **“legislative**
15 **expenditures or appropriations and taxpayer monies”** to the Legislator-Defendants, NPRI cannot
16 escape from its own allegations simply by pleading those allegations in the passive voice without
17 identifying the Legislature by name as the only constitutional body whose actions can authorize the
18 payment of those **“legislative expenditures or appropriations and taxpayer monies”** to the
19 Legislator-Defendants. In other words, despite NPRI’s attempts to use artful pleading as subterfuge,
20 NPRI has clearly alleged that the Legislature, by its actions, has violated the Nevada Constitution by
21 authorizing legislative expenditures or appropriations and the payment taxpayer monies to the
22 Legislator-Defendants in violation of the separation-of-powers provision.

23 Consequently, under NRS 218F.720(2)(a), the Legislature has an unconditional right and standing
24 to intervene in this action because NPRI “[a]lleges that the Legislature, by its actions or failure to act,

1 has violated . . . the Constitution or laws of this State.” NRS 218F.720(2)(a). Accordingly, the
2 Legislature is entitled to intervene as of right under NRS 218F.720(2)(a), and the Legislature’s motion
3 to intervene should be granted.

4 **C. The Legislature qualifies for intervention as of right under NRCP 24(a)(2) because the**
5 **Legislature’s substantial institutional interests in the subject matter of this action are not**
adequately represented by existing parties.

6 In its opposition, NPRI argues that the Legislature’s interests are adequately represented by
7 existing parties. (*NPRI’s Opp’n at 7-9.*) However, as discussed previously, because NPRI has alleged
8 that legislative expenditures or appropriations and taxpayer monies will be paid to the Legislator-
9 Defendants in violation of the separation-of-powers provision, NPRI has challenged the Legislature’s
10 constitutional power of appropriation, which is a separate institutional interest unique to the Legislature.
11 As a result, the Legislature has independent institutional interests in defending the validity of its
12 legislative actions in exercising the constitutional power of appropriation, and the Legislature’s
13 independent institutional interests are separate and distinct from the individual interests of the
14 Legislator-Defendants. As a consequence, this case strikes at the heart of one of the most vital
15 components of the legislative function—the constitutional power of appropriation. Because the
16 Legislature has a right to defend its exercise of the constitutional power of appropriation, the Legislature
17 has substantial institutional interests in the subject matter of this action that are not adequately
18 represented by existing parties.

19 Moreover, the Legislature has substantial institutional interests in the meaning, intent, purpose,
20 scope, applicability and enforceability of the separation-of-powers provision because that constitutional
21 provision governs the powers of the legislative branch and the Legislature’s administration of its
22 constitutional functions and the conduct of its members. See Heller v. Legislature, 120 Nev. 456, 466-
23 72 (2004); Comm’n on Ethics v. Hardy, 125 Nev. 285, 291-93 (2009). The Legislature has established a
24 public policy in this State that protects the concept of the “citizen-legislator” as the cornerstone of an

1 effective, responsive and qualified part-time legislative body. For example, as expressed in
2 NRS 281A.020, it is the public policy of this State that:

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

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

10 Thus, the Legislature has substantial institutional interests in ensuring that the broadest spectrum
11 of the citizenry is represented in the Legislature’s membership in order to protect “the constituency
12 concept of our legislature in this state, which can accurately be described as a citizens’ legislature.”

13 State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1093 (N.M. Ct. App. 1991). As further
14 explained by Justice Crockett of the Utah Supreme Court:

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

19 Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring and explaining that
20 Utah’s separation-of-powers provision would not prohibit state legislators from serving as public school
21 teachers). Accordingly, because the Legislature has substantial institutional interests in the meaning,
22 intent, purpose, scope, applicability and enforceability of the separation-of-powers provision, the
23 Legislature has substantial institutional interests in the subject matter of this action that are not
24 adequately represented by existing parties.

25 Finally, NPRI’s arguments also fail because of its misplaced reliance on Hairr v. First Jud. Dist.
26 Ct., 132 Nev. 180 (2016). In that case, the Nevada Supreme Court held that **private parties** were not
27 entitled to intervene as of right under NRCP 24(a)(2) because they did not show that “they have a

1 different legal interest than **the State** in the outcome of the litigation or that their interests in defending
2 the suit are adverse to **the State's** interests.” Id. at 186 (emphasis added). As a result, the **private**
3 **parties** “failed to make the required compelling showing to overcome the presumption that **the State**
4 will adequately represent their interest.” Id. at 186 (emphasis added).

5 In this case, because the Legislature would be representing **the State's** interests, the Legislature
6 cannot be equated to the **private parties** in Hairr. As discussed previously, as a state constitutional
7 body governed by the separation-of-powers provision, the Legislature has independent institutional
8 interests in this action that are separate and distinct from the individual interests of the Legislator-
9 Defendants because the Legislature has a right to defend its constitutional power of appropriation and
10 the meaning, intent, purpose, scope, applicability and enforceability of the separation-of-powers
11 provision which governs the powers of the legislative branch and the Legislature's administration of its
12 constitutional functions and the conduct of its members. Because these separate institutional interests
13 are unique to the Legislature as a state constitutional body, the Legislator-Defendants are not in a
14 position to adequately represent the separate institutional interests of the Legislature that are at stake in
15 this case. Under such circumstances, the Legislature's separate institutional interests are not adequately
16 represented by existing parties. Accordingly, the Legislature is entitled to intervention as of right under
17 NRCP 24(a)(2), and the Legislature's motion to intervene should be granted.

18 **D. The Legislature qualifies for permissive intervention under NRCP 24(b) because such**
19 **intervention would facilitate a more comprehensive and thorough presentation of the controlling**
20 **law and a better understanding of the issues, and such intervention would ensure that the views of**
21 **the Legislature are fairly and adequately represented and are not prejudiced by this case.**

22 In this case, even assuming the Legislature does not qualify for intervention as of right under
23 NRCP 24(a)(1) and 24(a)(2), the Court should exercise its discretion and grant the Legislature
24 permissive intervention under NRCP 24(b). As discussed previously, this case involves extremely
important questions of constitutional law whose resolution will have a substantial impact on the

1 Legislature's constitutional power of appropriation and the meaning, intent, purpose, scope, applicability
2 and enforceability of the separation-of-powers provision which governs the powers of the legislative
3 branch and the Legislature's administration of its constitutional functions and the conduct of its
4 members. By permitting the Legislature to intervene, the Court would be facilitating a more
5 comprehensive and thorough presentation of the controlling law and a better understanding of the issues,
6 and the Court would be ensuring that the views of the Legislature are fairly and adequately represented
7 and are not prejudiced by this case. Moreover, because this case is in its earliest stages, intervention will
8 not unduly delay the proceedings or prejudice the rights of existing parties. Therefore, even assuming
9 the Legislature does not qualify for intervention as of right under NRCP 24(a)(1) and 24(a)(2), the Court
10 should exercise its discretion and grant the Legislature permissive intervention under NRCP 24(b).

11 **CONCLUSION AND AFFIRMATION**

12 Based upon the foregoing, the Legislature respectfully requests that the Court enter an order
13 granting the Legislature's Motion to Intervene as Defendant.

14 The undersigned hereby affirm that this document does not contain "personal information about
15 any person" as defined in NRS 239B.030 and 603A.040.

16 DATED: This 21st day of October, 2020.

17 Respectfully submitted,

18 By: /s/ Kevin C. Powers

19 **KEVIN C. POWERS**

20 General Counsel

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Attorneys for the Legislature of the State of Nevada

ADDENDUM

NRCP 24. Intervention

(a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a state or federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) **Permissive Intervention.**

(1) **In General.** On timely motion, the court may permit anyone to intervene who:
(A) is given a conditional right to intervene by a state or federal statute; or
(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) **By a Government Officer or Agency.** On timely motion, the court may permit a state or federal governmental officer or agency to intervene if a party's claim or defense is based on:

- (A) a statute or executive order administered by the officer or agency; or
- (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) **Delay or Prejudice.** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

[Amended; effective March 1, 2019.]

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 or the General 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,

1 imprecise, indefinite or vague, is preempted by federal law or is otherwise inapplicable, invalid,
unenforceable or unconstitutional,

2 ➡ 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
3 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
4 defenses, in law or fact, or by a motion or request to file such a pleading, brief or dispositive
motion at a later time.

5 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
6 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
7 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
8 a party.

9 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
10 Legislature as a party based on the provisions of this section.

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

12 6. As used in this section:

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

14 (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.

15 (c) "Legislature" means:

16 (1) The Legislature or either House; or

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

18 (Added to NRS by 1965, 1461; A 1971, 1546; 1995, 1108; 1999, 2203; 2007, 3305; 2009,
1565; 2011, 3244; 2020, 32nd Special Session, 16)

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division,
3 and that on the **21st** day of October, 2020, pursuant to NRCP 5(b) and NEFCR 9, I served a true and
4 correct copy of the Nevada Legislature's Reply in Support of Motion to Intervene as Defendant, by
5 means of the Eighth Judicial District Court's electronic filing system, directed to:

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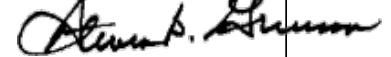
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20
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24



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13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**ERRATA TO PLAINTIFF'S
OPPOSITION TO NEVADA
LEGISLATURE'S MOTION TO
INTERVENE AS DEFENDANT**

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Plaintiff, Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq. of Fox Rothschild LLP, hereby advises the Court of the instant Errata.

Contrary to the histrionics of the Reply filed by the Legislative Counsel Bureau’s Legal Division in support of the Nevada Legislature’s Motion to Intervene as Defendant, in which it accuses NPRI of basing its Opposition thereto on a “fabricated version of NRS 281F.720(2)(b) that does not exist” (*see* Reply at 7:5-6)¹, NPRI hereby advises the Court of the following scrivener’s error, via the instant Errata and corrected version of its Opposition attached as **Exhibit 1** hereto:

In quoting the entirety of NRS 218F.720(2)(b) to identify the grounds upon which a challenge to a law could allow the Nevada Legislature’s intervention as of right, NPRI inadvertently excluded the words “including, without limitation.” NPRI submits the instant Errata, therefore, for the purpose of providing the Court and opposing counsel with its Opposition, amended to include the

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¹ As the Legislative Counsel Bureau’s counsel himself points out to excuse his wholesale exclusion of the language qualifying the applicability NRS 281F.720(2), NPRI’s scrivener’s error is entirely inconsequential where the Legislature reproduced the statute “**in its entirety**, in the addendum that is part of the Legislature’s motion.” *See* Reply at 3:8-9 (emphasis in original).

1 missing language, prior to the hearing on the Nevada Legislature’s Motion to Intervene as Defendant
2 on December 17, 2020.

3 Dated this 22th day of October, 2020.

4 **FOX ROTHSCHILD LLP**

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6 By: /s/ Colleen E. McCarty
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 22nd day of October, 2020, I caused the foregoing document entitled **ERRATA TO PLAINTIFF'S OPPOSITION TO NEVADA LEGISLATURE'S MOTION TO INTERVENE AS DEFENDANT** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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An Employee of Fox Rothschild LLP

Exhibit 1

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14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**PLAINTIFF'S OPPOSITION TO
NEVADA LEGISLATURE'S MOTION
TO INTERVENE AS DEFENDANT**

**[REVISED TO CORRECT
SCRIVENER'S ERROR]**

Date of Hearing: November 19, 2020

Time of Hearing: 9:00 a.m.

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna
13 L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Opposition
14 to the Nevada Legislature’s Motion to Intervene as Defendant, filed on September 30, 2020, by the
15 Legislative Counsel Bureau, Legal Division (“LCB Legal”)¹.

16 This Opposition is made and based on the following Memorandum of Points and Authorities,
17 the papers and pleadings on file, and any oral argument permitted at the hearing of this matter.

18 Dated this 22nd day of October, 2020.

19 **FOX ROTHSCHILD LLP**

20 By: /s/ Deanna L. Forbush

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Nevada Policy Research Institute

27 ¹ On September 25, 2020, NPRI filed a Motion to Disqualify the Official Attorneys from Representing Defendants
28 Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal (“Motion to Disqualify”), which is currently pending a hearing on
December 17, 2020. To the extent the Legislature’s intervention would effectively give all Defendants representation by
LCB Legal at taxpayers’ expense, exactly what NPRI asserts is improper, NPRI incorporates same by reference herein.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The Court is likely familiar with the expression “separate the wheat from the chaff.” This is
5 the unenviable task LCB Legal has forced on the Court in order for it to properly review the
6 Legislature’s request to intervene as a 12th named Defendant². What should have been a simple
7 motion to ask the Court to consider a request under NRCP 24(b) for permissive intervention has
8 instead been posed, without legal basis, as a request for intervention as of right under NRCP 24(a),
9 with permissive intervention a mere alternative. This straw person argument for intervention as of
10 right under NRCP 24(a) immediately fails, however, where the statute the Legislature invokes does
11 not apply. And, the potential for the Court to exercise its discretion to allow permissive intervention
12 under NRCP 24(b) also fails upon any fair application of the rule to the facts of the case.

13 LCB Legal spends a full 14 pages of its 16-page brief asserting the wholly inapposite
14 argument for the Legislature’s intervention as of right under NRCP 24(a)(1) and (2), when the very
15 statute it cites as conveying that right, i.e. NRS 281F.720, contains language that unambiguously
16 precludes its application, and, with three motions to dismiss pending before the Court already, the
17 existing parties are clearly representing any tangential interest the Legislature may have in the
18 instant case. Specifically, with regard to the applicability of NRCP 24(a)(1), LCB Legal’s motion
19 conspicuously ignores the entirety of NRS 281F.720, which contains the conditions precedent for
20 intervention as of right. NRS 281F.720 plainly limits intervention to those lawsuits containing
21 either: (a) a challenge to an action (or inaction) of the Legislature itself, which allegation is not
22 present here, or (b) a challenge to a law “on grounds that it is ambiguous, unclear, imprecise,
23 indefinite, or vague, is preempted by federal law, or is otherwise inapplicable, invalid,
24 unenforceable, or unconstitutional.” See NRS 281F.720(2)(a) and (b) (emphasis added).

25 NPRI gives LCB Legal the benefit of the doubt that it is not intentionally seeking to mislead
26

27 ² In its Amended Complaint, NPRI named 13 Defendants known to be simultaneously holding elected offices in the
28 Legislature and paid positions in State or local governments. NPRI subsequently entered Notices of Voluntary Dismissal
for Teresa Benitez-Thompson and Kasina Douglass-Boone upon notification that they were no longer engaging in dual
employment, leaving 11 remaining Defendants as parties to the instant action.

1 the Court in this regard, but not once does the language quoted and emphasized above appear in the
2 Legislature's motion. And, the reason is obvious: NPRI is clearly seeking through its Amended
3 Complaint to enforce the Separation of Powers clause of the Nevada Constitution as written, not
4 challenge it such that the Legislature's defense is necessary. To be more precise, NPRI's allegations
5 make clear that its case is premised on the fact that the Separation of Powers clause is unambiguous,
6 clear, precise, definite, not vague, not preempted by federal law, and not in any way otherwise
7 inapplicable, invalid, unenforceable, or unconstitutional. For these reasons, as detailed more fully
8 herein, intervention as of right is simply not available to the Legislature.

9 In the absence of a basis to consider intervention as of right under NRCP 24(a), the Court is
10 left to determine only whether permissive intervention under NRCP 24(b) is warranted, and it is not.
11 The Legislature's argument for permissive intervention is limited to 31 lines in the last 2 pages of the
12 motion, and, as LCB counsel admits from the outset, the Court's decision is entirely discretionary.
13 *See* Motion at 16:7-10. More importantly, NRCP 24(b) is limited in its application to non-parties
14 with either a conditional right to intervene or a defense in common with the primary case, or, in the
15 case of a non-party governmental entity, to lawsuits that are based on a statute administered by the
16 entity or a regulation, order, requirement or agreement issued under such a statute. Not one of these
17 scenarios is present in the instant case. NPRI purely seeks a determination by the Court, and
18 ultimately by the Nevada Supreme Court, that certain individual Legislators are engaging in dual
19 employment in violation of the Separation of Powers clause of the Nevada Constitution. The
20 Legislature is a branch of government that carries out its duties through individual legislators acting
21 in their official capacities as constituent members, no matter who occupies those seats, and the
22 Legislature pays their statutory salaries and allowances regardless. Thus, in no way is the
23 Legislature directly affected by who serves therein, and the Legislature is in no way called upon to
24 administer the Nevada Constitution in this regard.

25 For these additional reasons, there is no legal basis for the Legislature to intervene in the
26 instant case under any provision of NRCP 24. The Court's denial of LCB Legal's request does not
27 leave the Legislature without possible recourse, however. Should the Court rule in favor of NPRI
28 and those individual Defendants aggrieved by the decision appeal, the Legislature may seek approval

1 from the appellate court to file an *amicus curiae* brief. But allowing the Legislature to insert itself as
2 a party at this stage of the proceedings would appear to be a clear abuse of this Court’s discretion.

3 II.

4 ARGUMENT

5 A. The Nevada Legislature Does Not Have the Right to Intervene in the Instant 6 Litigation Under NRCP 24(a).

7 NRCP 24(a) provides the mechanism by which a non-party is permitted to intervene as a
8 matter of right. NRCP 24(a)(1) requires intervention when a state or federal statute gives a non-
9 party the unconditional right to intervene. NRCP 24(a)(2) applies where the non-party claims an
10 interest in the litigation that is not adequately represented by existing parties. Taking each provision
11 in turn, it is clear the Legislature does not have the right to intervene.

12 I. No Right to Intervene Under NRCP 24(a)(1).

13 The statute the Legislature relies on for its NRCP 24(a)(1) argument is NRS 218F.720(2)(a)
14 and (b). *See* Motion at 2:9, 5:1-3, 6:7-8, and 8:12-17. The Legislature first attempts to assert NRS
15 218F.720(2)(a) is applicable because NPRI is alleging that the Legislature itself, by its own actions
16 or failure to act, has violated the Nevada Constitution. *See* Motion at 8:12-13. The Amended
17 Complaint on file herein, however, contains no such allegation. Indeed the entirety of the Amended
18 Complaint takes aim solely at individual legislators who are “simultaneously holding elected offices
19 in the Nevada State Legislature and paid positions with Nevada State or local governments in
20 violation of the Separation of Powers requirement of Nevada Const. Art. 3, § 1, ¶ 1.” *See* Amended
21 Complaint at ¶¶ 23, 27. NPRI seeks both declaratory and injunctive relief against these individuals,
22 and only these individuals, to resolve this controversy and stop these ongoing violations. *See*
23 Amended Complaint at ¶¶ 24, 29. And, NPRI asserts in regard to its claim for injunctive relief
24 specifically that, “[w]ithout the Court’s intervention, legislative expenditures or appropriations and
25 taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1, and
26 irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
27 Constitution.” *See* Amended Complaint at ¶ 28.

28 The Legislature would have the Court believe that the mere reference to the Defendants’

1 actions resulting in the payment of “legislative expenditures or appropriations and taxpayer monies”
2 in ¶ 28 of its Amended Complaint is tantamount to NPRI alleging that “the Legislature has violated
3 the Nevada Constitution by authorizing legislative expenditures or appropriations,” such that NRS
4 218F.720(2)(a) would apply. *See* Motion at 9:8-13. This argument is both nonsensical and contrary
5 to Nevada law. The Court may take judicial notice that legislators are compensated by Legislative
6 expenditure, per statutory requirement. Specifically, legislators are paid a minimum daily salary of
7 \$130 for the first 60 days of a regular session and up to 20 days of a special session. NRS
8 218A.630(1)(a) and (b); *see also* https://www.leg.state.nv.us/General/AboutLeg/General_Short.html
9 (last visited Sept. 29, 2020). Legislators also receive a per diem allowance, paid each day the
10 Legislature is in session, which is intended to cover, among other things, lodging, meals and
11 incidental expenses. NRS 218A.635, *et seq.* While in session, Legislators are also entitled to
12 allowances for communications, postage, stationery and travel. *Id.* And, while the Legislature is
13 not in session, each Senator and Assembly member is entitled to receive a salary and the per diem
14 allowance and travel expenses for each day of attendance at a conference, training session, meeting,
15 seminar, or other gathering at which the Legislator officially represents the State or its Legislature.
16 *Id.* Each of the aforementioned statutory requirements exists independent of which persons hold
17 these elected offices, and NPRI is in no way challenging the Legislature’s carrying out of or
18 compliance with these requirements.

19 Where the Legislature is truly wrong-footed, however, is when it attempts to rely on NRS
20 218F.720(2)(b) for its argument under NRCP 24(a)(1). The Legislature selectively quotes the statute
21 as providing it the unconditional right to intervene because NPRI:

22 “[c]hallenges, contests or raises as an issue, either in law or in equity, in
23 whole or in part, or facially or as applied, the **meaning, intent, purpose,**
24 **scope, applicability,** validity, **enforceability** or constitutionality of any
25 law, resolution, initiative, referendum or other legislative or
constitutional measure.”

26 *See* Motion at 9:20-23 (citation omitted) (emphasis in original). In reality, when cited in its entirety,
27 this statutory provision would provide the Legislature the unconditional right to intervene only if
28 NPRI:

1 “[c]hallenges, contests or raises as an issue, either in law or in equity, in
2 whole or in part, or facially or as applied, the meaning, intent, purpose,
3 scope, applicability, validity, enforceability or constitutionality of any law,
4 resolution, initiative, referendum or other legislative or constitutional
5 measure, including, without limitation on the grounds that it is ambiguous,
6 unclear, imprecise indefinite, or vague, is preempted by federal law, or is
7 otherwise inapplicable, invalid, unenforceable or unconstitutional.”

8 NRS 281F.720(2)(b) (emphasis added). This additional language is determinative of the statute’s
9 application, and it is never once acknowledged by the Legislature in its motion. Tellingly, this
10 language is also conspicuously absent from the Resolution of the Legislative Commission that LCB
11 Legal obtained on September 18, 2020 and touts as directing it to intervene in the instant action. *See*
12 Motion at 3:17-20 and Exhibit B to the Motion at 3:14-17.

13 As any fair reading of the Amended Complaint makes clear, NPRI is seeking to enforce the
14 Separation of Powers clause of the Nevada Constitution, not challenge it on any grounds. Contrary
15 to the language in the preceding paragraph, NPRI’s entire case is premised on the fact that the
16 Separation of Powers clause is unambiguous, clear, precise, definite, not vague, not preempted by
17 federal law, and not in any way otherwise inapplicable, invalid, unenforceable, or unconstitutional.
18 And, certainly, NPRI’s efforts to enforce the Nevada Constitution will in no way invoke the need for
19 the Legislature to provide a defense to the Separation of Powers clause itself. For these reasons,
20 intervention as of right under NRCP 24(a)(1) is not available to the Legislature in the instant case,
21 and its motion should be denied on this basis.

22 **2. No Right to Intervene Under NRCP 24(a)(2).**

23 To intervene under NRCP 24(a)(2), a non-party must meet four requirements: (1) that it has a
24 sufficient interest in the litigation’s subject matter; (2) that it could suffer an impairment of its ability
25 to protect that interest if it does not intervene; (3) that its interest is not adequately represented by
26 existing parties; and (4) that its application is timely. *See Am. Home Assurance Co. v. Eighth*
27 *Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). Further, determining
28 whether an applicant has met these four requirements is within the district court’s discretion. *Id.*
(citations omitted).

NPRI has addressed in the preceding section why the Legislature has no legitimate interest in

1 the instant action, let alone an interest sufficient to meet the first two requirements stated above. But
2 even if the Court were to find that some protectable interest is held by the Legislature in this case,
3 the Legislature still has no right to intervene if its interest is adequately represented by the existing
4 Defendants. *Am. Home Assurance Co.*, 122 Nev. at 1241, 147 P.3d at 1128. It is the Legislature's
5 burden to prove its interest is not adequately represented, and although the burden is described as
6 "minimal," it cannot be met where the Legislature's interest or ultimate objective in the litigation is
7 the same as the existing Defendants or subsumed within the Defendants' objective. *Id.* (citation
8 omitted).

9 Whether an existing party's interest adequately represents an intervenor's interest is, in fact,
10 crucial to the analysis of a proposed intervention. *See Hairr v. First Judicial Dist. Ct.*, 132 Nev.
11 Adv. Op. 16, 368 P.3d 1198 (2016). In *Hairr*, the State of Nevada was defending litigation
12 regarding the constitutionality of an education grant program instituted by law. *Id.*, 368 P.3d at
13 1199. Parents of students seeking grants sought to intervene in the matter. *Id.* The court ultimately
14 found the parents seeking to intervene had the same interest as the State in having the program
15 declared constitutional. *Id.*, 368 P.3d at 1199-1200. "The most important factor in determining
16 adequacy of representation is how the interest compares with the interests of existing parties...[and]
17 when an applicant for intervention and an existing party have the same ultimate objective, a
18 presumption of adequacy of representation arises." *Id.*, 368 P.3d at 1201. The State's representation
19 was therefore presumptively adequate in representing the interests of the parents, and the parents
20 were not permitted to intervene as a matter of right under NRCP 24(a)(2). *Id.*

21 Here, the requesting intervenor is the Nevada Legislature, and there is no question it has the
22 same interest and ultimate objective as the Defendants in this litigation, which is to first seek
23 dismissal of NPRI's Amended Complaint, and, when that is not successful, to obtain a ruling from
24 this Court that the Separation of Powers clause of the Nevada Constitution does not prohibit state
25 legislators from holding positions of public employment with the State executive branch or with
26 local governments. The Legislature, in fact, references this exact determination by the Legislative
27 Commission as a key factual underpinning of its motion. *See Motion at 4:5-9.* More importantly,
28 the Legislature presents no argument or allegation that Defendants' representation of its interests or

1 carrying out of its objective to obtain the same ruling as LCB Legal obtained from the Legislative
2 Commission is deficient or lacking.

3 The Legislature's only attempt to differentiate its interests from that of the Defendants is to
4 claim it has "independent legal interests in defending the validity of its legislative actions in
5 exercising the constitutional power of appropriation." *See* Motion at 13:11-12. As addressed by
6 NPRI in the preceding section, its Amended Complaint is devoid of any challenge to the
7 Legislature's compliance with any of its requirements, appropriations or otherwise, which exist
8 independent of the persons holding elected offices as its constituent members. And, even if NPRI
9 were engaging in such a challenge, which it is not, no less that six of the eleven existing Defendants
10 have either filed or joined a total of three motion to dismiss, which seek to attack from every
11 conceivable angle NPRI's sincere efforts to obtain a definitive ruling on their dual employment.³
12 While NPRI is amazed that Defendants have chosen this approach, rather than seeking to advance
13 their position for final appellate review in the most expeditious way possible, the fact remains that
14 their representation is entirely aligned with the Legislature, and the Legislature's interest is more
15 than adequately protected. Because the Legislature fails to meet this essential prong for the right to
16 intervene under NRCP 24(a)(2), the Court should deny its motion on this basis as well.

17 **B. The Nevada Legislature Does Not Qualify for Permissive Intervention in the**
18 **Instant Litigation Under NRCP 24(b).**

19 Under the NRCP 24(b), as amended effective March 1, 2019, Nevada courts may grant
20 permissive intervention to non-parties with either a conditional right to intervene or a defense in
21 common with the primary case, or, in the case of a non-party governmental entity, in lawsuits that
22 are based on a statute administered by the entity or a regulation, order, requirement or agreement
23 issued under such a statute. *See* NRCP 24(b)(1) and (2). It is axiomatic that permissive intervention
24 is wholly discretionary with the court, and the Legislature acknowledges as much in its motion. *See*
25 Motion at 16:7-10.

27 ³ Although eleven Defendants remain as parties to this litigation, NPRI notes three of those Defendants—Nicole
28 Cannizzaro, James Ohrenschall, and Melanie Scheible—have so far evaded service and are the subject of a pending
motion for order to serve by publication. In fact, the number seeking dismissal is six of eight, or 75%, of the named
Defendants.

1 As demonstrated above, not one of the above scenarios is present in the instant case. NPRI is
2 purely seeking a determination by this Court, and ultimately by the Supreme Court, that certain
3 individual Legislators are engaging in dual employment in violation of the Separation of Powers
4 clause of the Nevada Constitution. The Legislature is a branch of government that carries out its
5 duties through individual legislators acting in their official capacities as constituent members,
6 regardless of who is sitting in those seats. And, the Legislature pays its constituent members daily
7 salaries and per diem and other allowances as set forth in statute. In no way would the Legislature
8 be directly affected by who its constituent members are, and the Legislature is not called upon to
9 defend the Separation of Powers clause of the Nevada Constitution when certain constituent
10 members are accused of violating its dual employment prohibition.

11 Indeed, the Legislature's participation in the case will add nothing to the merits of the
12 defense because the existing Defendants already represent any interest the Legislature may have in
13 the outcome of the litigation. The Legislature's intervention would needlessly multiply the
14 litigation. Its involvement would undoubtedly cause delay and increase costs through additional sets
15 of written discovery, additional schedules to accommodate; and additional attorneys conducting voir
16 dire, opening statements, direct and cross examinations, and closing arguments at trial. Increased
17 costs and potential for delay, which come with no measurable benefit, are sufficient reasons alone to
18 deny permissive intervention. *See Hairr*, 368 P.3d at 1202. Here, the Legislature's intervention
19 would only prolong the litigation and serve no other purpose, and the Court should exercise its
20 considerable discretion to maintain the status quo and deny permissive intervention.

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III.

CONCLUSION

NPRI respectfully asserts that the Nevada Legislature fails to qualify for intervention under either NRCP 24(a) or (b) and requests that its motion to intervene be denied in its entirety.

Dated this 22nd day of October, 2020.

FOX ROTHSCHILD LLP

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 22nd day of October, 2020, attached as Exhibit 1 to an Errata, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO NEVADA LEGISLATURE'S MOTION TO INTERVENE AS DEFENDANT** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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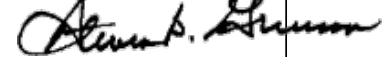
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Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
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and Clark County School District; JASON
FRIERSON, an individual engaging in dual
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an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FILED BY
DEFENDANT NICOLE
CANNIZZARO**

Date of Hearing: November 19, 2020

Time of Hearing: 9:00 a.m.

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
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Assembly and Clark County School District,

Defendants.

11
12 Nevada Policy Research Institute ("NPRI"), by and through its attorneys of record, Deanna
13 L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Opposition
14 to the Motion to Dismiss filed on October 19, 2020 by Defendant, Nicole Cannizzaro ("Defendant
15 Cannizzaro").

16 This Opposition is made and based on the following Memorandum of Points and Authorities,
17 the papers and pleadings already on file, and any oral argument the Court may permit at the hearing
18 of this matter.

19 Dated this 2nd day of November, 2020.

20 **FOX ROTHSCHILD LLP**

21
22 By: /s/ Deanna L. Forbush

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **ARGUMENT**

4 For reasons known only to her and their joint counsel of record, Defendant Cannizzaro chose
5 to file a motion to dismiss that copies verbatim the arguments made by Defendant Frierson in his
6 motion to dismiss filed on October 5, 2020, rather than to simply file a joinder thereto, as she did
7 with the motions to dismiss filed by Defendant Miller and the NSHE Defendants. Indeed, the only
8 differences in the language between Defendant Cannizzaro's brief and Defendant Frierson's brief are
9 found when Defendant Cannizzaro's name or title are used, or when she seeks to make a factual
10 argument that her position as a Chief Deputy District Attorney¹ is distinguishable from that of a
11 public official or officer. *See* Motion at 11:1-15; Fn. 7-10. The briefs are even identical to the point
12 that they include the same clerical errors. *See, e.g.*, Motion at 6:9.

13 The distinction between Defendant Cannizzaro's position as Chief Deputy District Attorney
14 and Defendant Frierson's position as Assistant Public Defender, however, is one without a difference
15 for purposes of their respective motions to dismiss. The gravamen of the NRCP 12(b)(5) dismissal
16 request made by each rests squarely on the false premise that the Nevada Supreme Court has
17 declared the Separation of Powers clause in the Nevada Constitution to be applicable only to
18 executive branch employees working directly for the state, as opposed to a local government, and
19 then only to those employees who also serve as public officials or officers. Each claims, with regard
20 to the latter argument, that they do not serve as a public official or officer, and the factual basis for
21 making this distinction does not change the argument itself in any way. More importantly, there is
22 no dispute that the Nevada Supreme Court has not yet rendered a decision on these ultimate issues,
23 let alone one that requires dismissal in the instant case. In fact, it is precisely for the purpose—and
24 only for the purpose—of having the Nevada Supreme Court settle these matters that NPRI filed its
25 Amended Complaint for both declaratory and injunctive relief in the district court, seeking to
26

27 ¹ Defendant Cannizzaro claims in her motion to dismiss she is "merely a Deputy District Attorney." *See* Motion at
28 11:4; *see also* Motion at 3:3; 10:14; 11:17. Upon information and belief, based on her listing in the *Nevada Legal
Directory* published by Nevada Legal News, July 2020 Edition, Defendant Cannizzaro in fact holds the position of Chief
Deputy District Attorney.

1 exclude legislators from employment with the executive branch, which mechanism of review the
2 Court's holding in *Secretary of State (Heller) v. Nevada State Legislature*, 120 Nev. 456, 472, 93
3 P.3d 746, 757 (2004), expressly approved.

4 For all of these reasons, NPRI opposes Defendant Cannizzaro's motion to dismiss arguments
5 in their entirety by adopting by reference and incorporating herein Plaintiff's Opposition to Motion
6 to Dismiss Filed by Defendant Jason Frierson and Joinders Thereto Filed by Britney Miller and
7 Selena Torres, filed by NPRI on October 19, 2020.

8 **II.**

9 **CONCLUSION**

10 NPRI respectfully requests this Honorable Court deny Defendant Cannizzaro's Motion to
11 Dismiss on all grounds stated therein.

12 Dated this 2nd day of November, 2020.

13 **FOX ROTHSCHILD LLP**

14 By: /s/ Deanna L. Forbush

15 DEANNA L. FORBUSH

16 Nevada Bar No. 6646

17 COLLEEN E. MCCARTY

18 Nevada Bar No. 13186

19 1980 Festival Plaza Drive, Suite 700

20 Las Vegas, Nevada 89135

21 Telephone: (702) 262-6899

22 Attorneys for Plaintiff

23 Nevada Policy Research Institute

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 2nd day of November, 2020, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT NICOLE CANNIZZARO** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

Gary A. Cardinal, Assistant General Counsel
University of Nevada, Reno
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Reno, Nevada 89557-0550
Email: gcardinal@unr.edu
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

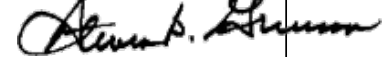
Bradley Schrager, Esq.
Daniel Bravo, Esq.
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*Attorneys for Defendants Brittney Miller and
Selena Torres*

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*Attorneys for Defendant Jason Frierson and
Nicole Cannizzaro*

Kevin C. Powers, General Counsel
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/s/ Natasha Martinez

An Employee of Fox Rothschild LLP



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Facsimile: (702) 597-5503

Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**PLAINTIFF'S OPPOSITION TO
JOINDERS TO DEFENDANT
BRITTNEY MILLER'S MOTION TO
DISMISS COMPLAINT FILED BY
DEFENDANTS JASON FRIERSON,
SELENA TORRES, AND NICOLE
CANNIZZARO**

Date of Hearing: November 19, 2020

Time of Hearing: 9:00 a.m.

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby submits its formal Opposition to the Joinders to Defendant Brittney Miller’s Motion to Dismiss Complaint (the “Miller Motion to Dismiss”), which were filed by Defendant Jason Frierson on October 5, 2020; Defendant Selena Torres on October 6, 2020; and Defendant Nicole Cannizzaro on October 19, 2020, respectively (the “Miller Joinders”).

Either by agreement of counsel or operation of rule, the Miller Joinders were filed after NPRI filed its timely Opposition to the Miller Motion to Dismiss on October 2, 2020. Because the Miller Joinders merely adopt and incorporate by reference therein the identical arguments made by Defendant Miller, without making any new or separate arguments, NPRI respectfully asserts that its Opposition constitutes a complete response to these after-filed Joinders.

That said, in the interest of avoiding any confusion in the record, NPRI hereby formally opposes the Miller Joinders in their entirety by adopting and incorporating by reference herein Plaintiff’s Opposition to Motion to Dismiss Filed by Defendant Brittney Miller, and the Joinder

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1 Thereto Filed by Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal, filed by NPRI
2 on October 2, 2020.

3 Dated this 2nd day of November, 2020.

4 **FOX ROTHSCHILD LLP**

5
6 By: /s/ Deanna L. Forbush
7 DEANNA L. FORBUSH
8 Nevada Bar No. 6646
9 COLLEEN E. MCCARTY
10 Nevada Bar No. 13186
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14 Attorneys for Plaintiff
15 Nevada Policy Research Institute
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 2nd day of November, 2020, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO JOINDERS TO DEFENDANT BRITTNEY MILLER'S MOTION TO DISMISS COMPLAINT FILED BY DEFENDANTS JASON FRIERSON, SELENA TORRES, AND NICOLE CANNIZZARO** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

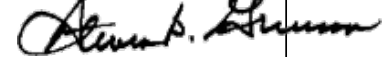
Gary A. Cardinal, Assistant General Counsel
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Email: dbravo@wrslawyers.com
*Attorneys for Defendants Brittney Miller and
Selena Torres*

Jonathan D. Blum, Esq.
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*Attorneys for Defendant Jason Frierson and
Nicole Cannizzaro*

Kevin C. Powers, General Counsel
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Attorneys for Nevada Legislature

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP



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Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**PLAINTIFF'S OPPOSITION TO
JOINDER TO DEFENDANTS
OSVALDO FUMO, HEIDI SEEVERS
GANSERT, AND DINA NEAL'S
MOTION TO DISMISS PURSUANT
TO NRCP 12(B)(5) AND NRCP 12(B)(6)
FILED BY DEFENDANT NICOLE
CANNIZZARO**

Date of Hearing: November 19, 2020

Time of Hearing: 9:00 a.m.

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby submits its formal Opposition to the Joinder to Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal’s Motion to Dismiss Pursuant to NRCP 12(b)(5) and NRCP 12(b)(6) (the “NSHE Defendants’ Motion to Dismiss”), which was filed by Defendant Nicole Cannizzaro on October 19, 2020 (the “Joinder”).

By operation of rule, the Joinder to the NSHE Defendant’s Motion to Dismiss was filed after NPRI filed its timely Opposition on October 8, 2020. Because the Joinder merely adopts and incorporates by reference therein the identical arguments made by the NSHE Defendants, without making any new or separate arguments, NPRI respectfully asserts that its Opposition constitutes a complete response to this after-filed Joinder.

That said, in the interest of avoiding confusion in the record, NPRI hereby formally opposes the Joinder in its entirety by formally adopting and incorporating by reference herein Plaintiff’s Opposition to Motion to Dismiss Filed by Defendants Osvaldo Fumo, Heidi Seevers Gansert, and

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1 Dina Neal and Joinders Thereto Filed by Defendants Jason Frierson, Brittney Miller, and Selena
2 Torres, filed by NPRI on October 8, 2020.

3 Dated this 2nd day of November, 2020.

4 **FOX ROTHSCHILD LLP**

5
6 By: /s/ Deanna L. Forbush
7 DEANNA L. FORBUSH
8 Nevada Bar No. 6646
9 COLLEEN E. MCCARTY
10 Nevada Bar No. 13186
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14 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 2nd day of November, 2020, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO JOINDER TO DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5) AND NRCP 12(b)(6) FILED BY DEFENDANT NICOLE CANNIZZARO** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
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Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

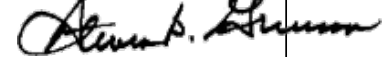
Gary A. Cardinal, Assistant General Counsel
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Reno, Nevada 89557-0550
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Heidi Seevers Gansert and Dina Neal*

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Daniel Bravo, Esq.
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Email: dbravo@wrslawyers.com
*Attorneys for Defendants Brittney Miller and
Selena Torres*

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Wiley Petersen
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Las Vegas, Nevada 89145
Email: jblum@wileypetersenlaw.com
*Attorneys for Defendant Jason Frierson and
Nicole Cannizzaro*

Kevin C. Powers, General Counsel
Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, Nevada 89701
Email: kpowers@lcb.state.nv.us
Attorneys for Nevada Legislature

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP



1 **NNOP**

2 DEANNA L. FORBUSH, ESQ.

3 Nevada Bar No. 6646

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8 **FOX ROTHSCHILD LLP**

9 1980 Festival Plaza Drive, Suite 700

10 Las Vegas, Nevada 89135

11 Telephone: (702) 262-6899

12 Facsimile: (702) 597-5503

13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**NOTICE OF NON-OPPOSITION TO
PLAINTIFF'S EX PARTE MOTION
FOR ENLARGEMENT OF TIME TO
SERVE AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF AND FOR AN
ORDER ALLOWING SERVICE BY
PUBLICATION OF DEFENDANTS
GLEN LEAVITT, JAMES
OHRENSCHALL, AND MELANIE
SCHEIBLE**

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

TO THE COURT, THE DEFENDANTS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE THAT Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, filed and served its Ex Parte Motion for Enlargement of Time to Serve Amended Complaint for Declaratory and Injunctive Relief and for an Order Allowing Service by Publication of Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible (“Motion for Enlargement of Time to Serve” and “Motion for Order Allowing Service by Publication,” respectively) on October 20, 2020. The deadline for filing and serving written opposition thereto was November 3, 2020.

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1 Pursuant to Rule 2.20(e) of the Eighth Judicial District Court Rules, NPRI respectfully
2 requests that this Court construe the failure to file any written or timely opposition to the Motion for
3 Enlargement of Time to Serve and the Motion for Order Allowing Service by Publication as an
4 admission that each is meritorious and as a consent to granting the same.

5 Dated this 4th day of November, 2020.

6 **FOX ROTHSCHILD LLP**

7
8 By: /s/ Deanna L. Forbush

9 DEANNA L. FORBUSH

10 Nevada Bar No. 6646

11 COLLEEN E. MCCARTY

12 Nevada Bar No. 13186

13 1980 Festival Plaza Drive, Suite 700

14 Las Vegas, Nevada 89135

15 Telephone: (702) 262-6899

16 Attorneys for Plaintiff

17 Nevada Policy Research Institute
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28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 4th day of November, 2020, I caused the foregoing document entitled **NOTICE OF NON-OPPOSITION TO PLAINTIFF'S EX PARTE MOTION FOR ENLARGEMENT OF TIME TO SERVE AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR AN ORDER ALLOWING SERVICE BY PUBLICATION OF DEFENDANTS GLEN LEAVITT, JAMES OHRENSCHALL, AND MELANIE SCHEIBLE** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

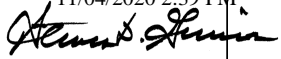
Gary A. Cardinal, Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street/MS 0550
Reno, Nevada 89557-0550
Email: gcardinal@unr.edu
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

Bradley Schrager, Esq.
Daniel Bravo, Esq.
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Las Vegas, Nevada 89120
Email: bschrager@wrslawyers.com
Email: dbravo@wrslawyers.com
*Attorneys for Defendants Brittney Miller and
Selena Torres*

Jonathan D. Blum, Esq.
Wiley Petersen
1050 Indigo Drive, Suite 200B
Las Vegas, Nevada 89145
Email: jblum@wileypetersenlaw.com
*Attorneys for Defendant Jason Frierson and
Nicole Cannizzaro*

Kevin C. Powers, General Counsel
Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, Nevada 89701
Email: kpowers@lcb.state.nv.us
Attorneys for Nevada Legislature

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP


CLERK OF THE COURT

ORDG

DEANNA L. FORBUSH, ESQ.

Nevada Bar No. 6646

dforbush@foxrothschild.com

COLLEEN E. MCCARTY, ESQ.

Nevada Bar No. 13186

cmccarty@foxrothschild.com

FOX ROTHSCHILD LLP

1980 Festival Plaza Drive, Suite 700

Las Vegas, Nevada 89135

Telephone: (702) 262-6899

Facsimile: (702) 597-5503

Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**ORDER GRANTING PLAINTIFF'S
MOTION FOR ENLARGMENT OF
TIME TO SERVE AMENDED
COMPLAINT AND ORDER TO
SERVE BY PUBLICATION
DEFENDANTS GLEN LEAVITT,
JAMES OHRENSCHALL, AND
MELANIE SCHEIBLE**

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELENA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna
13 L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, having filed its Ex Parte
14 Motion for Enlargement of Time to Serve Amended Complaint for Declaratory and Injunctive Relief
15 and for an Order Allowing Service by Publication of Defendants Glen Leavitt, James Ohrenschall,
16 and Melanie Scheible (“Motion for Enlargement of Time to Serve” and “Motion for Order Allowing
17 Service by Publication,” respectively); no timely opposition having been filed thereto; the Court
18 having reviewed the Motion for Enlargement of Time to Serve and finding the same to be
19 meritorious; and good cause appearing,

20 IT IS HEREBY ORDERED that NPRI’s Motion for Enlargement of Time to Serve is
21 GRANTED. Plaintiff has shown good cause, pursuant to the factors set forth in *Scrimmer v. Eighth*
22 *Judicial District Court*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1995-96 (2000), to enlarge the time
23 for service beyond the 120 days required under NRCP 4(e)(1).

24 IT IS FURTHER ORDERED that NPRI has an additional sixty (60) days from the date of
25 entry of this Order to serve Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible
26 (“Defendants”).

27 IT IS HEREBY FURTHER ORDERED that NPRI’s Motion for an Order Allowing Service
28 by Publication of Defendants is also GRANTED. NPRI may serve its Summons and Amended

1 Complaint for Declaratory and Injunctive Relief by joint publication, according to the requirements
2 of NRCP 4.4, directed to Defendants.

3 IT IS HEREBY FURTHER ORDERED that service by joint publication of the Summons &
4 Amended Complaint for Declaratory and Injunctive Relief on Defendants shall be made in one or
5 more newspapers or other periodicals published in Nevada, at least once a week for a period of four
6 weeks.

7 IT IS HEREBY FURTHER ORDERED that a copy of the Summons and Amended
8 Complaint for Declaratory and Injunctive Relief shall be mailed to each Defendant's last known
9 address.

10 IT IS HEREBY FURTHER ORDERED that service by joint publication of the Summons &
11 Amended Complaint for Declaratory and Injunctive Relief on Defendants shall be considered
12 complete four weeks from the later of: (i) the date of the first publication; or (ii) the date of the
13 mailing thereof.

Dated this 4th day of November, 2020

14 Dated this _____ day of November, 2020.

15
16
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JIM CROCKETT
District Court Judge

19 Respectfully submitted by:

20 **FOX ROTHSCHILD LLP**

959 5D4 E243 DF61
Jim Crockett
District Court Judge

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1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Nevada Policy Research
Institute, Plaintiff(s)

CASE NO: A-20-817757-C

7 vs.

DEPT. NO. Department 24

8
9 Nicole Cannizzaro, Defendant(s)

10
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13 Court. The foregoing Order Granting was served via the court's electronic eFile system to all
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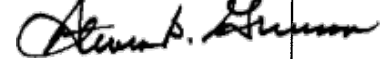
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*Attorney for Defendants,
Jason Frierson and Nicole Cannizzaro*

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA
DOUGLASSBOONE,
an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA
NEAL, an individual engaging in dual
employment with the Nevada State Assembly
and Nevada State College; JAMES

CASE No.: A-20-817757-C

DEPT. No.: 24

**REPLY TO PLAINTIFF'S
OPPOSITION TO JASON
FRIERSON'S MOTION TO
DISMISS**

1 OHRENSCHALL, an individual engaging in
2 dual employment with the Nevada State
3 Senate and Clark County Public Defender;
4 MELANIE SCHEIBLE an individual
5 engaging in dual employment with the
6 Nevada State Senate and Clark County
7 District Attorney; TERESA
8 BENITEZTHOMPSON,
9 an individual engaging in dual
10 employment with the Nevada State Assembly
11 and University of Nevada, Reno; JILL
12 TOLLES, an individual engaging in dual
13 employment with the Nevada State Assembly
14 and University of Nevada, Reno; and
15 SELINA TORRES, an individual engaging
16 in dual employment with the Nevada State
17 Assembly and Clark County School District,

18 Defendants.

19 Defendant JASON FRIERSON (“Speaker Frierson”) submits this Reply in support of his
20 Motion to Dismiss (the “Motion”). Specifically, this Reply responds to Plaintiff’s October 19, 2020
21 Opposition to the Motion (“Opposition”). Speaker Frierson is referred to at times collectively herein
22 as “Movants”.

23 **I. ARGUMENT**

24 **A. Plaintiff’s Main Argument is based on an Erroneous Interpretation of *Heller***

25 Plaintiff mistakenly argues that the Motion to Dismiss must be denied because it is based on
26 “a legal conclusion for which there is no legal precedent.” *See* Opposition, p. 3:9. This is incorrect.
27 Plaintiff then states that *Heller*, “unequivocally endorses the declaratory and injunctive relief actions
28 alleged by NPRI against executive branch employees without sovereign power.” *Id.* at 8:20-22.
However, this does not support denial of the Motion. The Nevada Supreme Court in *Heller*
dismissed the case entirely on procedural and separation of powers grounds. *Secretary of State*
(*Heller*) v. Nevada State Legislature, 120 Nev. 456, 93 P.3d 746, 757 (2004). The distinction

1 between public officers and others noted in *Heller* merely notes that quo warranto has very limited
2 application; it only applies to public offices with sovereign power.

3 A quo warranto action could be used to challenge any executive branch employees
4 **invested with sovereign power, who thereby occupy public offices within quo**
5 **warranto's exclusive reach.** And declaratory relief, possibly coupled with a request
6 for injunctive relief, could be sought against other executive branch employees.¹
7 *Heller* at 757 (emphasis added).

8 Indeed, *Heller* notes that quo warranto is codified in the Nevada Revised Statutes, and has its own
9 Chapter, NRS 35, which was enacted in 1911. The statute makes clear its limited application:

10 NRS 35.010 Action in name of State against **public officer**, association or usurper
11 of public office or franchise. A civil action may be brought in the name of the State:

12 1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a
13 **public office**, civil or military, except the office of Assemblyman, Assemblywoman
14 or State Senator, or a franchise, within this state, or an officer in a corporation created
15 by the authority of this state.

16 2. Against a **public officer**, civil or military, except the office of Assemblyman,
17 Assemblywoman or State Senator, who does or suffers an act which, by the provisions
18 of law, works a forfeiture of the office. (emphasis added).

19 *Heller* does not take a position on whether the Nevada Constitution's separation of powers provision
20 applies to local government employees, it merely notes that quo warranto is a limited remedy with
21 exclusive reach.² *Heller* simply outlines possible appropriate procedural avenues of remedy for
22 those that don't fit that description (i.e. non-public officers) but does not analyze the issue or reach
23 the merits of such a claim. *Heller* notes, "quo warranto is not only an adequate remedy to challenge a
24 person's right to hold public office, it is the exclusive remedy". *Id.* at 751. Local government
25 employees, such as Speaker Frierson, do not hold executive branch public offices, and therefore quo
26 warranto would not be an available remedy to remove him from his job.

27 ¹ Plaintiff makes no argument, and cites no authority for its implied position that Speaker Frierson is
28 an executive branch employee at all. The Motion cites plenty of law for the proposition that local
government employees are not executive branch employees at all.

² Quo Warranto is further limited by NRS 35.030, which states that only the Attorney General, when
directed by the governor, may commence a quo warranto action.

1 *Heller* also outlines the ability of parties other than the Attorney General pursuant to quo
2 warranto to seek relief pursuant to the constitutional separation of powers issue. That is, “someone
3 with a ‘legally protectible interest’³ may seek declaratory and injunctive relief. *Id.* *Heller* merely
4 stands for the proposition that Plaintiff’s Complaint is procedurally proper (to the extent it has a
5 legally protectible interest, which is disputed). Other than the standing issue, the procedural options
6 set forth in *Heller* are not disputed in the Motion.

7
8 However, contrary to the main argument in the Opposition, *Heller* does not support its
9 position that the distinction between public officers and local government employees is not
10 important, or even dispositive on the separation of powers issue. *Heller* merely comments on the
11 appropriate procedure to raise the issue, and does not reach or even comment on the merits of the
12 distinction between public officers with sovereign powers and other executive branch employees.
13 Plaintiff’s sole argument rests on this misapplication of *Heller* and is fatal to their position.

14
15 B. The Issue Presented is Purely Legal, and the Precedent Supports Dismissal

16 The issue presented in the Motion, namely the application of the Article 3, Section 1 to local
17 government employees, is purely legal. The Opposition states, “the truth is that it is precisely for the
18 purpose-and only for the purpose-of having the Supreme Court settle these matters that NPRI filed its
19 Amended Complaint for both declaratory and injunctive relief in the district court seeking to exclude
20 legislators from employment with the executive branch”. See Motion at p. 7:12-16. This Court can
21 and should rule on this issue at the motion to dismiss stage, and Plaintiff can still get what it seeks:
22 “having the Supreme Court settle these matters”, in the event it chooses to appeal an adverse ruling.
23 It is not uncommon for a District Court to dismiss a complaint pursuant to NRCP 12(b)(5) and then,
24 upon appeal, have the Nevada Supreme Court determine that the dispositive issue, “is a matter of first
25 impression in Nevada”, and go on to uphold the dismissal. See e.g. *Knittle v. Progressive Cas. Ins.*
26 *Co.*, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996). Dismissal at the pleading stage is not dependent on
27

28 ³ Plaintiff is certainly not “a person seeking the executive branch position held by the legislator”,
and, as addressed below, does not have a legally protectible interest.

1 the Nevada Supreme Court having issued an on-point direct decision on the exact issue at hand. In
2 this case, however, there is more than sufficient law on the subject for this Court to make a decision
3 on this purely legal issue. Indeed, dismissal is warranted under the caselaw cited in the Motion.
4 Accepting all of the factual allegations of the complaint as true, there are no set of facts that Plaintiff
5 could prove that would entitle it to relief. Indeed the Opposition cites no factual issues that warrant
6 discovery, and it is unclear what they advocate as the proper time for the District Court to Rule on
7 this issue given that they believe the Nevada Supreme Court has not decided it. In fact, there is
8 ample precedent on this issue, all of which is essentially ignored in the Opposition.

9
10 C. Plaintiff Fails to Address the Cited Case Law Regarding Local Government
11 Employees, Which Support Dismissal

12 The Motion does not argue that the Nevada Supreme Court has squarely decided this issue.
13 Plaintiff rests on this proposition and fails to address the substantive legal arguments and case law set
14 forth in the Motion. Specifically, the wording of Nev. Const. Art. 3, § 1 itself, and the numerous
15 cases noting the distinction between state government and political subdivisions. *See* Motion p. 5:22-
16 9:17. That is because Plaintiff is unable to effectively distinguish or nullify those cases, which
17 support dismissal.

18
19 Plaintiff's conclusory attempt to distinguish *Fernley* and *City of Sparks* as "inapposite" fails.
20 *Fernley* makes clear the Nevada Supreme Court's recognition that there is a real distinction between
21 the branches of the Nevada's state government and the political subdivisions, such as counties,
22 specifically with respect to Article 3 of the Nevada Constitution. *City of Fernley v. State*, 132 Nev.
23 32, 366 P.3d 699 (2016). The Supreme Court states, "Further, the language of the separation of
24 powers provision in the Constitution does not extend any protection to political subdivisions. Nev.
25 Const. art. 3, § 1 ("The powers of the Government of the State of Nevada shall be divided into three
26 separate departments" *Id.* at 707. This is consistent with the Nevada Supreme Court decisions in
27 *Nunez* and *DR Partners*, also ignored in the Opposition. *Univ. & Cmty. Coll. Sys. v. DR Partners*,

1 117 Nev. 195, 203-04 (2001) ("Neither state-owned institutions, **nor state departments**, nor public
2 corporations are synonymous with political subdivisions of the state. (emphasis added); *Nunez v. City*
3 *of N Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000). Plaintiff cites no law suggesting that
4 political subdivision employees, such as Speaker Frierson, are a part of the executive branch of the
5 state of Nevada, at all.

6 Plaintiff also fails to address the other cited case law stating merely that such law
7 "significantly predates the Attorney General Opinion". See Opposition, p. 9:13-17. However, the
8 ignored case law is compelling on this issue, and the fact that it predates the Attorney General
9 Opinion is irrelevant. Specifically, *Mason* concluded that the actions of a board of county
10 commissioners was not subject to Nevada's separation of powers constitutional provision. This
11 reasoning translates downward to the employees of such political subdivisions. *State ex rel. Mason*
12 *v. Bd. of Cnty. Comm'rs*, 6 Nev. 392, 396-97 (1872).

14 The Opposition also fails to address or dispute the 2001 holding of *Harvey* which states,
15 "since Nevada relied upon the California Constitution as a basis for developing the Nevada
16 Constitution, it is appropriate for us to look to the California Supreme Court's interpretation of the ex
17 officio language in the California Constitution." *State ex rel. Harvey v. Second Judicial Dist. Ct.*, 117
18 Nev. 754, 763, 32 P.3d 1263, 1269 (2001). The key case of *Provines*, which analyzed an analogous
19 provision in the California Constitution and concluded that it did not apply to local governments, was
20 also ignored. *People ex rel. Att'y Gen. v. Provines*, 34 Cal. 520 (1868). "We understand the
21 Constitution to have been formed for the purpose of establishing a *State* Government; and we here
22 use the term 'State Government' in contradistinction to local, or to county or municipal
23 governments." *Id.* at 532 (emphasis original). Other cases are cited in the Motion with the same
24 findings and are also ignored. See Motion p. 8:3 – 9:8.

27 This Court can and should decide the issue of local government employees based on a fair
28 reading of the Constitutional provision itself, in conjunction with the cited case law, including but not

1 limited to California's thorough analysis of their analogous provision, and the Nevada Supreme
2 Court repeated pronunciations regarding the distinctions between state and local government.
3 Because local political subdivisions in this state are not included within one of the three departments
4 of state government, their officers and employees also are not part of one of the three departments of
5 state government. Thus, the separation of powers provision does not prohibit legislators from
6 holding positions of public employment with local governments. This ends the inquiry with regard to
7 Speaker Frierson and warrants dismissal. By Plaintiff's logic, this Court would have no ability to
8 make a decision, even after discovery, on this purely legal issue because the Nevada Supreme Court
9 has yet to address it directly on the merits. Again, the Nevada Supreme Court upholds dismissals
10 pursuant to NRCP 12(b) regularly on issues of first impression. Based on the cited case law, in
11 conjunction with the language of the constitutional provision itself, this Court should dismiss this
12 matter.
13

14
15 D. Plaintiff does not Have Standing

16 With respect to the issue of standing, Plaintiff does not have standing pursuant to the elements
17 set forth in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016). Speaker Frierson refers to and
18 incorporates the argument on that subject set forth in the Defendants Osvaldo Fumo, Heidi Seevers
19 Gansert, and Dina Neal's Reply to Plaintiff's Opposition to Motion to Dismiss, filed on October 16,
20 2020. *Id.* p. 3:16 – 6:10.
21

22 E. Plaintiff Failed to Include Necessary Parties

23 With respect to the issue of joinder of necessary parties, Speaker Frierson refers to and
24 incorporates the argument on that issue set forth in the Defendants Osvaldo Fumo, Heidi Seevers
25 Gansert, and Dina Neal's Reply to Plaintiff's Opposition to Motion to Dismiss, filed on October 16,
26 2020. *Id.* p. 8:8 – 9:2. Plaintiff should be required to join the necessary parties, or face dismissal.
27

28 \\\

1 **II. CONCLUSION**

2
3 For the reasons set forth above, Speaker Frierson respectfully request that his Motion to Dismiss
4 be granted as to all claims.

5 DATED this 10 day of November, 2020.

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8
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18 *Attorney for Defendants,*
19 *Jason Frierson and Nicole Cannizzaro*
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of WILEY PETERSEN, and the 12th day of November 2020, I caused to be served a true and correct copy of the foregoing **REPLY TO PLAINTIFFS OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT JASON FRIERSON AND JOINDERS THERETO FILED BY BRITTNEY MILLER AND SELENA TORRES** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

A handwritten signature in blue ink, appearing to read "Bautista", is written over a horizontal line.

An Employee of WILEY PETERSEN

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE,

Appellant,

vs.

NICOLE J. CANNIZZARO, an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; JASON FRIERSON, an individual engaging in dual employment with the Nevada State Assembly and Clark County Public Defender; HEIDI SEEVERS GANSERT, an individual engaging in dual employment with the Nevada State Senate and University of Nevada, Reno; GLEN LEAVITT, an individual engaging in dual employment with the Nevada State Assembly and Regional Transportation Commission; BRITTNEY MILLER, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; DINA NEAL, an individual engagement in dual employment with the Nevada State Senate and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defendant; MELANIE SCHEIBLE, an individual engagement in dual employment with the Nevada State Senate and Clark County District Attorney; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno;

Supreme Court Case No.: 82341

[District Court Case No.:
A-20-817757-C]

and SELENA TORRES, an individual
engaging in dual employment with the
Nevada State Assembly and Clark County
School District,

Respondents,

and Legislature of the State of Nevada,

Intervenor-Respondent.

JOINT APPENDIX VOLUME 4 of 7

Appeal from the Eighth Judicial District Court,
Orders Granting Motions to Dismiss and Joinders Thereto;
Order Granting Motion to Intervene; and Order Denying Motion to Disqualify
The Honorable Jim Crockett (Ret.), District Court Judge

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5	Affidavit of Service	9/16/2020	1	JA000020 – JA000022
6	Affidavit of Service	9/16/2020	1	JA000023 – JA000025
7	Notice of Voluntary Dismissal of Defendant Teresa Benitez-Thompson	9/17/2020	1	JA000026 – JA000028
8	Defendant Brittney Miller's Motion to Dismiss Complaint	9/18/2020	1	JA000029 – JA000054
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10	NSHE Defendants Fumo, Gansert, and Neal's Joinder in Defendant Brittney Miller's Motion to Dismiss Complaint	9/24/2020	1	JA000058 – JA000061
11	Plaintiff's Motion to Disqualify the Official Attorneys from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal	9/25/2020	1	JA000062 – JA000070
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23	Defendants Brittney Miller and Selena Torres's Joinder to Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal's Motion to Dismiss	10/6/2020	2	JA000253 – JA000255
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36	Defendant Nicole Cannizzaro's Joinder to Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5) and NRCP 12(b)(6)	10/19/2020	3	JA000358 – JA000360
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38	Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal's Opposition to Plaintiff's Ex Parte Application for Order Shortening Time to Hear Motion to Disqualify Official Attorneys and to Re-Set All Other Pending Matters	10/21/2020	3	JA000381 – JA000386
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42	Plaintiff's Opposition to Joinders to Defendant Brittney Miller's Motion to Dismiss Complaint filed by	11/2/2020	3	JA000425 – JA000428

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53	Plaintiff's Motion for the Court's Clarification of Its Decision to Grant Defendants' Motions to Dismiss Based on Plaintiff's Lack of Standing on Order Shortening Time	12/1/2020	4	JA000485 – JA000495
54	Order Denying Plaintiff's Motion for Order to Serve by Publication Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible	12/04/2020	4	JA000496 – JA000500
55	Joint Opposition to Plaintiff's Motion for the Court's Clarification of Its Decision to Grant Defendants' Motions to Dismiss Based on Plaintiff's Lack of Standing and Countermotion to Dismiss All Remaining Defendants Based on Plaintiff's Lack of Standing	12/7/2020	4	JA000501 – JA000510
56	Order Granting Nevada Legislature's Motion to Intervene as Defendant	12/08/2020	4	JA000511 – JA000538
57	Omnibus Order Granting Motions to Dismiss	12/08/2020	4	JA000539 – JA000556
58	Notice of Entry of Omnibus Order Granting Motions to Dismiss	12/08/2020	4	JA000557 – JA000577
59	Notice of Entry of Order Granting Nevada Legislature's Motion to Intervene as Defendant	12/8/2020	5	JA000578 – JA000608
60	Order Denying Plaintiff's Motion to Disqualify Official Attorneys	12/9/2020	5	JA000609 – JA000630
61	Notice of Entry of Order Denying Plaintiff's Motion to Serve by Publication Defendants Glen Leavitt,	12/9/2020	5	JA000631 – JA000638

Tab	Document	Date	Volume	Pages
	James Ohrenschall, and Melanie Scheible			
62	Notice of Entry of Order Denying Plaintiff's Motion to Disqualify Official Attorneys	12/9/2020	6	JA000639 – JA000664
63	Acceptance of Service	12/9/2020	6	JA000665 – JA000666
64	Affidavit of Publication	12/10/2020	6	JA000667
65	Affidavit of Publication	12/10/2020	6	JA000668
66	Affidavit of Publication	12/10/2020	6	JA000669
67	Plaintiff Nevada Policy Research Institute's: (1) Notice of Non-Opposition to Joint Countermotion to Dismiss All Remaining Defendants Based on Plaintiff's Lack of Standing, and (2) Limited Reply in Support of Motion for the Court's Clarification of Its Decision to Grant Defendants' Motions to Dismiss Based on Plaintiff's Lack of Standing	12/14/2020	6	JA000670 – JA000678
68	Court Minutes	12/15/2020	6	JA000679 – JA000680
69	Stipulation and Order to Vacate the Voluntary Dismissal of Defendant Jill Tolles Only and That the Parties Shall Be Bound By the Court's Prior Rulings	12/16/2020	6	JA000681 – JA000690
70	Order Denying Plaintiff's Motion for Clarification, Granting Joint Countermotion to Dismiss All Remaining Defendants Based on Plaintiff's Lack of Standing, and Entering Final Judgment in Favor of All Defendants Based on Plaintiff's Lack of Standing	12/28/2020	7	JA000691 – JA000719

Tab	Document	Date	Volume	Pages
71	Notice of Entry of Order Denying Plaintiff's Motion for Clarification, Granting Joint Countermotion to Dismiss All Remaining Defendants Based on Plaintiff's Lack of Standing, and Entering Final Judgment in Favor of All Defendants Based on Plaintiff's Lack of Standing	12/28/2020	7	JA000720 – JA000751
72	Notice of Appeal	1/8/2021	7	JA000752 – JA000754
73	Notice of Posting Bond	1/19/2021	7	JA000755 – JA000759

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 2021, I caused the foregoing to be served on all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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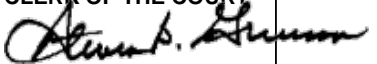
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA
DOUGLASSBOONE,
an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA
NEAL, an individual engaging in dual
employment with the Nevada State Assembly
and Nevada State College; JAMES

CASE No.: A-20-817757-C

DEPT. No.: 24

**REPLY TO PLAINTIFF'S
OPPOSITION TO NICOLE
CANNIZZARO'S MOTION TO
DISMISS**

OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZTHOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District, Defendants.

Defendant NICOLE CANNIZZARO (“Senator Cannizzaro”) submits this Reply in support of her Motion to Dismiss (the “Motion”). Specifically, this Reply responds to Plaintiff’s November 2, 2020 Opposition to the Motion (“Opposition”). Senator Cannizzaro is referred to at times collectively herein as “Movants”.

I. ARGUMENT

A. Plaintiff’s Main Argument is based on an Erroneous Interpretation of *Heller*

Plaintiff mistakenly argues that the Motion to Dismiss must be denied because it is based on “a legal conclusion for which there is no legal precedent.” *See* Opposition, p. 3:9. This is incorrect. Plaintiff then states that *Heller*, “unequivocally endorses the declaratory and injunctive relief actions alleged by NPRI against executive branch employees without sovereign power.” *Id.* at 8:20-22. However, this does not support denial of the Motion. The Nevada Supreme Court in *Heller* dismissed the case entirely on procedural and separation of powers grounds. *Secretary of State (Heller) v. Nevada State Legislature*, 120 Nev. 456, 93 P.3d 746, 757 (2004). The distinction

1 between public officers and others noted in *Heller* merely notes that quo warranto has very limited
2 application; it only applies to public offices with sovereign power.

3 A quo warranto action could be used to challenge any executive branch employees
4 **invested with sovereign power, who thereby occupy public offices within quo**
5 **warranto's exclusive reach.** And declaratory relief, possibly coupled with a request
6 for injunctive relief, could be sought against other executive branch employees.¹
7 *Heller* at 757 (emphasis added).

8 Indeed, *Heller* notes that quo warranto is codified in the Nevada Revised Statutes, and has its own
9 Chapter, NRS 35, which was enacted in 1911. The statute makes clear its limited application:

10 NRS 35.010 Action in name of State against **public officer**, association or usurper
11 of public office or franchise. A civil action may be brought in the name of the State:

12 1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a
13 **public office**, civil or military, except the office of Assemblyman, Assemblywoman
14 or State Senator, or a franchise, within this state, or an officer in a corporation created
15 by the authority of this state.

16 2. Against a **public officer**, civil or military, except the office of Assemblyman,
17 Assemblywoman or State Senator, who does or suffers an act which, by the provisions
18 of law, works a forfeiture of the office. (emphasis added).

19 *Heller* does not take a position on whether the Nevada Constitution's separation of powers provision
20 applies to local government employees, it merely notes that quo warranto is a limited remedy with
21 exclusive reach.² *Heller* simply outlines possible appropriate procedural avenues of remedy for
22 those that don't fit that description (i.e. non-public officers) but does not analyze the issue or reach
23 the merits of such a claim. *Heller* notes, "quo warranto is not only an adequate remedy to challenge a
24 person's right to hold public office, it is the exclusive remedy". *Id.* at 751. Local government
25 employees, such as Senator Cannizzaro, do not hold executive branch public offices, and therefor quo
26 warranto would not be an available remedy to remove her from her job.

27 ¹ Plaintiff makes no argument, and cites no authority for its implied position that Senator Cannizzaro
28 is an executive branch employee at all. The Motion cites plenty of law for the proposition that local
government employees are not executive branch employees.

² Quo Warranto is further limited by NRS 35.030, which states that only the Attorney General, when
directed by the governor, may commence a quo warranto action.

1 *Heller* also outlines the ability of parties other than the Attorney General pursuant to quo
2 warranto to seek relief pursuant to the constitutional separation of powers issue. That is, “someone
3 with a ‘legally protectible interest’³ may seek declaratory and injunctive relief. *Id.* *Heller* merely
4 stands for the proposition that Plaintiff’s Complaint is procedurally proper (to the extent it has a
5 legally protectible interest, which is disputed). Other than the standing issue, the procedural options
6 set forth in *Heller* are not disputed in the Motion.
7

8 However, contrary to the main argument in the Opposition, *Heller* does not support its
9 position that the distinction between public officers and local government employees is not
10 important, or even dispositive on the separation of powers issue. *Heller* merely comments on the
11 appropriate procedure to raise the issue, and does not reach or even comment on the merits of the
12 distinction between public officers with sovereign powers and other executive branch employees.
13 Plaintiff’s sole argument rests on this misapplication of *Heller* and is fatal to their position.
14

15 B. The Issue Presented is Purely Legal, and the Precedent Supports Dismissal

16 The issue presented in the Motion, namely the application of the Article 3, Section 1 to local
17 government employees, is purely legal. The Opposition states, “the truth is that it is precisely for the
18 purpose-and only for the purpose-of having the Supreme Court settle these matters that NPRI filed its
19 Amended Complaint for both declaratory and injunctive relief in the district court seeking to exclude
20 legislators from employment with the executive branch”. *See* Motion at p. 7:12-16. This Court can
21 and should rule on this issue at the motion to dismiss stage, and Plaintiff can still get what it seeks:
22 “having the Supreme Court settle these matters”, in the event it chooses to appeal an adverse ruling.
23 It is not uncommon for a District Court to dismiss a complaint pursuant to NRCP 12(b)(5) and then,
24 upon appeal, have the Nevada Supreme Court determine that the dispositive issue, “is a matter of first
25 impression in Nevada”, and go on to uphold the dismissal. *See e.g. Knittle v. Progressive Cas. Ins.*
26 *Co.*, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996). Dismissal at the pleading stage is not dependent on
27

28 ³ Plaintiff is certainly not “a person seeking the executive branch position held by the legislator”,
and, as addressed below, does not have a legally protectible interest.

1 the Nevada Supreme Court having issued an on-point direct decision on the exact issue at hand. In
2 this case, however, there is more than sufficient law on the subject for this Court to make a decision
3 on this purely legal issue. Indeed, dismissal is warranted under the caselaw cited in the Motion.
4 Accepting all of the factual allegations of the complaint as true, there are no set of facts that Plaintiff
5 could prove that would entitle it to relief. Indeed the Opposition cites no factual issues that warrant
6 discovery, and it is unclear what they advocate as the proper time for the District Court to Rule on
7 this issue given that they believe the Nevada Supreme Court has not decided it. In fact, there is
8 ample precedent on this issue, all of which is essentially ignored in the Opposition.

9
10 C. Plaintiff Fails to Address the Cited Case Law Regarding Local Government
11 Employees, Which Support Dismissal

12 The Motion does not argue that the Nevada Supreme Court has squarely decided this issue.
13 Plaintiff rests on this proposition and fails to address the substantive legal arguments and case law set
14 forth in the Motion. Specifically, the wording of Nev. Const. Art. 3, § 1 itself, and the numerous
15 cases noting the distinction between state government and political subdivisions. *See* Motion p. 5:22-
16 9:17. That is because Plaintiff is unable to effectively distinguish or nullify those cases, which
17 support dismissal.
18

19 Plaintiff's conclusory attempt to distinguish *Fernley* and *City of Sparks* as "inapposite" fails.
20 *Fernley* makes clear the Nevada Supreme Court's recognition that there is a real distinction between
21 the branches of the Nevada's state government and the political subdivisions, such as counties,
22 specifically with respect to Article 3 of the Nevada Constitution. *City of Fernley v. State*, 132 Nev.
23 32, 366 P.3d 699 (2016). The Supreme Court states, "Further, the language of the separation of
24 powers provision in the Constitution does not extend any protection to political subdivisions. Nev.
25 Const. art. 3, § 1 ("The powers of the Government of the State of Nevada shall be divided into three
26 separate departments" *Id.* at 707. This is consistent with the Nevada Supreme Court decisions in
27 *Nunez* and *DR Partners*, also ignored in the Opposition. *Univ. & Cmty. Coll. Sys. v. DR Partners*,

1 117 Nev. 195, 203-04 (2001) ("Neither state-owned institutions, **nor state departments**, nor public
2 corporations are synonymous with political subdivisions of the state. (emphasis added); *Nunez v. City*
3 *of N Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000). Plaintiff cites no law suggesting that
4 political subdivision employees, such as Senator Cannizzaro, are a part of the executive branch of the
5 state of Nevada, at all.

6 Plaintiff also fails to address the other cited case law stating merely that such law
7 "significantly predates the Attorney General Opinion". See Opposition, p. 9:13-17. However, the
8 ignored case law is compelling on this issue, and the fact that it predates the Attorney General
9 Opinion is irrelevant. Specifically, *Mason* concluded that the actions of a board of county
10 commissioners was not subject to Nevada's separation of powers constitutional provision. This
11 reasoning translates downward to the employees of such political subdivisions. *State ex rel. Mason*
12 *v. Bd. of Cnty. Comm'rs*, 6 Nev. 392, 396-97 (1872).

13 The Opposition also fails to address or dispute the 2001 holding of *Harvey* which states,
14 "since Nevada relied upon the California Constitution as a basis for developing the Nevada
15 Constitution, it is appropriate for us to look to the California Supreme Court's interpretation of the ex
16 officio language in the California Constitution." *State ex rel. Harvey v. Second Judicial Dist. Ct*, 117
17 Nev. 754, 763, 32 P.3d 1263, 1269 (2001). The key case of *Provines*, which analyzed an analogous
18 provision in the California Constitution and concluded that it did not apply to local governments, was
19 also ignored. *People ex rel. Att'y Gen. v. Provines*, 34 Cal. 520 (1868). "We understand the
20 Constitution to have been formed for the purpose of establishing a *State Government*; and we here
21 use the term 'State Government' in contradistinction to local, or to county or municipal
22 governments." *Id.* at 532 (emphasis original). Other cases are cited in the Motion with the same
23 findings and are also ignored. See Motion p. 8:3 – 9:8.

24 This Court can and should decide the issue of local government employees based on a fair
25 reading of the Constitutional provision itself, in conjunction with the cited case law, including but not
26

1 limited to California's thorough analysis of their analogous provision, and the Nevada Supreme
2 Court repeated pronunciations regarding the distinctions between state and local government.
3 Because local political subdivisions in this state are not included within one of the three departments
4 of state government, their officers and employees also are not part of one of the three departments of
5 state government. Thus, the separation of powers provision does not prohibit legislators from
6 holding positions of public employment with local governments. This ends the inquiry with regard to
7 Senator Cannizzaro and warrants dismissal. By Plaintiff's logic, this Court would have no ability to
8 make a decision, even after discovery, on this purely legal issue because the Nevada Supreme Court
9 has yet to address it directly on the merits. Again, the Nevada Supreme Court upholds dismissals
10 pursuant to NRCP 12(b) regularly on issues of first impression. Based on the cited case law, in
11 conjunction with the language of the constitutional provision itself, this Court should dismiss this
12 matter.
13

14
15 D. Plaintiff does not Have Standing

16 With respect to the issue of standing, Plaintiff does not have standing pursuant to the elements
17 set forth in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016). Senator Cannizzaro refers to and
18 incorporates the argument on that subject set forth in the Defendants Osvaldo Fumo, Heidi Seevers
19 Gansert, and Dina Neal's Reply to Plaintiff's Opposition to Motion to Dismiss, filed on October 16,
20 2020. *Id.* p. 3:16 – 6:10.
21

22 E. Plaintiff Failed to Include Necessary Parties

23 With respect to the issue of joinder of necessary parties, Senator Cannizzaro refers to and
24 incorporates the argument on that issue set forth in the Defendants Osvaldo Fumo, Heidi Seevers
25 Gansert, and Dina Neal's Reply to Plaintiff's Opposition to Motion to Dismiss, filed on October 16,
26 2020. *Id.* p. 8:8 – 9:2. Plaintiff should be required to join the necessary parties, or face dismissal.
27

28 \ \ \

1 **II. CONCLUSION**

2
3 For the reasons set forth above, Senator Cannizzaro respectfully requests that her Motion to
4 Dismiss be granted as to all claims.

5 DATED this 12th day of November, 2020.
6
7

8 /s/ Jonathan D. Blum
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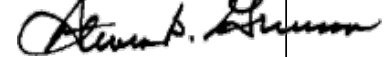
17 *Attorney for Defendants,*
18 *Jason Frierson and Nicole Cannizzaro*
19
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28

CERTIFICATE OF SERVICE

I hereby certify that I an employee of WILEY PETERSEN, and the 12th day of November 2020, I caused to be served a true and correct copy of the foregoing **REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT NICOLE CANNIZZARO AND JOINDERS THERETO FILED BY BRITTNEY MILLER AND SELENA TORRES** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

/s/ Ivette Bautista
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15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**PLAINTIFF'S REPLY IN SUPPORT
OF MOTION TO DISQUALIFY THE
OFFICIAL ATTORNEYS FROM
REPRESENTING DEFENDANTS
OSVALDO FUMO, HEIDI SEEVERS
GANSERT AND DINA NEAL**

Date of Hearing: November 19, 2020

Time of Hearing: 9:00 a.m.

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 NEVADA POLICY RESEARCH INSTITUTE (“NPRI”), by and through its attorneys of
13 record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby
14 submits its Reply in Support of Plaintiff’s Motion to Disqualify the Official Attorneys From
15 Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal, to which the
16 interested NSHE Defendants filed an Opposition (“Motion to Disqualify,” “Opposition,” and
17 “Reply,” respectively). The Reply is based on this Memorandum of Points and Authorities, the
18 papers and pleadings already on file, and any argument the Court may permit at a hearing thereof.

19 Dated this 12th day of November, 2020.

20 **FOX ROTHSCHILD LLP**

21
22 By: /s/ Deanna L. Forbush

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Attorneys for Plaintiff

Nevada Policy Research Institute

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This is the last brief NPRI will file before the Court's hearing of all pending matters on
5 November 19, 2020. And it will likely be one of the earliest reviewed if, as expected, the Court
6 begins its analysis by taking up the issue of the necessary disqualification of NSHE's in-house
7 counsel. For this reason, NPRI respectfully submits for the Court's ease of reference the
8 demonstrative chart attached hereto as **Exhibit 1**, which sets forth each pending matter and its
9 related briefing deadlines.

10 NPRI brought the instant case for the sole purpose of settling the issue of what constitutes
11 unconstitutional dual employment under the Separation of Powers clause of the Nevada Constitution.
12 The Court will simply need to make the necessary legal determination at the appropriate time, and,
13 in turn, the Nevada Supreme Court will presumably do the same. Despite the myriad of protests by
14 Defendants to the contrary, no misstatements of statutes or tactical advantages have been necessary
15 or utilized. On the contrary, NPRI has timely filed all responsive briefs, including the instant Reply,
16 and thereby clearly demonstrated: (1) its standing to bring the instant lawsuit, pursuant to the public-
17 importance exception to the particularized harm requirement set forth in *Schwartz v. Lopez*, 132 Nev.
18 732, 743, 382 P.3d 886, 894 (2016), and (2) its authority to assert claims for declaratory and
19 injunctive relief against those executive branch employees engaging in dual employment, pursuant to
20 the holding in *Secretary of State (Heller) v. Nevada State Legislature*, 120 Nev. 456, 472, 93 P.3d
21 746, 757 (2004).

22 The foregoing will permit the Court to quickly deny the 4 pending motions to dismiss and 8
23 joinders thereto, which leaves only the issues of whether the Nevada Legislature will be allowed to
24 intervene as a separate Defendant and, as addressed herein, whether the two in-house counsel for
25 NSHE institutions will be allowed to represent the NSHE Defendants going forward. Specifically,
26 Defendants Fumo, Gansert and Neal are currently represented by NSHE in-house counsel who are
27 seeking to serve as "Official Attorneys," pursuant to NRS 41.0338(2)(b). Each Defendant, however,
28 has been sued solely as a result of his or her individual action to engage in dual employment in

1 violation of the Separation of Powers clause of the Nevada Constitution, not it any official capacity
2 that would constitute a circumstance under which an official government attorney is permitted to
3 provide a defense. Accordingly, NSHE counsel should be immediately disqualified.

4 II.

5 ARGUMENT

6 Contrary to the NSHE Defendants' Opposition, there can be no doubt disqualification of the
7 NSHE counsel is appropriate, if not imperative, to avoid the appearance of impropriety and public
8 suspicion in the instant case. First, the statutory definition of an "official attorney" who may provide
9 a defense to a State employee limits that representation to cases where the employee "is named as a
10 defendant solely because of an alleged act or omission relating to the public duties or employment"
11 of the employee. *See* NRS 41.0338(2)(b) (emphasis added). On the contrary, in the instant case the
12 Defendants were named solely because of their individual decisions to serve in the Nevada State
13 Legislature while also being employed by a State or local government. Nothing about the
14 controversy at issue involves any actual act or omission relating to the carrying out of the NSHE
15 Defendants' public duties.

16 Second, the Supreme Court gives district courts "broad discretion to determine whether
17 disqualification of counsel is required." *Willmes v. Reno Mun. Ct.*, 118 Nev. 831, 836, 59 P.3d
18 1197, 1200 (2002). Specifically, district courts "are responsible for controlling the conduct of
19 attorney's practicing before them and have broad discretion in determining whether disqualification
20 is required in a particular case." *Brown v. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269
21 (2000). Such decisions involve "the delicate and sometimes difficult task of balancing competing
22 interests," which include "the public's interest in the scrupulous administration of justice." *Id.*, 116
23 Nev. at 1205, 14 P.3d at 1269-70. And, doubts should generally be resolved in favor of
24 disqualification, absent some misuse of the motion for harassment or delay. *Id.* (emphasis added).

25 In their Opposition, the NSHE Defendants reference, but fail to analyze, the entirely
26 analogous Supreme Court holding earlier this year in *State of Nevada ex rel. Cannizzaro v. First Jud.*
27 *Dist. Ct.*, 136 Nev. Adv. Op. 34 (June 26, 2020). In its decision, the Supreme Court ruled that
28 certain State Legislators were not entitled to representation by Legislative Counsel Bureau attorneys,

1 and thus there was no conflict of interest in their lawsuit against other State Legislators, because
2 their action in challenging a piece of legislation could not be considered acting on the Legislature's
3 behalf. As the decision makes clear, the official attorney's client is the entity he or she represents,
4 and representation of individuals can only occur where they are alleged to have been acting in their
5 official capacities. *Id.* at *3. Applying the Supreme Court's reasoning to the instant litigation, then,
6 the NSHE attorneys represent their respective NSHE institutions and may only represent an
7 employee of the institution if that employee is being sued for an action taken on behalf of the
8 institution. This is simply not the case in the instant lawsuit.

9 More importantly, and again contrary to the argument of the NSHE Defendants in their
10 Opposition, the statute that specifically authorizes an official attorney to provide a defense to a State
11 employee does not permit representation in the instant case. Under that statute, representation is
12 limited to a defendant named in the civil action "solely because of an alleged act or omission relating
13 to the public duties or employment" of the employee and where the "act or omission on which the
14 action is based appears to be within the course and scope of public duty or employment and appears
15 to have been performed or omitted in good faith." *See* NRS 41.0339(1)(b). Again, the instant
16 litigation seeks only to challenge the fact of each Defendant's executive branch employment, not any
17 action taken because of such employment. As such, Defendants may not properly be considered
18 clients of NSHE counsel.

19 Finally, to the extent the NSHE Defendants seek to defeat NPRI's Motion to Disqualify by
20 challenging its standing and legally protectable interest in the instant action, NPRI opposes such
21 arguments in their entirety by adopting by reference and incorporating herein Sections IV(A) and (B)
22 of its Opposition to Defendant Miller's Motion to Dismiss and the Joinders thereto. *See* Opposition
23 to Motion to Dismiss Filed by Defendant Brittney Miller at 6:3-11:13, filed October 2, 2020.

24 **III.**

25 **CONCLUSION**

26 For the foregoing reasons, NPRI respectfully requests this Court enter an order disqualifying
27 NSHE counsel from future representation of Defendants Fumo, Gansert and Neal. NPRI further
28 requests the Court include in the order the requirement that Defendants Fumo, Gansert and Neal, to

1 the extent they do not wish to engage in self-representation, retain new counsel at their own expense
2 within a reasonable time certain.

3 Dated this 12th day of November, 2020.

FOX ROTHSCHILD LLP

4

5

6

By: /s/ Deanna L. Forbush
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Nevada Policy Research Institute

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 12th day of November, 2020, I caused the foregoing document entitled **PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO DISQUALIFY OFFICIAL ATTORNEYS FROM REPRESENTING DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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Nicole Cannizzaro*

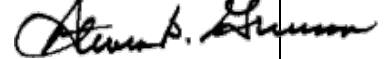
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/s/ Natasha Martinez

An Employee of Fox Rothschild LLP

Exhibit 1

Document	Party	Dated Served	Response Due	Reply Due	Hearing
Motion to Dismiss	Miller	9/18/20	10/2/20	11/12/20	11/19/20
Motion to Dismiss	Fumo, Gansert and Neal	9/24/20	10/8/20	11/12/20	11/19/20
Joinder to Motion to Dismiss (Miller)	Fumo, Gansert, and Neal	9/24/20	10/2/20	11/12/20	11/19/20
Motion to Disqualify Official Attorneys from Representing Fumo, Gansert, and Neal	NPRI	9/25/20	10/9/20	11/12/20	11/19/20
Motion for Order to Serve by Publication Leavitt, Ohrenschall, and Scheible	NPRI	9/29/20, refiled 10/20/20	11/3/20	N/A (ORDG filed 11/4)	N/A
Motion to Intervene as Defendant	NV Legislature	9/30/20	10/14/20 (errata filed 10/22/20)	11/12/20 (actually filed 10/21/20)	11/19/20
Motion to Dismiss	Frierson	10/5/20	10/19/20	11/12/20	11/19/20
Joinder to Motion to Dismiss (Fumo, et al.)	Frierson	10/5/20	10/19/20 (actually filed 10/8/2020)	11/12/20	11/19/20
Joinder to Motion to Dismiss (Miller)	Frierson	10/5/20	10/19/20	11/12/20	11/19/20
Joinder to Motion to Dismiss (Miller)	Torres	10/6/20	10/20/20 (actually filed 11/2/20)	11/12/20	11/19/20
Joinder to Motion to Dismiss (Fumo, et al.)	Miller and Torres	10/6/20	10/20/20 (actually filed 10/8/20)	11/12/20	11/19/20
Joinder to Motion to Dismiss (Frierson)	Miller and Torres	10/6/20	10/20/20 (actually filed 10/19/20)	11/12/20	11/19/20
Motion to Dismiss	Cannizzaro	10/19/20	11/2/20	11/12/20	11/19/20
Joinder to Motion to Dismiss (Miller)	Cannizzaro	10/19/20	11/2/20	11/12/20	11/19/20
Joinder to Motion to Dismiss (Fumo, et al.)	Cannizzaro	10/19/20	11/2/20	11/12/20	11/19/20



RPLY

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Attorneys for Defendants,

Brittney Miller and Selena Torres

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,

v s .

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA DOUGLASS-
BOONE, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and. Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA

Case No. A-20-817757-C
Dept. No.: 24

**DEFENDANT BRITTNEY MILLER'S
REPLY IN SUPPORT OF MOTION TO
DISMISS, AND DEFENDANT SELENA
TORRES' JOINDER THERETO**

**HEARING DATE: November 19, 2020
HEARING TIME: 9:00 a.m.**

1 NEAL, an individual engaging in dual
2 employment with the Nevada State Assembly
and Nevada State College; JAMES
3 OHRENSCHALL, an individual engaging in
dual employment with the Nevada State
4 Senate and Clark County Public Defender;
MELANIE SCHEIBLE an individual
5 engaging in dual employment with the
Nevada State Senate and Clark County
6 District Attorney; TERESA BENITEZ-
THOMPSON, an individual engaging in dual
7 employment with the Nevada State Assembly
and University of Nevada, Reno; JILL
8 TOLLES, an individual engaging in dual
9 employment with the Nevada State Assembly
and University of Nevada, Reno; and
10 SELENA TORRES, an individual engaging
11 in dual employment with the Nevada State
Assembly and Clark County School District,
12
13 Defendants.

14
15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 To avoid duplication and repetition, Defendant Miller here incorporates the arguments
17 regarding the failure of Plaintiff the Nevada Policy Research Institute (“NPRI”) to establish
18 standing to maintain the present suit found in the replies to their own motions to dismiss of
19 Defendants Fumo, Gansert, and Neal (section II.A. of their reply brief, filed on October 16,
20 2020). Ms. Miller will, however, note for the Court below the aspects of NPRI’s opposition brief
21 that require attention and, in truth, require grant of the motion to dismiss.

22 As a statement of NPRI’s political aspirations, the opposition brief is adequate; as a
23 legal argument establishing standing to bring its case, however, it fails abjectly. NPRI cannot and
24 does not establish—as it is required to do—that it has standing in this matter. “The burden of
25 demonstrating a particularized injury and thus establishing standing falls to the parties bringing
26 the suit.” *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). Its stated injuries are
27 speculative and not particularized beyond that which could be asserted on behalf of the public at
28 large; its attempts to squeeze into the *Schwartz* particularized-injury requirement are not

persuasive; and its claims to state its own “organizational and associational injuries-in-fact” do more to convince the Court to dismiss than they do to further NPRI’s case. To their partial credit, NPRI realizes this. After a tortured analysis under the factors of the *Schwartz* exception, “NPRI respectfully requests this Court employ its prudential discretion to expand the application of the public interest exception...” Opp., at 9. To the Court’s experienced ears this lands exactly as it ought to, as a plea for the Court to make law instead of enforce it, to create grounds for exception to the particularized-injury requirement where none exists, and to rush beyond the bounds of the Nevada Supreme Court’s decision in *Schwartz*. The Court knows this would be beyond its ken, and should reject NPRI’s improper invitation. If the Nevada Supreme Court desires to recognize the sort of standing NPRI is grasping for here, it can and will say exactly that in due time, but until then the Court is bound by the law and, therefore, dismissal is appropriate.

I. ARGUMENT

A. NPRI’s Complaint Is Not Immune To Dismissal At This Stage

NPRI’s first gambit is to claim that “the Court obviously cannot make... key factual determinations without the parties putting forth evidence, which is fatal to a request for dismissal...” Opp., at 3. This makes no sense. As stated, it is NPRI’s responsibility to establish its standing in the case. In NPRI’s logic, no complaint could be dismissed on standing grounds if a plaintiff simply pleads that it has standing. That sort of circular reasoning is not sufficient as a defense to a standing challenge. Lack of standing is a jurisdictional defect and may be challenged under Rule 12(b)(1), it is not akin to a summary judgment analysis ferreting out undisputed or disputed material facts germane to the judgment in the case. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326 (1986).

B. NPRI Cannot Meet The Elements Of The *Schwartz* Exception

The recently-announced public interest exception to Nevada’s longstanding requirement of particularized injury is available to few litigants, in very narrow circumstances, and only if the following criteria are met:

First, the case must involve an issue of significant public importance. Second, the case must involve a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution. And

1 third, the plaintiff must be an ‘appropriate’ party, meaning that there is no one
2 else in a better position who will likely bring an action and that the plaintiff is
capable of fully advocating his or her position in court.

3 *Schwartz*, 132 Nev. at 743. Let us grant, *arguendo*, the first prong, that this is a matter of public
4 importance, in interests of brevity. NPRI cannot meet the remaining, exacting elements of the
5 exception, something its opposition brief makes abundantly clear.

6 First, NPRI asserts, against all reason, that its “challenge to a legislative expenditure or
7 appropriation” is, in fact, based upon legislators’ daily salary in-session or their per diem
8 allowances, or allowances for postage or travel. Again, this makes no sense. NPRI has stated it is
9 not suing these individuals as legislators or in their legislative capacities; it cannot, therefore,
10 claim legislative allowances to legislators as the monies they are challenging in their action, in
11 order to establish standing. Indeed, NPRI has not sued the Legislature to enjoin these allowances.
12 It has not sued whatever governmental organ disburses these funds—probably the Legislative
13 Counsel Bureau, to enjoin Ms. Miller’s salary or postage allowance for the upcoming legislative
14 session. It does not identify these as the “expenditures or appropriations” it is targeting by this
15 suit, or the statutes or rules that permit or require them, as it is required to do by the express
16 language in *Schwartz*. Its precise allegations regarding these allowances—made for the first time
17 in its opposition to the motion—are entirely divorced from the framing of the lawsuit. Having
18 disclaimed and excluded Ms. Miller’s teacher’s salary as the basis for its challenge—which,
19 although implausible and unlikely to succeed as an alternative basis for standing, but at least had
20 the veneer or arguability—there is nothing left for NPRI to grab onto as a hook for establishing
21 its standing under *Schwartz*.

22 Second, NPRI claims it is, in fact, the only appropriate party to bring the present suit,
23 despite its long history of litigation with individual plaintiffs that may, in fact, be able to claim
24 injury. It argues, essentially, that it would be “implausible” or inconvenient to require them to
25 put up, as the Nevada Supreme Court has already counseled, “someone with a legally protectible
26 interest, such as a person seeking the executive branch position held by the legislator.” *Heller v.*
27 *Legislature*, 120 Nev. 456, 472-473, 93 P.3d 746, 757 (2004). But NPRI immediately
28 undermines its own argument in a succeeding section of the brief by telling this Court that it has

1 “a number of supporters [whom] are duly qualified, hold the job requirements for, and earnestly
2 seek the paid positions with state or local government held by Defendants.” Opp., at 11. So it has
3 identified, or can, the very sorts of prospective plaintiffs this kind of suit requires in order to
4 proceed, but it will not deign to bring them forward because there are so many defendants in this
5 action. There are no shortcuts to standing; litigants either do the necessary work to structure their
6 complaints properly, or they do not. NPRI has chosen not to, apparently deliberately.

7 **C. NPRI Has No Organizational or Associational Standing**

8 In an attempt to avoid the consequences of being on the wrong side of a *Schwartz* public-
9 interest standing analysis, NPRI alternatively claims associational standing. This is the section,
10 of course, where it claims to have members who could, but will not, serve as plaintiffs in this
11 matter, so immediately the arguments work at cross-purposes. Despite its claims, no one forced
12 NPRI to “divert resources” from its other political interests in order to pursue this suit; it was its
13 own choice, as was every other aspect of this action. Furthermore, associational standing is not a
14 doctrine in Nevada; if it were, it is presumed NPRI would have cited a case in its favor. It did
15 not, not a single one.

16 Standing “consists of both a case or controversy requirement stemming from Article III,
17 Section 2 of the Constitution, and a subconstitutional prudential element.” *In re AMERCO*
18 *Derivative Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011). While Nevada state courts do
19 not have a strict requirement of constitutional Article III standing, “Nevada has a long history of
20 requiring an actual justiciable controversy as a predicate to judicial relief.” *Doe v. Bryan*, 102
21 Nev. 523, 525, 728 P.2d 443, 444 (1986). “The question of standing concerns whether the party
22 seeking relief has a sufficient interest in the litigation.” *Schwartz*, 132 Nev. at 743 (citing
23 *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983)).

24 NPRI here cannot achieve “associational” standing in these circumstances, and cannot
25 meet the *Schwartz* exception. It has no standing to sue, period.

26 **D. NPRI Has Not Complied With NRS 41.0337**

27 NPRI’s response to this issue is part and parcel of the shell game they are playing with
28 this Court regarding legal representation of certain Defendants. NPRI claims not to be suing

1 Defendants in their legislative capacity, but also not to be suing them in their official capacities
2 as purported employees in a co-ordinate branch. Instead, NPRI wants the Court to create and/or
3 recognize a wholly-novel third category, individuals who are alleged to be operating in more
4 than one branch of government but liable to suit as members of no branch at all, simply
5 suspended in animation so that NPRI can pick and choose which aspects of either capacity that
6 may suit them in framing their pleadings.

7 NRS 41.0337(2) states that:

8 No tort action may be brought against a person who is named as a defendant in the action
9 solely because of an alleged act or omission relating to the public duties or employment
of any present or former:

- 10 (a) Local judicial officer or state judicial officer;
11 (b) Officer or employee of the State or of any political subdivision;
12 (c) Immune contractor; or
13 (d) State Legislator

unless the State or appropriate political subdivision is named a party defendant
under NRS 41.031.

14 NRS 41.0337(2). It does no good for NPRI to claim it is not suing over acts or omissions—of
15 course they are. The pertinent constitutional language expressly states that “no persons charged
16 with the exercise of powers properly belonging to one of these departments shall exercise any
17 functions, appertaining to either of the others, except in the cases expressly directed or permitted
18 in this constitution.” Nev. Const. art. 3, sec. 1. Look at that text: as a basic matter of logic, the
19 only persons who could imaginably be sued pursuant to the section are those *exercising powers*,
20 i.e., doing things and committing acts in their respective capacities. In fact, if NPRI continues to
21 claim they are not suing on the basis of any acts or omissions, it obviously fails to state a claim
22 pursuant to the text of the state constitution.

23 NPR does not get to walk through the raindrops and say they have fashioned a new legal
24 category that both states a claim and confers them standing. NPRI was and is required to name
25 the respective political subdivisions in their suit, and it has not done so, therefore its suit cannot
26 proceed as pled.

27 ///

28

1 **II. JOINDER**

2 Defendant Selena Torres joins in this reply generally, and in the arguments advanced
3 herein.

4 **III. CONCLUSION**

5 NPRI does not have standing to pursue its case, and has not named the pertinent political
6 subdivisions even if it could claim standing to sue. The action should be dismissed.

7
8 DATED this 12th day of November, 2020

9 **WOLF, RIFKIN, SHAPIRO,**
10 **SCHULMAN & RABKIN, LLP**

11 By: /s/ Bradley Schrager
12 BRADLEY SCHRAGER, ESQ. (SBN 10217)
13 DANIEL BRAVO, ESQ. (SBN 13078)
14 3556 E. Russell Road, Second Floor
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16 (702) 341-5200/Fax: (702) 341-5300

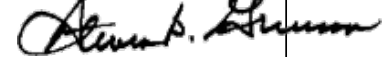
17 *Attorneys for Defendants,*
18 *Brittney Miller and Selena Torres*
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2020, a true and correct copy of the foregoing **DEFENDANTS BRITTNEY MILLER AND SELENA TORRES’S REPLY IN SUPPORT OF MOTION TO DISMISS** was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an email address on record, pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

By: /s/ Dannielle Fresquez
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
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NVDP

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Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**NOTICE OF VOLUNTARY
DISMISSAL OF DEFENDANTS
OSVALDO FUMO AND JILL TOLLES**

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 Plaintiff, Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record,
13 Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby voluntarily
14 dismisses Defendants, Osvaldo Fumo and Jill Tolles, only from the above-captioned litigation,
15 without prejudice, pursuant to NRC 41(a)(1).

16 Dated this 16th day of November, 2020.

FOX ROTHSCHILD LLP

17
18
19 By: /s/ Deanna L. Forbush

DEANNA L. FORBUSH

Nevada Bar No. 6646

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Telephone: (702) 262-6899

Attorneys for Plaintiff

Nevada Policy Research Institute

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 16th day of November, 2020, I caused the above and foregoing document entitled **NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANTS OSVALDO FUMO AND JILL TOLLES** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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Heidi Seevers Gansert and Dina Neal*

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Heidi Seevers Gansert and Dina Neal*

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*Attorneys for Defendant Jason Frierson and
Nicole Cannizzaro*

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Email: kpowers@lcb.state.nv.us
Attorneys for Nevada Legislature

/s/ Natasha Martinez

An Employee of Fox Rothschild LLP

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Matters

COURT MINUTES

November 18, 2020

A-20-817757-C Nevada Policy Research Institute, Plaintiff(s)
vs.
Nicole Cannizzaro, Defendant(s)

November 18, 2020 03:00 AM Minute Order

HEARD BY: Crockett, Jim COURTROOM: Phoenix Building 11th Floor 116

COURT CLERK: Lord, Rem

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

Plaintiff's Motion to Disqualify the Official Attorneys from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal on Order Shortening Time

Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by 11/16/2020 by the parties without oral argument since the court deems oral argument unnecessary.

Plaintiff says Official Attorneys should be disqualified because Defendants were not sued based upon anything they did in their official capacity but instead are sued for alleged violation of constitution prohibition against dual employment in violation of Article 3 of the Nevada Constitution.

10/9/20 Opposition says Nevada Policy Research Institute lacks standing to even bring this Motion because it cannot demonstrate particularized harm beyond that of any ordinary taxpayer and since standing is a jurisdictional matter, this motion must be denied. Opposition further contends that it is by virtue of the fact that Defendants are government employees that they were sued and Official attorneys are not prohibited from representing them and may choose to represent if so requested. . The simple fact is that Official Attorney is a duly authorized legal counsel who is not prohibited from representing the Defendants so this Motion to Disqualify is DENIED. Defendants to submit the Order. COURT FURTHER ORDERED, 11/19/20 hearing VACATED and matter SET for Status Check.

Defendant Nicole Cannizzaro's Motion to Dismiss

Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by 11/16/2020 by the parties without oral argument since the court deems oral argument unnecessary. Standing is the controlling issue here and while other issues are discussed, standing is the determinative issue above all else. Nevada Policy Research Institute simply lacks standing to bring this suit. It is an organization, rather than a particularly-aggrieved individual, harmed by any alleged dual employment. It is quite clear that Nevada Policy Research Institute does not allege any particularized harm beyond that of any ordinary taxpayer and that is simply not enough to give standing to Nevada Policy Research Institute to bring this suit. Nevada Policy Research Institute's Opposition does not make persuasive arguments regarding standing, suggesting that an evidentiary hearing would need to be conducted but not offering any theory as to how an evidentiary hearing would demonstrate particularized harm or otherwise lead to a finding that Nevada Policy Research Institute has

standing to pursue this case against Defendants. And the court is not persuaded that Nevada Policy Research Institute comes within the recent Schwartz exception. And, it cannot be ignored that Nevada Policy Research Institute blows hot and cold on whether or not it is suing the Defendants as legislators. Historically, Nevada Policy Research Institute has demonstrated that it has been able to enlist individuals who might provide a more colorable claim of particularized harm but have simply opted not to do so in this case to enhance the possibility of finding that counsel represents someone with actual standing. The court finds that the Reply brief puts the matter to rest. Nevada Policy Research Institute clearly lacks standing to bring this suit and thus the Motion to Dismiss must be GRANTED. The Joinders of the other Defendants are also GRANTED. Counsel for Defendant to submit the order granting the Motion to Dismiss as to the moving Defendant and all Defendants who filed Joinders to this Motion to Dismiss. COURT FURTHER ORDERED, 11/19/20 hearing VACATED and matter SET for Status Check.

Defendant Jason Frierson's Motion to Dismiss

Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by 11/16/2020 by the parties without oral argument since the court deems oral argument unnecessary. Standing is the controlling issue here and while other issues are discussed, standing is the determinative issue above all else. Nevada Policy Research Institute simply lacks standing to bring this suit. It is an organization, rather than a particularly-aggrieved individual, harmed by any alleged dual employment. It is quite clear that Nevada Policy Research Institute does not allege any particularized harm beyond that of any ordinary taxpayer and that is simply not enough to give standing to Nevada Policy Research Institute to bring this suit. Nevada Policy Research Institute's Opposition does not make persuasive arguments regarding standing, suggesting that an evidentiary hearing would need to be conducted but not offering any theory as to how an evidentiary hearing would demonstrate particularized harm or otherwise lead to a finding that Nevada Policy Research Institute has standing to pursue this case against Defendants. And the court is not persuaded that Nevada Policy Research Institute comes within the recent Schwartz exception. And, it cannot be ignored that Nevada Policy Research Institute blows hot and cold on whether or not it is suing the Defendants as legislators. Historically, Nevada Policy Research Institute has demonstrated that it has been able to enlist individuals who might provide a more colorable claim of particularized harm but have simply opted not to do so in this case to enhance the possibility of finding that counsel represents someone with actual standing. The court finds that the Reply brief puts the matter to rest. Nevada Policy Research Institute clearly lacks standing to bring this suit and thus the Motion to Dismiss must be GRANTED. The Joinders of the other Defendants are also granted. Counsel for Defendant to submit the order granting the Motion to Dismiss as to the moving Defendant and all Defendants who filed Joinders to this Motion to Dismiss. COURT FURTHER ORDERED, 11/19/20 hearing VACATED and matter SET for Status Check.

Defendant Brittney Miller's Motion to Dismiss Complaint Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by 11/16/2020 by the parties without oral argument since the court deems oral argument unnecessary. Standing is the controlling issue here. Defendant argues that NPRI simply lacks standing to bring this suit. It is an organization, rather than a particularly-aggrieved individual, harmed by any alleged dual employment. It is quite clear that NPRI does not allege any particularized harm beyond that of any ordinary taxpayer and that is simply not enough to give standing to NPRI to bring this suit. NPRI's 10/2/20 Opposition does not make persuasive arguments regarding standing, suggesting that an evidentiary hearing would need to be conducted but not offering any theory as to how an evidentiary hearing would demonstrate particularized harm or otherwise lead to a finding that NPRI has standing to pursue this case against Defendant Miller (or the other Defendants for that matter). And the court is not persuaded that NPRI comes within the recent Schwartz exception. And, it cannot be ignored that NPRI blows hot and cold on whether or not

it is suing the Defendants as legislators. Historically, NPRI has demonstrated that it has been able to enlist individuals who might provide a more colorable claim of particularized harm but have simply opted not to do so in this case to enhance the possibility of finding that counsel represents someone with actual standing. The court finds that the Reply brief puts the matter to rest. NPRI clearly lacks standing to bring this suit and thus the Motion to Dismiss must be GRANTED. The Joinders of Fumo, Gansert and Neal and Frierson and Canizzaro are also granted. Counsel for Defendant Miller to submit the order granting the Motion to Dismiss as to Defendant Miller and all Defendants who filed a Joinder to her Motion to Dismiss.

Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5) and NRCP 12(b)(6)

Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by 11/16/2020 by the parties without oral argument since the court deems oral argument unnecessary. Standing is the controlling issue here and while other issues are discussed, standing is the determinative issue above all else. Nevada Policy Research Institute simply lacks standing to bring this suit. It is an organization, rather than a particularly-aggrieved individual, harmed by any alleged dual employment. It is quite clear that Nevada Policy Research Institute does not allege any particularized harm beyond that of any ordinary taxpayer and that is simply not enough to give standing to Nevada Policy Research Institute to bring this suit. Nevada Policy Research Institute's Opposition does not make persuasive arguments regarding standing, suggesting that an evidentiary hearing would need to be conducted but not offering any theory as to how an evidentiary hearing would demonstrate particularized harm or otherwise lead to a finding that Nevada Policy Research Institute has standing to pursue this case against Defendants. And the court is not persuaded that Nevada Policy Research Institute comes within the recent Schwartz exception. And, it cannot be ignored that Nevada Policy Research Institute blows hot and cold on whether or not it is suing the Defendants as legislators. Historically, Nevada Policy Research Institute has demonstrated that it has been able to enlist individuals who might provide a more colorable claim of particularized harm but have simply opted not to do so in this case to enhance the possibility of finding that counsel represents someone with actual standing. The court finds that the Reply brief puts the matter to rest. Nevada Policy Research Institute clearly lacks standing to bring this suit and thus the Motion to Dismiss must be GRANTED. The Joinders of the other Defendants are also granted. Counsel for Defendants to submit the order granting the Motion to Dismiss as to the moving Defendants and all Defendants who filed Joinders to this Motion to Dismiss. COURT FURTHER ORDERED, 11/19/20 hearing VACATED and matter SET for Status Check.

Nevada Legislature's Motion to Intervene as Defendant

Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by 11/16/2020 by the parties without oral argument since the court deems oral argument unnecessary. The LCB/State of Nevada says it wishes to intervene because it has a real and substantial interest in the issues here since it has historically rendered opinions supporting the kind of employment that the Defendants are alleged to have and providing legal reassurance to the Defendants that such employment is entirely legal and constitutional. Nevada Policy Research Institute opposes saying the Nevada Legislature does not have the right to intervene and that permissive intervention, which is discretionary, should not be permitted. Nevada State Legislature's Reply Brief is very persuasive and the court is persuaded that the Nevada Legislature is entitled to intervene as a matter of right and that even if it were only entitled to permissive intervention, the court chooses to exercise its discretion to find that the Nevada Legislature is also allowed to intervene permissively. Nevada Legislature's Motion to Intervene as Defendant is granted. Nevada Legislature is directed to prepare the order which includes for the court's findings the headlined points contained in the Reply Brief. COURT

FURTHER ORDERED, matter SET for Status Check.

12/17/20 9:00 AM STATUS CHECK: FILING OF ORDERS (11/17/20)

CLERK'S NOTE: This Amended Minute Order was electronically served to all registered parties for Odyssey File & Serve. /rl 11/18/2020

**DISTRICT COURT
CLARK COUNTY, NEVADA****Other Civil Matters****COURT MINUTES****November 19, 2020**

A-20-817757-C Nevada Policy Research Institute, Plaintiff(s)
vs.
Nicole Cannizzaro, Defendant(s)

**November 19, 2020 03:00 AM Status Check: Filing of Order Denying Plaintiff s Motion for Order
to Serve by Publication (10/19)**

HEARD BY: Crockett, Jim

COURTROOM: Phoenix Building 11th Floor 116

COURT CLERK: Lord, Rem

RECORDER:

REPORTER:

PARTIES PRESENT:

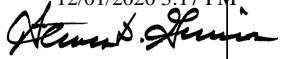
JOURNAL ENTRIES

Status Check: Filing of Order Denying Plaintiff's Motion for Order to Serve by Publication
(10/19)

COURT NOTED as of 8:00 am this morning the Order had not been filed. COURT
ORDERED, matter CONTINUED.

CONTINUED TO: 12/10/2020 9:00 AM

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for
Odyssey File & Serve. /rl 11/19/2020


CLERK OF THE COURT

MCLA
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COLLEEN E. MCCARTY, ESQ.
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Facsimile: (702) 597-5503
Attorneys for Plaintiff
Nevada Policy Research Institute

DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C
Dept. No.: XXIV

**PLAINTIFF'S MOTION FOR THE
COURT'S CLARIFICATION OF ITS
DECISION TO GRANT
DEFENDANTS' MOTIONS TO
DISMISS BASED ON PLAINTIFF'S
LACK OF STANDING**

ON ORDER SHORTENING TIME

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Plaintiff Nevada Policy Research Institute ("NPRI"), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby submits its Motion for the Court's Clarification of Its Decision to Grant Defendants' Motions to Dismiss Based on Plaintiff's Lack of Standing ("Motion for Clarification"), on Order Shortening Time.

The instant Motion is made and based on the following Memorandum of Points and Authorities; the Declaration of Deanna L. Forbush, Esq. included therein; all pleadings and papers already on file; and any oral argument the Court may permit at a hearing of this matter.

Dated this 1st day of December, 2020.

FOX ROTHSCHILD LLP

By: /s/ Deanna L. Forbush

DEANNA L. FORBUSH

Nevada Bar No. 6646

COLLEEN E. MCCARTY

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Telephone: (702) 262-6899

Attorneys for Plaintiff

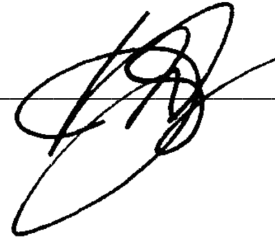
Nevada Policy Research Institute

ORDER SHORTENING TIME

GOOD CAUSE APPEARING, it is hereby ORDERED that the time for hearing the above-captioned **PLAINTIFF'S MOTION FOR CLARIFICATION OF DECISION TO GRANT DEFENDANTS' MOTIONS TO DISMISS BASED ON LACK OF STANDING** will be shortened and heard on the 17th day of December, 2020 at 9:00 am a.m./p.m., or as soon thereafter as the matter may be heard.

Opposition by Defendants must be filed and served by December 7, 2020.

Reply by Plaintiff must be filed and served by December 14, 2020.
Dated this 1st day of December, 2020



Respectfully submitted by:

FOX ROTHSCHILD LLP

918 558 0AED EC64
Jim Crockett
District Court Judge

By: /s/ Deanna L. Forbush
DEANNA L. FORBUSH
Nevada Bar No. 6646
COLLEEN E. MCCARTY
Nevada Bar No. 13186
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 862-8300
Attorneys for Plaintiff
Nevada Policy Research Institute

**DECLARATION OF COUNSEL IN SUPPORT OF MOTION FOR CLARIFICATION
ON ORDER SHORTENING TIME**

I, Deanna L. Forbush, hereby declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada, and I am a partner with Fox Rothschild LLP, attorneys for Plaintiff, Nevada Policy Research Institute (“NPRI”).

2. I have personal knowledge of the facts stated in this Declaration. If called upon to testify to the same, I am competent to do so.

3. In the instant litigation, NPRI asserted standing pursuant to the public importance exception to the standing requirement to show particularized injury in order to seek injunctive and declaratory relief in the public interest. The extraordinary relief was specifically sought to address the alleged ongoing constitutional violations of the Separation of Powers requirement of the Nevada Constitution by 13 individually named Defendants, each of whom are engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local government.

4. On November 18, 2020, the day prior to the scheduled hearings thereon, the Court issued its ruling via minute order on all pending motions, including the 4 pending motions to dismiss and 8 joinders thereto.¹ Therein, the Court specifically granted all motions to dismiss, and although not referenced, presumably all joinders thereto, based on a finding that, “Nevada Policy Research Institute clearly lacks standing to bring this suit and thus the Motion[s] to Dismiss must be GRANTED.”

5. The Court further found that “Nevada Policy Research Institute....does not make persuasive arguments regarding standing,” and that the Court “is not persuaded that Nevada Policy Research Institute comes within the recent Schwartz [public importance] exception.” The Court, however, did not indicate which factor or factors permitting standing to sue under the public importance exception set forth in *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016)

¹ The Court also denied NPRI’s motion to disqualify the official attorneys and granted the Nevada Legislature’s motion to intervene, but these decisions do not appear to be based on a finding regarding Plaintiff’s standing. To the extent the issue of standing was considered by the Court in rendering its decisions on these additional matters, NPRI respectfully requests the Court indicate same in any clarification given in response to the instant motion.

1 that NPRI failed to meet.

2 6. In light of the significant importance, for purposes of appeal, of knowing the Court's
3 basis for denying application of the public importance standing exception in the instant case, NPRI
4 brings its Motion for Clarification now, in the interest of both judicial and party economy. No
5 prevailing party has submitted a proposed order for review by NPRI, and no future hearings are
6 currently pending before the Court, so while time is of the essence, no prejudice will result if the
7 Court hears and ultimately grants NPRI's clarification request.

8 7. Further, as insufficient time exists for the Court to hear the instant motions and grant
9 the relief requested therein in the normal course, where the Court's retirement is imminent, NPRI
10 respectfully requests the Court provide its clarification on Order Shortening Time at the earliest
11 convenient opportunity, whether at the time of hearing of this matter or by additional minute order
12 issued in advance thereof.

13 8. Concurrently with submitting this Motion for Clarification to chambers, I caused a
14 copy to be served via email to counsel for Defendants. I will also ensure a copy of the signed Order
15 Shortening Time is served on all counsel immediately upon receipt, to provide Defendants the
16 appropriate time to file their oppositions, if any, to Plaintiff's request.

17 9. This Order Shortening Time is made in good faith and without dilatory motive.

18 I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045)² that
19 the foregoing is true and correct.

20 Dated this 1st day of December, 2020.

21 /s/ Deanna L. Forbush
22 DEANNA L. FORBUSH

23 ///

24 ///

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26
27 ² NRS 53.045. Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence
28 or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an
unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially
the prescribed form.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 NPRI's request herein is both a simple and a respectful one. While NPRI had hoped the
5 Court would apply the public importance exception recognized by the Nevada Supreme Court in the
6 recent case *Schwartz v. Lopez*, to permit NPRI to pursue the instant litigation and ultimately obtain
7 the elusive determination of whether Defendants' dual employment violates Separation of Powers
8 clause of the Nevada Constitution, the Court did not agree with NPRI's analysis. NPRI fully
9 respects, and in no way seeks herein to challenge, that decision. NPRI does, however, wish to
10 appeal that decision at the first available opportunity and believes the Court's specific articulation of
11 its analysis of the factors set forth in *Schwartz v. Lopez*, which analysis would in turn be
12 incorporated into the final order of the Court, is both necessary and appropriate to afford complete
13 relief upon appellate review.

14 **II.**

15 **ARGUMENT**

16 **A. Standard for Relief.**

17 The Nevada Supreme Court explicitly recognizes motions for clarification as a procedurally
18 proper vehicle to seek explanation of a Court's prior order. *See, e.g. Bronneke v. Martin Rutherford*,
19 120 Nev. 230, 234, 89 P.3d 40, 43 (2004); *see also State v. Eighth Judicial District Court*, 116 Nev.
20 374, 377, 997 P.2d 126, 129 (2000). Clarification may also be sought under Rule 60 of the Nevada
21 Rules of Civil Procedure ("NRCP"). The Ninth Circuit Court of Appeals has affirmed a party's
22 ability to seek clarification under Rule 60.³ *See Earth Island Inst. v. Ruthenback*, 459 F.3d 954, 966
23 (9th Cir. 2006) (recognizing a party's ability to file a motion for clarification pursuant to Rule 60 in
24 order to determine the scope of an injunction). NRCP 60 also specifically provides that the Court
25 may correct its record on motion or on its own, with or without notice. NRCP 60(a).

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27
28

³ The Nevada Supreme Court has repeatedly stated that decisions involving the Federal Rules of Civil Procedure provide persuasive authority for interpreting the NRCP. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

1 At this juncture, therefore, this Court has considerable discretion to revisit its November 18,
2 2020 minute order and to clarify the basis for its ruling stated therein to ensure the record is clear for
3 appellate purposes, in the interest of both judicial and party economy.

4 **B. The Court's Decision Requires Clarification Regarding the Basis for Finding**
5 **Plaintiff Lacked Standing to File the Instant Litigation.**

6 As all motions were summarily decided against NPRI in the Court's November 18, 2020
7 minute order, and the opposing parties had argued against NPRI's standing in varying ways, the
8 record as it currently stands is not clear as to which factor or factors for the application of the public
9 importance exception set forth in *Schwartz v. Lopez* the Court believes NPRI failed to sufficiently
10 allege in order to survive Defendants' motions to dismiss.

11 As the Supreme Court held in *Schwartz v. Lopez*, cases of significant public importance such
12 as the instant matter enjoy an exception to the basic standing requirement of showing a particularized
13 injury. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. Although the exception is identified as being
14 narrow, the Supreme Court ultimately set forth three clear criteria for the application of the
15 exception, each of which NPRI argued applied in the instant case.

16 First, for the public importance standing exception to apply, the case must involve an issue of
17 significant public importance. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (citation omitted). Each
18 motion to dismiss appears to concede the application of this first factor. Second, the public
19 importance standing exception requires that a case involve a challenge to a legislative expenditure or
20 appropriation on the basis that it violates a specific provision of the Nevada Constitution. *Schwartz*,
21 132 Nev. at 743, 382 P.3d at 894 (citation omitted). NPRI argued it made the necessary allegation
22 and asked the Court to take judicial notice of the fact that Legislators are compensated by Legislative
23 Department expenditure. Some Defendants directly opposed NPRI's standing on this point, and
24 others did not. Finally, for a party to be granted standing under the public importance exception, it
25 must show that there is no one better positioned to bring the instant action and that it is fully capable
26 of advocating its position in court. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894-95 (citation omitted).
27 NPRI argued it is the only entity to date to challenge Legislators engaging in dual employment as a
28

1 violation of Separation of Powers. Again, some Defendants directly opposed NPRI's standing on
2 this point, and others did not.

3 Accordingly, to avoid any protracted delay resulting from the likelihood of disputed and
4 possibly even conflicting orders resulting from the Court's November 18, 2020 decision, NPRI
5 respectfully requests the Court clarify its determination regarding Plaintiff's standing at the earliest
6 available opportunity. Further, to facilitate timely and meaningful appellate review, NPRI requests
7 the Court find there is no just reason to delay and direct entry of final judgment as to the Defendants,
8 pursuant to NPCR 54(b).

9 **III.**

10 **CONCLUSION**

11 Based on the foregoing, NPRI hereby moves this Honorable Court to clarify its decision to
12 grant Defendants' motions to dismiss based on Plaintiff's lack of standing. Specifically, NPRI seeks
13 for appellate purposes, in the interest of both judicial and party economy, the Court's clear
14 articulation of why it found NPRI had not alleged facts in its Amended Complaint that conferred
15 standing to sue under the public importance exception set forth in *Schwartz v. Lopez*, 132 Nev. 732,
16 743, 382 P.3d 886, 894 (2016).

17 Additionally, NPRI requests the Court direct entry of final judgment as to all motions to
18 dismiss heard by the Court, pursuant to NRCP 54(b).

19 Dated this 1st day of December, 2020.

20 **FOX ROTHSCHILD LLP**

21 By: /s/ Deanna L. Forbush
22 DEANNA L. FORBUSH, ESQ.
23 Nevada Bar No. 6646
24 COLLEEN E. MCCARTY, ESQ.
25 Nevada Bar No. 13186
26 1980 Festival Plaza Dr., Suite 700
27 Las Vegas, Nevada 89135
28 Telephone: (702) 262-6899
Attorneys for Plaintiff
Nevada Policy Research Institute

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 1st day of December, 2020, I caused the foregoing document entitled **PLAINTIFF'S MOTION FOR THE COURT'S CLARIFICATION OF ITS DECISION TO GRANT DEFENDANTS' MOTIONS TO DISMISS BASED ON PLAINTIFF'S LACK OF STANDING** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

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Carson City, Nevada 89701
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Attorneys for Nevada Legislature

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Nevada Policy Research
7 Institute, Plaintiff(s)

CASE NO: A-20-817757-C

8 vs.

DEPT. NO. Department 24

9 Nicole Cannizzaro, Defendant(s)

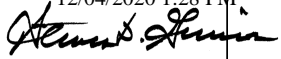
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11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Motion for Clarification was served via the court's electronic eFile
14 system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 12/1/2020

15 Bradley Schrager	bschrager@wrslawyers.com
16 Dannielle Fresquez	dfresquez@wrslawyers.com
17 Daniel Bravo	dbravo@wrslawyers.com
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CLERK OF THE COURT

ODM

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COLLEEN E. MCCARTY, ESQ.

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Telephone: (702) 262-6899

Facsimile: (702) 597-5503

Attorneys for Plaintiff

Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**ORDER DENYING PLAINTIFF'S
MOTION FOR ORDER TO SERVE
BY PUBLICATION DEFENDANTS
GLEN LEAVITT, JAMES
OHRENSCHALL, AND MELANIE
SCHEIBLE**

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
University of Nevada, Reno; JILL TOLLES, an
individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Reno; and SELINA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,

Defendants.

11
12 Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna
13 L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, having filed its Motion for
14 Order to Serve by Publication Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible
15 (“Motion”) on September 29, 2020, and no timely opposition having been filed thereto;

16 The Court, having considered the papers and pleadings on file, finds as follows:

17 IT IS HEREBY ORDERED that NPRI’s Motion is DENIED. The attempted publication
18 would conclude beyond the 120 day time period in which to effectuate personal service.

19 IT IS FURTHER ORDERED that NPRI submit a new Motion accompanied by the requisite
20 Motion for Enlargement of Time, which includes a discussion of the factors set forth in *Scrimmer v.*
21 *Eighth Judicial Dist. Court*, 116 Nev. 507, 516-517, 998 P.2d 1190, 1195-96 (2000), and good cause
22 as to why the Amended Complaint was not timely served.

23 ///

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25 ///

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27 ///

1 IT IS HEREBY FURTHER ORDERED that NPRI shall re-title the exhibits listed as
2 Affidavits of Due Diligence to Declarations in the new Motion. Dated this 4th day of December, 2020

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7 Respectfully submitted by:

8 **FOX ROTHSCHILD LLP**

9F9 B9D DE6C BA33
Jim Crockett
District Court Judge

10 By: /s/ Deanna L. Forbush
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18 Attorneys for Plaintiff
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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Nevada Policy Research
Institute, Plaintiff(s)

CASE NO: A-20-817757-C

7 vs.

DEPT. NO. Department 24

8
9 Nicole Cannizzaro, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Denying Motion was served via the court's electronic eFile
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/4/2020

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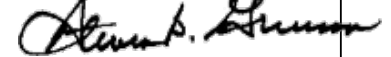
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Attorneys for Intervenor-Defendant Legislature of the State of Nevada

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada,
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an
individual engaging in dual employment with the
Nevada State Assembly and Nevada State College;
JAMES OHRENSCHALL, an individual engaging
in dual employment with the Nevada State Senate
and Clark County Public Defender; MELANIE
SCHEIBLE, an individual engaging in dual
employment with the Nevada State Senate and Clark
County District Attorney; TERESA BENITEZ-

**Case No. A-20-817757-C
Dept. No. 24**

**JOINT OPPOSITION TO PLAINTIFF'S
MOTION FOR THE COURT'S
CLARIFICATION OF ITS DECISION TO
GRANT DEFENDANTS' MOTIONS TO
DISMISS BASED ON PLAINTIFF'S
LACK OF STANDING AND
COUNTERMOTION TO DISMISS ALL
REMAINING DEFENDANTS BASED ON
PLAINTIFF'S LACK OF STANDING**

Date of Hearing: December 17, 2020
Time of Hearing: 9:00 a.m.

1 THOMPSON, an individual engaging in dual
2 employment with the Nevada State Assembly and
3 University of Nevada, Reno; JILL TOLLES, an
4 individual engaging in dual employment with the
5 Nevada State Assembly and University of Nevada,
6 Reno; and SELENA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,
Defendants.

7 **JOINT OPPOSITION AND COUNTERMOTION**

8 **Defendants Brittney Miller and Selena Torres**, by and through their counsel Bradley Schrager,
9 Esq., and Daniel Bravo, Esq., of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP; **Defendants Jason**
10 **Frierson and Nicole Cannizzaro**, by and through their counsel Jonathan D. Blum, Esq., of Wiley
11 Petersen; **Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal**, by and through their
12 counsel Berna L. Rhodes-Ford, General Counsel, Nevada State College, and Gary A. Cardinal, Assistant
13 General Counsel, University of Nevada, Reno; and **Intervenor-Defendant Legislature of the State of**
14 **Nevada** (“Legislature”), by and through its counsel Kevin C. Powers, General Counsel, Legislative
15 Counsel Bureau, Legal Division (“LCB Legal”), under NRS 218F.720, hereby file this Joint Opposition
16 to Plaintiff’s Motion for the Court’s Clarification of its Decision to Grant Defendants’ Motions to
17 Dismiss based on Plaintiff’s Lack of Standing and Joint Countermotion to Dismiss all Remaining
18 Defendants based on Plaintiff’s Lack of Standing. This Joint Opposition and Countermotion is made
19 under EDCR 2.20 and is based upon the attached Memorandum of Points and Authorities, all pleadings,
20 documents and exhibits on file in this case and any oral arguments the Court may allow.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. Background.**

23 In this action, Plaintiff Nevada Policy Research Institute (“NPRI”) has alleged that the individual
24 Defendants are persons simultaneously holding elected offices in the Legislature and paid positions with

1 the executive branch of the Nevada State Government or with local governments in violation of the
2 separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution. During the course of
3 this action: (1) NPRI filed a Motion to Disqualify the Official Attorneys from Representing Defendants
4 Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal (the “NSHE Defendants”); (2) NPRI filed a
5 Motion for an Order Allowing Service by Publication of Defendants Glen Leavitt, James Ohrenschall,
6 and Melanie Scheible; (3) the Legislature filed a Motion to Intervene as a Defendant under NRCP 24
7 and NRS 218F.720; and (4) Defendants Brittney Miller and Selena Torres, Defendants Jason Frierson
8 and Nicole Cannizzaro, and Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal, filed
9 their respective Motions to Dismiss and respective Joinders to each other’s Motions to Dismiss.

10 While this action was pending, NPRI filed: (1) a Notice of Voluntary Dismissal of Defendant
11 Teresa Benitz-Thompson on September 17, 2020; (2) a Notice of Voluntary Dismissal of Defendant
12 Kasina Douglass-Boone on September 28, 2020; and (3) a Notice of Voluntary Dismissal of Defendants
13 Osvaldo Fumo and Jill Tolles on November 16, 2020. NPRI filed its Notice of Voluntary Dismissal
14 prematurely and now seeks a stipulation to correct its error of dismissing Defendant Jill Tolles.

15 On November 18, 2020, the Court entered an Order in the Court Minutes (“November 18 Minute
16 Order”), which directed counsel for the prevailing parties to prepare proposed orders for the Court’s
17 review as follows: (1) a proposed Order Denying NPRI’s Motion to Disqualify the Official Attorneys
18 from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal; (2) a proposed
19 Order Granting Defendants’ Motions to Dismiss based on Plaintiff’s Lack of Standing; and (3) a
20 proposed Order Granting the Legislature’s Motion to Intervene as a Defendant.

21 On December 1, 2020, NPRI filed its Motion for the Court’s Clarification of its Decision to Grant
22 Defendants’ Motions to Dismiss based on Plaintiff’s Lack of Standing (“Motion for Clarification”). In
23 its Motion for Clarification, NPRI asks the Court to clarify its determination regarding Plaintiff’s lack of
24 standing under the public-interest exception to standing recognized in *Schwartz v. Lopez*, 132 Nev. 732,

1 743, 382 P.3d 886, 894 (2016) (recognizing “an exception to [the] injury requirement in certain cases
2 involving issues of public importance.”). NPRI also states that it wants to appeal the Court’s decision
3 based on lack of standing “at the first available opportunity and believes the Court’s specific articulation
4 of its analysis of the factors set forth in *Schwartz v. Lopez*, which analysis would in turn be incorporated
5 into the final order of the Court, is both necessary and appropriate to afford complete relief upon
6 appellate review.” (*NPRI’s Mtn. at 6.*) Additionally, although not framed as a motion as required by
7 NRCP 7(b) and supported by a memorandum of points and authorities as required by EDCR 2.20, NPRI
8 also states that “to facilitate timely and meaningful appellate review, NPRI requests the Court find there
9 is no just reason to delay and direct entry of final judgment as to the Defendants, pursuant to
10 NRCP 54(b).” (*NPRI’s Mtn. at 8.*) On December 4, 2020, NPRI sent a letter by email to the Court’s
11 Law Clerk, Mr. Marvin Simeon. In its letter, NPRI requested that the Court hold off processing of the
12 proposed orders until the Court resolves NPRI’s pending Motion for Clarification.

13 Finally, on November 4, 2020, the Court entered an Order Granting NPRI’s Motion for an Order
14 Allowing Service by Publication of Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible.
15 Those Defendants and Defendant Jill Tolles—if the parties are able to reach an agreement—are the only
16 remaining Defendants who were not included within the Court’s disposition in the November 18 Minute
17 Order.

18 **II. Argument.**

19 **A. NPRI’s Motion for Clarification should be denied as procedurally improper because the**
20 **Court has not entered a final order and judgment yet that can be clarified.**

21 NRCP 58(b)(1) provides that “all judgments must be approved and signed by the court and filed
22 with the clerk.” Moreover, NRCP 58(c) provides that “[t]he filing with the clerk of a judgment signed
23 by the court . . . constitutes the entry of the judgment, and *no judgment is effective for any purpose until*
24 *it is entered.*” *Id.* (emphasis added). Thus, when the district court has entered a minute order but has not

1 signed a final order and judgment and filed it with the clerk, the district court has not made a decision
2 that is subject to clarification because the minute order is not the district court's final order and
3 judgment regarding the matter. *See Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380,
4 1382 (1987). As further explained by the Nevada Supreme Court:

5 An oral pronouncement of judgment is not valid for any purpose, NRCP 58(c); therefore,
6 only a written judgment has any effect, and only a written judgment may be appealed. The
7 district court's oral pronouncement from the bench, *the clerk's minute order*, and even an
unfiled written order are ineffective for any purpose and cannot be appealed.

8 *Id.* (emphasis added).

9 In the Court's November 18 Minute Order, the Court directed the prevailing parties to prepare
10 proposed orders for the Court's review. Under the Court's Department 24 Guidelines:

11 *All orders must bear original signatures by all counsel.* Counsel designated to prepare the
12 order will be advised if the Court requires the non-drafting counsel to review the order prior
13 to submission. Disputes may be resolved by submission to Chambers of a proposed order
14 copied on all parties, with or without a draft of a competing order. *A hearing shall only be
set if counsel files a Motion for Reconsideration or Clarification, and counsel is unsatisfied
with the proposed order the Court elected to sign.*

15 <http://www.clarkcountycourts.us/departments/judicial/civil-criminal-divison/departments-xxiv/>

16 (emphasis added).

17 Based on the Court's Department 24 Guidelines, the prevailing parties in this case have prepared
18 proposed orders and submitted them to NPRI's counsel for review. If NPRI's counsel has objections to
19 the proposed orders or wants clarification, NPRI's counsel should prepare competing proposed orders
20 and submit them to the Court for consideration. If, thereafter, NPRI's counsel is unsatisfied with the
21 proposed orders that the Court elects to sign, NPRI's counsel can file a Motion for Reconsideration or
22 Clarification after the Court has signed a final order and judgment and filed it with the clerk. Therefore,
23 NPRI's Motion for Clarification should be denied as procedurally improper because the Court has not
24 entered a final order and judgment yet that can be clarified.

1 **B. NPRI’s request for NRCP 54(b) certification should be denied as procedurally improper**
2 **because NPRI has not a filed a Motion for NRCP 54(b) Certification supported by a**
3 **memorandum of points and authorities which details the facts and reasoning that make**
4 **interlocutory appellate review appropriate.**

5 NRCP 7(b) provides that “[a] request for a court order must be made by motion.” Moreover,
6 EDCR 2.20(c) provides that “[a] party filing a motion must also serve and file with it *a memorandum of*
7 *points and authorities in support of each ground thereof.*” *Id.* (emphasis added). EDCR 2.20(c) also
8 provides that “[t]he absence of such memorandum may be construed as an admission that the motion is
9 not meritorious, as cause for its denial or as a waiver of all grounds not so supported.” Finally, the
10 Advisory Committee Note to the 2019 Amendment to NRCP 54(b) states that the district court “has
11 discretion in deciding whether to grant Rule 54(b) certification.” However, it also explains that “given
12 the strong policy against piecemeal review, an order granting Rule 54(b) certification *should detail the*
13 *facts and reasoning that make interlocutory review appropriate.* An appellate court may review whether
14 a judgment was properly certified under this rule.” *Id.* (emphasis added).

15 Even though NPRI has filed a Motion for Clarification, it has not included in that document a
16 separate and distinct Motion for NRCP 54(b) Certification that is supported by a memorandum of points
17 and authorities in support of each ground thereof, and NPRI does not detail the facts and reasoning that
18 make interlocutory appellate review appropriate. Therefore, NPRI’s request for NRCP 54(b)
19 certification should be denied as procedurally improper because NPRI has not a filed a Motion for
20 NRCP 54(b) Certification supported by a memorandum of points and authorities which details the facts
21 and reasoning that make interlocutory appellate review appropriate.

22 //

23 //

24 //

1 **C. The Joint Countermotion to Dismiss all Remaining Defendants based on NPRI's Lack**
2 **of Standing should be granted because NPRI lacks standing to bring its constitutional claims**
3 **against all Defendants named in the Amended Complaint, regardless of whether they have**
4 **appeared in this action.**

5 NRCP 12(h)(3) provides that “[i]f the court determines at any time that it lacks subject-matter
6 jurisdiction, the court must dismiss the action.” When a plaintiff files a complaint for declaratory and
7 injunctive relief, the district court may not exercise subject-matter jurisdiction over the plaintiff’s claims
8 unless the plaintiff has standing to bring the claims. *Doe v. Bryan*, 102 Nev. 523, 524-26, 728 P.2d 443,
9 444-45 (1986). When the plaintiff lacks standing to bring its claims, the defendant is entitled to
10 dismissal for lack of subject-matter jurisdiction as a matter of law. *Id.*

11 Furthermore, when the plaintiff pleads a claim against multiple defendants and one of the
12 defendants proves that the claim fails as a matter of law, the natural consequence is that the claim fails
13 as a matter of law as to all defendants named in the claim, even if some of the defendants do not answer
14 or defend against the claim. *See In re Forsyth’s Estate*, 45 Nev. 385, 392, 204 P. 887, 889-90 (1922)
15 (explaining the “well-known and general rule to the effect that, where several persons are joined as
16 defendants, one or more of whom made default, and the others defend successfully upon a ground not
17 personal to themselves, but which goes to destroy the very basis of the action, their success in
18 maintaining such defense inures to the benefit of all.”). The reason for this rule is that when a claim
19 fails as a matter of law, it is legally unsustainable, and the plaintiff cannot prosecute the claim against
20 any defendant, regardless of whether the defendant has appeared in the action. *See Sutherland v. Gross*,
21 105 Nev. 192, 198, 772 P.2d 1287, 1291 (1989) (stating that “when the defenses interposed by the
22 answering co-defendant call into question the validity of plaintiff’s entire cause of action and when such
23 defenses prove successful, the defenses inure to the benefit of the defaulting co-defendant.
24 Consequently, the plaintiff cannot take judgment against the defendant in default.” (citations omitted));
 Paul v. Pool, 96 Nev. 130, 132, 605 P.2d 635, 636 (1980) (“The answer of a co-defendant inures to the

benefit of a defaulting defendant where there exists, as here, a common defense as to both of them.”).

In this case, NPRI lacks standing to bring its constitutional claims against all Defendants named in the Amended Complaint, regardless of whether they have appeared in this action. As a result, all Defendants named in the Amended Complaint are entitled to dismissal for lack of subject-matter jurisdiction as a matter of law. Consequently, under NRCP 12(h)(3), the Court must dismiss this action against all Defendants named in the Amended Complaint because the Court lacks subject-matter jurisdiction. Therefore, the Joint Countermotion to Dismiss all Remaining Defendants based on NPRI’s Lack of Standing should be granted because NPRI lacks standing to bring its constitutional claims against all Defendants named in the Amended Complaint, regardless of whether they have appeared in this action.

CONCLUSION AND AFFIRMATION

Based upon the foregoing, Defendants and Intervenor-Defendant Legislature respectfully request that the Court enter an order: (1) denying Plaintiff’s Motion for the Court’s Clarification of its Decision to Grant Defendants’ Motions to Dismiss based on Plaintiff’s Lack of Standing; and (2) granting the Joint Countermotion to Dismiss all Remaining Defendants based on Plaintiff’s Lack of Standing.

The undersigned hereby affirm that this document does not contain “personal information about any person” as defined in NRS 239B.030 and 603A.040.

DATED: This 7th day of December, 2020.

Respectfully submitted by:

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division,
3 and that on the 7th day of December, 2020, pursuant to NRCP 5(b) and NEFCR 9, I served a true
4 and correct copy of the Joint Opposition to Plaintiff's Motion for the Court's Clarification of its
5 Decision to Grant Defendants' Motions to Dismiss Based on Plaintiff's Lack of Standing and Joint
6 Countermotion to Dismiss all Remaining Defendants Based on Plaintiff's Lack of Standing, by means of
7 the Eighth Judicial District Court's electronic filing system, directed to:

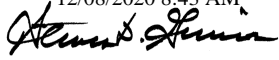
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20 /s/ Kevin C. Powers
21 An Employee of the Legislative Counsel Bureau
22
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24


CLERK OF THE COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
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dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an
individual engaging in dual employment with the
Nevada State Assembly and Nevada State College;
JAMES OHRENSCHALL, an individual engaging
in dual employment with the Nevada State Senate
and Clark County Public Defender; MELANIE
SCHEIBLE, an individual engaging in dual
employment with the Nevada State Senate and Clark
County District Attorney; TERESA BENITEZ-

**Case No. A-20-817757-C
Dept. No. 24**

**ORDER GRANTING NEVADA
LEGISLATURE'S MOTION TO
INTERVENE AS DEFENDANT**

1 THOMPSON, an individual engaging in dual
2 employment with the Nevada State Assembly and
3 University of Nevada, Reno; JILL TOLLES, an
4 individual engaging in dual employment with the
5 Nevada State Assembly and University of Nevada,
6 Reno; and SELENA TORRES, an individual
7 engaging in dual employment with the Nevada State
8 Assembly and Clark County School District,
9
10 Defendants.

11 INTRODUCTION

12 In this action, Plaintiff Nevada Policy Research Institute (NPRI) has alleged that the individual
13 Legislator-Defendants are persons simultaneously holding elected offices in the Nevada Legislature
14 (Legislature) and paid positions with the executive branch of the Nevada State Government or with local
15 governments in violation of the separation-of-powers provision in Article 3, Section 1 of the Nevada
16 Constitution. The Legislature filed a motion to intervene as a defendant under NRCP 24 and
17 NRS 218F.720. NPRI filed an opposition, and the Legislature filed a reply. The Court concludes that
18 the Legislature is entitled to intervene as a matter of right. In addition, the Court concludes that, even if
19 the Legislature was only entitled to seek permissive intervention, the Court chooses to exercise its
20 discretion to find that the Legislature is allowed to intervene permissively. Therefore, the Court grants
21 the Legislature's motion to intervene as a defendant.

22 DISCUSSION

23 **1. Intervention as a matter of right under NRCP 24(a)(1) and NRS 218F.720(2)(b).**

24 The Legislature contends that it is entitled to intervention as a matter of right under
NRCP 24(a)(1), which provides that, on timely motion, the Court must permit anyone to intervene who
"is given an unconditional right to intervene by a state or federal statute." When the movant establishes
that it is given an unconditional right to intervene by statute, "there is no room for the operation of a
court's discretion," and "the right to intervene is absolute and unconditional." *Bhd. of R.R. Trainmen v.*

1 *Balt. & Ohio R.R.*, 331 U.S. 519, 531 (1947).

2 The Legislature contends that NRS 218F.720 gives it an unconditional right to intervene in this
3 action. The statute provides in relevant part:

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

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

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

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

19 3. Notwithstanding any other law to the contrary, upon the filing of a motion or request
20 to intervene pursuant to subsection 2, the Legislature has an unconditional right and standing
21 to intervene in the action or proceeding and to present its arguments, claims, objections or
22 defenses, in law or fact, whether or not the Legislature's interests are adequately represented
23 by existing parties and whether or not the State or any agency, officer or employee of the
24 State is an existing party. If the Legislature intervenes in the action or proceeding, the
Legislature has all the rights of a party.

16 The Legislature contends that NRS 218F.720(2)(b) gives it an unconditional right to intervene in
17 this action in order to defend against NPRI's constitutional challenge because it involves allegations
18 concerning the meaning, intent, purpose, scope, applicability and enforceability of the separation-of-
19 powers provision with regard to members of the Legislature who hold positions of public employment
20 with the state executive branch or with local governments. The Court agrees.

21 In its amended complaint, NPRI has alleged that "[t]here is an actual controversy between [NPRI],
22 acting in the public interest, and [the Legislator-Defendants] and each of them, as to the *meaning* of the
23 Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and its *application* to [the Legislator-
24 Defendants] and their conduct." *Am. Compl.* ¶ 23 (emphasis added). Based on NPRI's allegations, the

1 Court finds that NRS 218F.720(2)(b) gives the Legislature an unconditional right to intervene in this
2 action in order to defend against NPRI's constitutional challenge.

3 NPRI argues that NRS 218F.720(2)(b) is not applicable because NPRI is seeking to enforce the
4 separation-of-powers provision and is not challenging it on any grounds. To support its argument, NPRI
5 contends that the statute would grant the Legislature an unconditional right to intervene only if NPRI
6 had challenged the separation-of-powers provision "on grounds that it is ambiguous, unclear, uncertain,
7 imprecise, indefinite or vague, is preempted by federal law or is otherwise inapplicable, invalid,
8 unenforceable or unconstitutional." NRS 218F.720(2)(b). The Court disagrees with NPRI's
9 interpretation of NRS 218F.720(2)(b) because such an interpretation would disregard the plain meaning
10 of the statutory language by ignoring the plain meaning of the words "including, without limitation,"
11 which are expressly set forth in the statute.

12 Based on the plain meaning of the statutory language, NRS 218F.720(2)(b) contains a broadly
13 worded grant of authority which gives the Legislature an unconditional right to intervene whenever a
14 party "[c]hallenges, contests or raises as an issue, either in law or in equity, in whole or in part, or
15 facially or as applied, the *meaning, intent, purpose, scope, applicability, validity, enforceability* or
16 constitutionality of any law, resolution, initiative, referendum or other legislative or constitutional
17 measure." NRS 218F.720(2)(b) (emphasis added). Following the statute's broadly worded grant of
18 authority, the statute also contains an illustrative and nonexhaustive list of examples of such statutory or
19 constitutional challenges that would grant the Legislature an unconditional right to intervene, "*including,*
20 *without limitation,* on grounds that it is ambiguous, unclear, uncertain, imprecise, indefinite or vague, is
21 preempted by federal law or is otherwise inapplicable, invalid, unenforceable or unconstitutional."
22 NRS 218F.720(2)(b) (emphasis added).

23 Under the rules of statutory construction, when words such as "including, without limitation," and
24 "including, but not limited to," are used in a statutory provision, they are not words of limitation.

1 Instead, they are words of enlargement which are intended to convey that the statutory provision
2 contains an illustrative and nonexhaustive list of examples that is not intended to be exclusive. *See Am.*
3 *Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933) (stating that in “statutes and other writings,
4 ‘include’ is frequently, if not generally, used as a word of extension or enlargement rather than as one of
5 limitation or enumeration.”); *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100
6 (1941) (stating that “the term ‘including’ is not one of all-embracing definition, but connotes simply an
7 illustrative application of the general principle.”); *People v. Williams*, 108 Cal. Rptr. 3d 772, 775 (Cal.
8 Ct. App. 2010); *Colbert v. Cleveland*, 790 N.E.2d 781, 784 (Ohio 2003); *In re Forfeiture of \$5,264*, 439
9 N.W.2d 246, 252 (Mich. 1989).

10 Thus, the Court disagrees with NPRI’s interpretation of NRS 218F.720(2)(b) because such an
11 interpretation would disregard the plain meaning of the statutory language by ignoring the plain meaning
12 of the words “including, without limitation,” which are expressly set forth in the statute. The Court
13 finds that the “including, without limitation,” provision places no limitation on the Legislature’s broad
14 authority to intervene as of right under the statute. Instead, this provision merely serves as an
15 illustrative—but not exhaustive—list of examples which describe some—but not all—of the
16 circumstances under which the Legislature may exercise its broad authority to intervene as of right
17 under the statute. Accordingly, the Court concludes that NRS 218F.720(2)(b) gives the Legislature an
18 unconditional right to intervene in this action in order to defend against NPRI’s constitutional challenge
19 because it involves allegations concerning the meaning, intent, purpose, scope, applicability and
20 enforceability of the separation-of-powers provision with regard to members of the Legislature who hold
21 positions of public employment with the state executive branch or with local governments.

22 **2. Intervention as a matter of right under NRCP 24(a)(1) and NRS 218F.720(2)(a).**

23 The Legislature contends that NRS 218F.720(2)(a) gives it an unconditional right to intervene in
24 this action in order to defend against NPRI’s constitutional challenge because it involves allegations that

1 the Legislature has violated the Nevada Constitution through its appropriation of public money in
2 violation of the separation-of-powers provision with regard to members of the Legislature who hold
3 positions of public employment with the state executive branch or with local governments. The Court
4 agrees.

5 In its amended complaint, NPRI has alleged that “*legislative expenditures or appropriations and*
6 *taxpayer monies* will be paid to [the Legislator-Defendants] in violation of Nevada Const. Art. 3, §1, ¶1,
7 and irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
8 Constitution.” *Am. Compl.* ¶ 28 (emphasis added). Based on NPRI’s allegations, the Court finds that
9 NRS 218F.720(2)(a) gives the Legislature an unconditional right to intervene in this action in order to
10 defend against NPRI’s constitutional challenge.

11 In its opposition, NPRI acknowledges that “[t]he Court may take judicial notice that legislators are
12 compensated by Legislative expenditure, per statutory requirement.” *NPRI’s Opp’n at 6.* However,
13 NPRI argues that it “is in no way challenging the Legislature’s carrying out of or compliance with these
14 [statutory] requirements.” *Id.* Even though NPRI’s amended complaint includes allegations of the
15 unconstitutional payment of “legislative expenditures or appropriations and taxpayer monies” to the
16 Legislator-Defendants, NPRI’s amended complaint is silent with regard to the governmental body that
17 authorizes the payment of those “legislative expenditures or appropriations and taxpayer monies” to the
18 Legislator-Defendants. Nevertheless, under Nevada law, the Legislature is the only governmental body
19 whose actions can authorize the payment of those “legislative expenditures or appropriations and
20 taxpayer monies” to the Legislator-Defendants. Nev. Const. art. 4, § 19; NRS 218A.150; *State ex rel.*
21 *Davis v. Eggers*, 29 Nev. 469, 484-85, 91 P. 819, 824 (1907) (explaining that “all appropriations must be
22 within the legislative will.”). Therefore, given that the Legislature is the only governmental body which
23 authorizes the appropriation of public money that NPRI alleges is being paid to the Legislator-
24 Defendants in violation of the separation-of-powers provision, the Court concludes that

1 NRS 218F.720(2)(a) gives the Legislature an unconditional right to intervene in this action because it
2 involves allegations that the Legislature has violated the Nevada Constitution through its appropriation
3 of public money with regard to members of the Legislature who hold positions of public employment
4 with the state executive branch or with local governments.

5 **3. Intervention as a matter of right under NRCP 24(a)(2).**

6 The Legislature contends that it is entitled to intervention as a matter of right under
7 NRCP 24(a)(2), which provides that, on timely motion, the Court must permit anyone to intervene who
8 “claims an interest relating to the property or transaction that is the subject of the action, and is so
9 situated that disposing of the action may as a practical matter impair or impede the movant’s ability to
10 protect its interest, unless existing parties adequately represent that interest.” To qualify for intervention
11 as of right under NRCP 24(a)(2), the movant must establish that: (1) the movant has sufficient interests
12 in the subject matter of the litigation; (2) the movant’s ability to protect those interests could be impaired
13 if the movant is not permitted to intervene; (3) the movant’s interests may not be adequately represented
14 by the existing parties; and (4) the motion to intervene is timely. *Am. Home Assurance Co. v. Eighth*
15 *Jud. Dist. Ct.*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). The Court finds that the Legislature
16 has established the requirements for intervention as a matter of right under NRCP 24(a)(2).

17 First, the Court finds that when the Legislature filed its motion to intervene, this action had not
18 progressed beyond its initial and preliminary stages. Therefore, because the Legislature sought
19 intervention during the earliest stages of this action, the Court determines that the Legislature’s motion
20 to intervene was timely and that its intervention will not delay the proceedings, complicate management
21 of the case or cause any prejudice to the existing parties.

22 Next, the Court finds that the Legislature has substantial institutional interests in the subject matter
23 of this action. The Legislature has substantial institutional interests in the meaning, intent, purpose,
24 scope, applicability and enforceability of the separation-of-powers provision because that constitutional

1 provision governs the powers of the legislative branch and the Legislature's administration of its
2 constitutional functions and the conduct of its members, including the Legislator-Defendants. *See*
3 *Heller v. Legislature*, 120 Nev. 456, 93 P.3d 746 (2004); *Comm'n on Ethics v. Hardy*, 125 Nev. 285,
4 212 P.3d 1098 (2009). The Legislature also has substantial institutional interests in defending the
5 validity of its legislative actions in exercising the constitutional power of appropriation, including the
6 appropriation of public money for the payment of legislative compensation to the Legislator-Defendants.
7 *See State of Nev. Employees Ass'n v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992) (explaining that
8 "it is well established that the power of controlling the public purse lies within legislative, not executive
9 authority."). The Legislature also has substantial institutional interests in ensuring that the broadest
10 spectrum of the citizenry is represented in the Legislature's membership in order to promote the public
11 policy of this State that:

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

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

19 Finally, the Court finds that the Legislature's ability to protect its institutional interests in this
20 action could be impaired if the Legislature is not permitted to intervene and that its institutional interests
21 may not be adequately represented by the existing parties. Because the Legislature's institutional
22 interests are unique to the Legislature as the constitutional body charged with the legislative and policy-
23 making power of this State, the individual Legislator-Defendants are not in a position to adequately
24 represent the separate and distinct institutional interests of the Legislature that are at stake in this action.
Under such circumstances, the Court determines that the Legislature's separate and distinct institutional
interests are not adequately represented by the existing parties. As a result, the Court concludes that the

1 Legislature is entitled to intervention as a matter of right under NRCP 24(a)(2).

2 **4. Permissive intervention under NRCP 24(b).**

3 Under NRCP 24(b), on timely motion, the court may permit anyone to intervene who “has a claim
4 or defense that shares with the main action a common question of law or fact.” NRCP 24(b)(1)(B).
5 Additionally, the court may permit a governmental officer or agency to intervene if a party’s claim or
6 defense is based on “a statute or executive order administered by the officer or agency.”
7 NRCP 24(b)(2)(A). Permissive intervention under NRCP 24(b) is wholly discretionary with the district
8 court. *Hairr v. First Jud. Dist. Ct.*, 132 Nev. 180, 187, 368 P.3d 1198, 1202 (2016).

9 Under NRCP 24(b), when the intervenor is a governmental agency, permissive intervention
10 ordinarily should be granted to the agency where the legal issues in the case may have a substantial
11 impact on “the maintenance of its statutory authority and the performance of its public duties.” *SEC v.*
12 *U.S. Realty & Impr. Co.*, 310 U.S. 434, 460 (1940). Thus, where the governmental agency’s interest in
13 the case “is a public one” and it intends to raise claims or defenses concerning questions of law involved
14 in the case, permissive intervention should be granted, especially when the agency’s intervention “might
15 be helpful in [a] difficult and delicate area.” *United States v. Local 638, Enter. Ass’n of Pipefitters*, 347
16 F. Supp. 164, 166 (S.D.N.Y. 1972) (quoting *SEC v. U.S. Realty & Impr. Co.*, 310 U.S. 434, 460 (1940)).

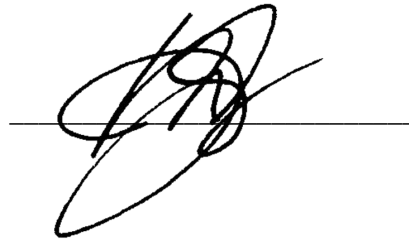
17 In this action, even assuming that the Legislature was not otherwise entitled to intervene as a
18 matter of right under NRCP 24(a)(1) and NRCP 24(a)(2), the Court chooses to exercise its discretion
19 and grants the Legislature permissive intervention under NRCP 24(b). The Court finds that the
20 Legislature’s permissive intervention under NRCP 24(b) would facilitate a more comprehensive and
21 thorough presentation of the controlling law and a better understanding of the issues, and such
22 intervention would ensure that the views of the Legislature are fairly and adequately represented and are
23 not prejudiced by this case. Therefore, even if the Legislature was only entitled to seek permissive
24 intervention in this action, the Court chooses to exercise its discretion and grants the Legislature

1 permissive intervention under NRCP 24(b).

2 **CONCLUSION**

3 For the reasons set forth herein, IT IS HEREBY ORDERED THAT the Legislature's motion to
4 intervene as a defendant is GRANTED.

Dated this 8th day of December, 2020

5
6
7 

8 Order submitted by:

9 /s/ Kevin C. Powers

10 **KEVIN C. POWERS**, General Counsel
11 Nevada Bar No. 6781
12 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
13 401 S. Carson St.
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Attorneys for Intervenor-Defendant Legislature of the State of Nevada

91A D5B BDAD D58C
Jim Crockett
District Court Judge

14 Order reviewed by:

15 /s/ Refused to Sign Order

16 **DEANNA L. FORBUSH, ESQ.**
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19 dforbush@foxrothschild.com
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Attorneys for Plaintiff Nevada Policy Research Institute

20 /s/ Bradley Schrager

21 **BRADLEY SCHRAGER, ESQ.**
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/s/ Berna L. Rhodes-Ford

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Attorneys for Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal

/s/ Jonathan D. Blum

JONATHAN D. BLUM, ESQ.
WILEY PETERSEN
jblum@wileypetersenlaw.com
Attorneys for Defendants Jason Frierson and Nicole Cannizzaro

Powers, Kevin

From: Bradley Schrager <BSchrager@wrslawyers.com>
Sent: Thursday, December 3, 2020 5:25 AM
To: Powers, Kevin; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; Daniel Bravo; jblum@wileypetersenlaw.com; Berna Rhodes-Ford
Cc: Nita Armendariz
Subject: RE: A-20-817757-C_Nevada Policy Research Institute v Cannizzaro_Proposed Order Granting Nevada Legislature's Motion to Intervene as Defendant

Approved on our end, Counsel

Bradley S. Schrager
Areas of Practice: Politics & Government – Appeals & Writs – Wage & Labor
Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP
3556 E. Russell Rd, Las Vegas, Nevada 89120
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bschrager@wrslawyers.com

This correspondence is intended for the individual or entity to whom it is addressed, and may be protected by privilege.

From: Powers, Kevin [mailto:kpowers@lcb.state.nv.us]
Sent: Wednesday, December 02, 2020 11:32 PM
To: dforbush@foxrothschild.com; cmccarty@foxrothschild.com; Bradley Schrager; Daniel Bravo; jblum@wileypetersenlaw.com; Berna Rhodes-Ford
Cc: Nita Armendariz
Subject: A-20-817757-C_Nevada Policy Research Institute v Cannizzaro_Proposed Order Granting Nevada Legislature's Motion to Intervene as Defendant

CAUTION:EXTERNAL EMAIL

Counsel:

Please review the attached proposed Order Granting Nevada Legislature's Motion to Intervene as Defendant.

Please let me know whether you have any proposed revisions and whether you agree to the use of your electronic signature on the proposed order.

Thanks.

Kevin C. Powers

General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701-4747
(775) 684-6830
(775) 684-6761-Fax

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Powers, Kevin

From: Berna Rhodes-Ford <Berna.Rhodes-Ford@nsc.edu>
Sent: Thursday, December 3, 2020 6:45 AM
To: Powers, Kevin
Cc: dforbush@foxrothschild.com; cmccarty@foxrothschild.com;
bschrager@wrslawyers.com; dbravo@wrslawyers.com; jblum@wileypetersenlaw.com;
Nita Armendariz
Subject: Re: A-20-817757-C_Nevada Policy Research Institute v Cannizzaro_Proposed Order
Granting Nevada Legislature's Motion to Intervene as Defendant

Approved.

Berna L. Rhodes-Ford
office [702.992.2378](tel:702.992.2378)
Berna.Rhodes-Ford@nsc.edu

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On Dec 2, 2020, at 11:32 PM, Powers, Kevin <kpowers@lcb.state.nv.us> wrote:

Counsel:

Please review the attached proposed Order Granting Nevada Legislature's Motion to Intervene as Defendant.

Please let me know whether you have any proposed revisions and whether you agree to the use of your electronic signature on the proposed order.

Thanks.

Kevin C. Powers
General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
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<2020_12-02_01_A-20-817757-C_Proposed Order Granting Legislature's Motion to Intervene as Defendant.pdf>

Powers, Kevin

From: jblum@wileypetersenlaw.com
Sent: Thursday, December 3, 2020 10:25 AM
To: Powers, Kevin; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; bschrager@wrslawyers.com; dbravo@wrslawyers.com; 'Berna Rhodes-Ford'
Cc: 'Nita Armendariz'; ibautista@wileypetersenlaw.com
Subject: RE: A-20-817757-C_Nevada Policy Research Institute v Cannizzaro_Proposed Order Granting Nevada Legislature's Motion to Intervene as Defendant 00618

You may affix my e-signature. Thanks.

Jonathan D. Blum, Esq.



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From: Powers, Kevin <kpowers@lcb.state.nv.us>
Sent: Wednesday, December 2, 2020 11:32 PM
To: dforbush@foxrothschild.com; cmccarty@foxrothschild.com; bschrager@wrslawyers.com; dbravo@wrslawyers.com; jblum@wileypetersenlaw.com; Berna Rhodes-Ford <Berna.Rhodes-Ford@nsc.edu>
Cc: Nita Armendariz <Nita.Armendariz@nsc.edu>
Subject: A-20-817757-C_Nevada Policy Research Institute v Cannizzaro_Proposed Order Granting Nevada Legislature's Motion to Intervene as Defendant

Counsel:

Please review the attached proposed Order Granting Nevada Legislature's Motion to Intervene as Defendant.

Please let me know whether you have any proposed revisions and whether you agree to the use of your electronic signature on the proposed order.

Thanks.

Kevin C. Powers

General Counsel

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December 4, 2020

VIA EMAIL TRANSMISSION
Dept24LC@clarkcountycourts.us

Marvin Simeon
Law Clerk to the Honorable Jim Crockett
Eighth Judicial District Court, Dept. XXIV
200 Lewis Avenue
Las Vegas, Nevada 89155

Re: *Nevada Policy Research Institute v. Nicole Cannizzaro, et al.*, Case No. A-20-817757-C
Request to Hold Processing of Orders from November 18, 2020 Minute Order

Dear Mr. Simeon:

Following the Court's entry of the OST on NPRI's Motion for Clarification, opposing counsel for the NSHE Defendants, the Nevada Legislature, and the individual Defendants, Nicole Cannizzaro and Jason Frierson, respectively, prepared and forwarded to my attention for review draft orders from the Court's Minute Order entered on November 18, 2020. While NPRI is the party with the most to gain from the expedited entry of these orders and the opportunity they will provide to seek appellate review in advance of the 2021 Legislative Session, I have respectfully requested that each opposing counsel wait to submit his or her proposed order until the Court resolves the pending Motion for Clarification on or before December 17, 2020 and I have the opportunity to provide input to complete the necessary orders. Opposing counsel, however, have declined this courtesy, in agreement with the position articulated by Mr. Johnathan D. Blum, Esq., which is the reason for this correspondence. The relevant emails are enclosed herewith as **Exhibit 1**.

I would note, again, that each proposed order draft was submitted to me for my consideration after service of NPRI's Motion for Clarification, and this was either on or after the 14-day period for submission of proposed orders to Chambers pursuant to EDCR 7.21, which period ran yesterday, December 2, 2020. That said, the reason NPRI respectfully requests that any order hereafter submitted to Chambers be held for consideration is to first allow the Court to clarify its Minute Order as requested. All parties, and quite possibly the successor Judge on this case, will benefit from having the clearest possible record. And, it is both inefficient and costly to my client to be asked to discuss draft orders now, when additional information for inclusion in

JA000527

December 4, 2020
Page 2

some, if not all, of the orders will be forthcoming from the Court within the next two weeks at the latest.

Finally, to the extent counsel for the NSHE Defendants and/or the Nevada Legislature would suggest that clarification of the Court's standing determination does not directly impact their clients' order, NPRI respectfully submits this does not override the efficiency of completing each order simultaneously, rather than on a piecemeal basis. Also, although not specifically included in the Court's Minute Order, the NSHE Defendants argued lack of standing as a basis for issuing an order in their favor, the same as those Defendants seeking dismissal. And, the Nevada Legislature, by its own admission, understands this case "involves extremely important questions of constitutional law" (*see* Nevada Legislature's Motion to Intervene as Defendant at 16:22-23), which goes directly to the first criteria for application of the public importance exception. For these reasons, I will likely seek to include the Court's clarifications in each order ultimately entered by the Court as a result of the November 18, 2020 Minute Order.

Should you wish further explanation of the specific objections my client and I have to the form of orders I received and am anticipating will be submitted with or without my signature by opposing counsel, I will be happy to provide this to you immediately upon request. Again, however, it is my hope to avoid the unnecessary additional expense to my client of further reviewing and preparing competing orders in advance of the December 17, 2020 hearing.

Please do not hesitate to contact me directly at (702) 702-262-6899 if you have any questions or need any additional information. Thank you in advance for your kind consideration

Sincerely,

FOX ROTHSCHILD LLP

/s/ Colleen E. McCarty

Colleen E. McCarty

CEM/nm

cc: Jonathan D. Blum, Esq. (jblum@wileypetersenlaw.com)
Gary A. Cardinal, Esq. (gcardinal@unr.edu)
Kevin C. Powers, Esq. (kpowers@lcb.state.nv.us)
Berna L. Rhodes-Ford, Esq. (berna.rhodes-ford@nsc.edu)
Bradley Schrager, Esq. (bschrager@wrslawyers.com)

EXHIBIT 1

From: jblum@wileypetersenlaw.com <jblum@wileypetersenlaw.com>
Sent: Thursday, December 3, 2020 9:00 PM
To: McCarty, Colleen E. <CMcCarty@foxrothschild.com>; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>; 'Gary A Cardinal' <gcardinal@unr.edu>; 'Bradley Schrager' <BSchrager@wrslawyers.com>; DBravo@wrslawyers.com; 'Powers, Kevin' <kpowers@lcb.state.nv.us>; Forbush, Deanna L. <DForbush@foxrothschild.com>
Cc: Martinez, Natasha <NMartinez@foxrothschild.com>; ibautista@wileypetersenlaw.com
Subject: [EXT] RE: NPRI v. Cannnizzaro et al. 00618

Colleen,

From my perspective the draft orders were not submitted earlier due to the intervening holiday, and the language of the minute order. The status check for the filing of the orders was set for Dec. 17, indicating a longer timeframe allowed by the Court, specifically permitted under EDCR 7.21. My position is that, per the minute order and local rules we can't simply fail to submit an order because there is another pending motion that may potentially affect that order. The motion for clarification should have been filed after a final order on the motions were entered, and is, in my opinion, premature. (I recognize the issue of Judge Crockett's departure from the bench as an issue, but requiring another round of briefing before the Judge has an opportunity to sign an order on the original motions causes additional fees for all of us.)

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Thanks,
Jon

Jonathan D. Blum, Esq.



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Sent: Thursday, December 3, 2020 6:54 PM
To: 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>; Gary A Cardinal <gcardinal@unr.edu>; jblum@wileypetersenlaw.com; Bradley Schrager <BSchrager@wrslawyers.com>; DBravo@wrslawyers.com; Powers, Kevin <kpowers@lcb.state.nv.us>; Forbush, Deanna L. <DForbush@foxrothschild.com>
Cc: Martinez, Natasha <NMartinez@foxrothschild.com>
Subject: NPRI v. Cannizzaro et al.

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Thank you in advance for your consideration.

Colleen

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Attorney
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Cc: Powers, Kevin <kpowers@lcb.state.nv.us>; jblum@wileypetersenlaw.com; McCarty, Colleen E. <CMcCarty@foxrothschild.com>; Gary A Cardinal <gcardinal@unr.edu>; Daniel Bravo <DBravo@wrslawyers.com>; Forbush, Deanna L. <DForbush@foxrothschild.com>; Martinez, Natasha <NMartinez@foxrothschild.com>; ibautista@wileypetersenlaw.com
Subject: [EXT] Re: NPRI v. Cannizzaro et al. 00618

I am in agreement as well.

Berna L. Rhodes-Ford
office [702.992.2378](tel:702.992.2378)
Berna.Rhodes-Ford@nsc.edu

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On Dec 3, 2020, at 9:56 PM, Bradley Schrager <BSchrager@wrslawyers.com> wrote:

I concur

Bradley Schrager
Wolf Rifkin Shapiro Schulman & Rabkin

On Dec 3, 2020, at 9:17 PM, Powers, Kevin <kpowers@lcb.state.nv.us> wrote:

CAUTION:EXTERNAL EMAIL

LCB Legal agrees with Mr. Blum's legal analysis, procedural approach, and timeline as set forth in his email below. Therefore, LCB Legal will follow all the same with regard to its proposed Order Granting Nevada Legislature's Motion to Intervene as Defendant.

Thanks.

Kevin C. Powers

General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701-4747
(775) 684-6830
(775) 684-6761-Fax

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Cc: 'Martinez, Natasha' <NMartinez@foxrothschild.com>; ibautista@wileypetersenlaw.com

Subject: RE: NPRI v. Cannizzaro et al. 00618

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Jon

Jonathan D. Blum, Esq.

<image001.jpg>
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Thank you in advance for your consideration.

Colleen

Colleen E. McCarty

Attorney

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Nevada Policy Research
7 Institute, Plaintiff(s)

CASE NO: A-20-817757-C

8 vs.

DEPT. NO. Department 24

9 Nicole Cannizzaro, Defendant(s)

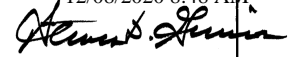
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11 **AUTOMATED CERTIFICATE OF SERVICE**

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13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
14 system to all recipients registered for e-Service on the above entitled case as listed below:

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19 Kevin Powers	kpowers@lcb.state.nv.us
20 Deanna Forbush	dforbush@foxrothschild.com
21 Colleen McCarty	cmccarty@foxrothschild.com
22 Natasha Martinez	nmartinez@foxrothschild.com
23 Ivette Bautista	ibautista@wileypetersenlaw.com
24 Jonathan Blum	jblum@wileypetersenlaw.com
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1	Berna Rhodes-Ford	Berna.Rhodes-Ford@nsc.edu
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3	Gary Cardinal	gcardinal@unr.edu
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CLERK OF THE COURT

ORDR

JONATHAN D. BLUM, ESQ.

Nevada Bar No. 09515

WILEY PETERSEN

1050 Indigo Dr., Suite 200B

Las Vegas, Nevada 89145

Telephone No. (702) 910-3329

Fax: (702) 553-3467

jblum@wileypetersenlaw.com

*Attorney for Defendants,
Jason Frierson and Nicole Cannizzaro*

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA DOUGLASS-
BOONE,

an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA
NEAL, an individual engaging in dual
employment with the Nevada State Assembly
and Nevada State College; JAMES
OHRENSCHALL, an individual engaging in
dual employment with the Nevada State

Case No.: A-20-817757-C

Dept. No.: 24

**OMNIBUS ORDER GRANTING
MOTIONS TO DISMISS**

1 Senate and Clark County Public Defender;
2 MELANIE SCHEIBLE an individual
3 engaging in dual employment with the
4 Nevada State Senate and Clark County
5 District Attorney; TERESA BENITEZ-
6 THOMPSON,
7 an individual engaging in dual
8 employment with the Nevada State Assembly
9 and University of Nevada, Reno; JILL
10 TOLLES, an individual engaging in dual
11 employment with the Nevada State Assembly
12 and University of Nevada, Reno; and
13 SELENA TORRES, an individual engaging
14 in dual employment with the Nevada State
15 Assembly and Clark County School District,

16 Defendants.

17
18 In this action, Plaintiff Nevada Policy Research Institute (“NPRI”) has alleged that the
19 individual Defendants are persons simultaneously holding elected offices in the Nevada Legislature
20 and paid positions with the executive branch of the Nevada State Government or with local
21 governments in violation of the separation-of-powers provision in Article 3, Section 1 of the Nevada
22 Constitution. Defendants filed Motions to Dismiss as follows: Motion to Dismiss filed by Defendant
23 Brittney Miller on September 18, 2020; Motion to Dismiss filed by Defendants Osvaldo Fumo, Heidi
24 Seevers Gansert, and Dina Neal on September 28, 2020; Motion to Dismiss filed by Defendant Jason
25 Frierson on October 5, 2020; and, Motion to Dismiss filed by Defendant Nicole Cannizzaro on October
26 19, 2020 (collectively, the “Motions to Dismiss”). Each of the defendants that filed a motion to dismiss
27 also filed a joinder to the other Motions to Dismiss.

28 The Court having read and considered the pleadings and briefs filed by the parties, and for good
cause appearing finds as follows:

Pursuant to EDCR 2.23 (c) and (d), this matter was decided on the briefs and pleadings filed by
the parties without oral argument because the Court deems oral argument unnecessary.

Standing is the controlling issue here and while other issues are discussed, standing is the
determinative issue above all else. Here, NPRI simply lacks standing to bring this suit. It is an
organization rather than a particularly-aggrieved individual harmed by any alleged dual employment
by any defendant. It is quite clear that NPRI does not allege any particularized harm beyond that of any

1 ordinary taxpayer, and that is not enough to give standing sufficient for NPRI to maintain this suit. *See*
2 *Katz v. Incline Village General Improvement District*, 414 P.3d 300, 2018 WL 1129140 (unpublished
3 decision), Nev. S. Ct. Case No. 70440 (Feb. 26, 2018) (“This court recently reaffirmed the general rule
4 that a taxpayer lacks standing when he or she has not suffered a special or peculiar injury different
5 from that sustained by the general public.”).

6 NPRI’s Opposition does not make persuasive arguments regarding standing, suggesting that an
7 evidentiary hearing would need to be conducted but not offering any theory as to how such a hearing
8 would demonstrate particularized harm or otherwise lead to a finding that it has standing to pursue this
9 case against Defendants.

10 Neither is the Court persuaded that NPRI comes within the recent *Schwartz* public-interest
11 exception to Nevada’s standing doctrine. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894
12 (2016) (recognizing “an exception to [the] injury requirement in certain cases involving issues of public
13 importance.”). To establish standing under the public-interest exception: (1) the case must involve an
14 issue of significant public importance; (2) the case must involve a challenge to a legislative expenditure
15 or appropriation on the basis that it violates a specific provision of the Nevada Constitution; and (3)
16 the plaintiff must be an “appropriate” party, meaning that there is no one else in a better position who
17 will likely bring an action and that the plaintiff is capable of fully advocating his or her position in
18 court. *Id.*

19 Even granting, *arguendo*, that this matter is one of public importance, NPRI is not directly
20 challenging a legislative appropriation or expenditure that can be enjoined in this action. In *Schwartz*,
21 the challenged legislative expenditure at issue involved multi-million dollar educational expenditures
22 projected over decades, alleged to be unconstitutionally diverted from appropriate state education
23 funds, which persuaded the Nevada Supreme Court that parents of children in Nevada’s public school
24 system had standing to maintain suit under the public-interest exception without meeting the
25 particularized-injury requirement. It was the legislative expenditure, and the entirety of the
26 circumstances, that established the public-interest exception in *Schwartz* and exempted the parents
27 from meeting the particularized-injury requirement.

28 Here, at least in response to Defendant Miller’s motion, NPRI avers that her *per diem* or

1 legislative salary is the challenged “legislative appropriation” satisfying that prong of a *Schwartz*
2 analysis. But the present suit is about “dual employment” as a violation of Nevada’s separation-of-
3 powers provision, not about legislative pay; NPRI is not suing the paymasters of legislators to enjoin
4 such payments for the services of legislators; and NPRI blows hot and cold on whether or not it is suing
5 the Defendants as legislators at all, appearing to prefer to cast this action as against executive branch
6 and local government employees when convenient, and against legislators when not. Indeed, NPRI
7 seeks, unsuccessfully, to create a wholly-new and separate category of defendant here, sued neither in
8 his or her official capacity as legislator nor as public employee, in an attempt to disqualify institutional
9 attorneys from representing Defendants, a maneuver that the Court rejected in its order denying NPRI’s
10 motion to disqualify the attorneys for the Nevada State Higher Education System.

11 Further, NPRI cannot demonstrate that it is the “appropriate” party here, beyond its general
12 policy disagreement with legislators holding positions of public employment with the state executive
13 branch or with local governments. Historically, in the numerous suits NPRI has either brought or
14 assisted in bringing on this subject, it has demonstrated that it has been able to enlist individuals who
15 might provide a more colorable claim of particularized harm, but NPRI has simply opted not to do so
16 in this case to enhance the possibility of finding that counsel represents someone with actual standing.
17 NPRI even states in its papers that it has individual members ready and willing to seek the employment
18 positions of Defendants, demonstrating that it is not the sole and appropriate party to bring this suit,
19 especially given the direction provided by the Nevada Supreme Court in *Heller v. Legislature*, 120
20 Nev. 456, 472-473, 93 P.3d 746, 757 (2004), that an appropriate action raising the “dual service issue”
21 under Nevada’s separation-of-powers provision “could be sought by someone with a legally protectible
22 interest, such as a person seeking the executive branch position held by the legislator.” *Id.* (internal
23 quotation and citation omitted).

24 Meeting neither the basic elements of standing in Nevada nor at least two of the three prongs
25 of the analysis in *Schwartz*, NPRI clearly lacks standing to bring this suit.

26 ///

27 ///

28 ///

ORDER

IT IS HEREBY ORDERED that the Motions to Dismiss are **GRANTED**.

IT IS FURTHER ORDERED that the Joinders of the other Defendants are also **GRANTED**.

IT IS HEREBY FURTHER ORDERED that the hearing on this matter set for November 19,
2020 is hereby **VACATED**.
Dated this 8th day of December, 2020



Approved as to form and content by:

FOX ROTHSCHILD LLP

**GENERAL COUNSEL NEVADA STATE
COLLEGE E08 FB5 9880 C605
Jim Crockett
District Court Judge**

Refused to Sign Order

DEANNA L. FORBUSH, ESQ.
Nevada Bar No. 06646
COLEEN E. MCCARTY, ESQ.
Nevada Bar No. 13186
1980 Festival Plaza Drive, Suite 700
Las Vegas Nevada 89135

*Attorneys for Plaintiff,
Nevada Policy Research Institute*

/s/ Berna L. Rhodes-Ford

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Nevada Bar No. 07879
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Henderson, Nevada 89002

*Attorneys for Defendants,
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

**ASSISTANT GENERAL COUNSEL
UNIVERSITY OF NEVADA, RENO**

**WOLF RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

/s/ Gary A. Cardinal

GARY A. CARDINAL, ESQ.
Nevada Bar No. 00076
1664 North Virginia Street/MS 0550
Reno, Nevada 89557

*Attorneys for Defendants,
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

/s/ Bradley Schrager

BRADLEY SCHRAGER, ESQ.
Nevada Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

*Attorneys for Defendants,
Brittney Miller and Selena Torres*

\\

\\

\\

\\

1 **LEGISLATIVE COUNSEL BUREAU,**
2 **LEGAL DIVISION**

3 /s/ Kevin C. Powers

4 KEVIN C. POWERS, ESQ.

5 Nevada Bar No. 6781

6 401 S. Carson St.

7 Carson City, Nevada 89701

8 *Attorneys for Intervenor-Defendant*
9 *Legislature of the State of Nevada*

10 *Respectfully submitted by:*

11 **WILEY PETERSEN**

12 JONATHAN D. BLUM, ESQ.

13 Nevada Bar No. 09515

14 1050 Indigo Dr., Suite 200B

15 Las Vegas, Nevada 89145

16 Telephone No. (702) 910-3329

17 Fax: (702) 553-3467

18 jblum@wileypetersenlaw.com

19 *Attorneys for Defendants,*
20 *Jason Frierson and Nicole Cannizzaro*

From: Gary A Cardinal <gcardinal@unr.edu>
Sent: Monday, December 7, 2020 9:39 AM
To: 'jblum@wileypetersenlaw.com'; 'Bradley Schrager'; 'Powers, Kevin'; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo'; 'Nita Armendariz'; 'Berna Rhodes-Ford'
Cc: ibautista@wileypetersenlaw.com
Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Jon,
You have permission to attach my signature.
Thank you,
Gary

GARY A. CARDINAL

Assistant General Counsel
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Subject: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Counsel,
I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

Deanna and Colleen, I understand you will not be signing, but if you can respond confirming the same, that would be helpful.

I plan to submit this today.

Thanks,

Jon

Jonathan D. Blum, Esq.



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Cc: ibautista@wileypetersenlaw.com
Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Please affix ours.

Bradley S. Schrager
Areas of Practice: Politics & Government – Appeals & Writs – Wage & Labor
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702.639.5102
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To: Bradley Schrager; 'Powers, Kevin'; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; Daniel Bravo; 'Nita Armendariz'; gcardinal@unr.edu; 'Berna Rhodes-Ford'
Cc: ibautista@wileypetersenlaw.com
Subject: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

CAUTION:EXTERNAL EMAIL

Counsel,
I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

Deanna and Colleen, I understand you will not be signing, but if you can respond confirming the same, that would be helpful.

I plan to submit this today.

Thanks,
Jon

Jonathan D. Blum, Esq.



1050 Indigo Drive, Suite 200B

Las Vegas, Nevada 89145

Office 702.910.3329 | Mobile 702.443.0677

jblum@wileypetersenlaw.com

www.wileypetersenlaw.com



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From: Powers, Kevin <kpowers@lcb.state.nv.us>

Sent: Monday, December 7, 2020 11:24 AM

To: jblum@wileypetersenlaw.com; 'Bradley Schrager' <BSchrager@wrslawyers.com>; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>

Cc: ibautista@wileypetersenlaw.com

Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

LCB Legal has reviewed the proposed Omnibus Order Granting Motions to Dismiss, and I agree to the use of the my electronic signature for the proposed order.

Thanks.

Kevin C. Powers

General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701-4747
(775) 684-6830
(775) 684-6761-Fax

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From: jblum@wileypetersenlaw.com <jblum@wileypetersenlaw.com>

Sent: Monday, December 07, 2020 9:37 AM

To: 'Bradley Schrager' <BSchrager@wrslawyers.com>; Powers, Kevin <kpowers@lcb.state.nv.us>; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>

Cc: ibautista@wileypetersenlaw.com

Subject: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Counsel,

I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

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I plan to submit this today.

Thanks,
Jon

Jonathan D. Blum, Esq.



1050 Indigo Drive, Suite 200B
Las Vegas, Nevada 89145
Office 702.910.3329 | Mobile 702.443.0677
jblum@wileypetersenlaw.com
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From: Berna Rhodes-Ford <Berna.Rhodes-Ford@nsc.edu>
Sent: Monday, December 7, 2020 2:41 PM
To: jblum@wileypetersenlaw.com
Cc: Bradley Schragar; Powers, Kevin; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; Daniel Bravo; Nita Armendariz; gcardinal@unr.edu; ibautista@wileypetersenlaw.com
Subject: Re: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

You may affix my e-signature.

Berna L. Rhodes-Ford
office [702.992.2378](tel:702.992.2378)
Berna.Rhodes-Ford@nsc.edu

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On Dec 7, 2020, at 9:37 AM, jblum@wileypetersenlaw.com wrote:

Counsel,
I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

Deanna and Colleen, I understand you will not be signing, but if you can respond confirming the same, that would be helpful.

I plan to submit this today.

Thanks,
Jon

Jonathan D. Blum, Esq.

<image001.jpg>
1050 Indigo Drive, Suite 200B
Las Vegas, Nevada 89145
Office 702.910.3329 | Mobile 702.443.0677

jblum@wileypetersenlaw.com
www.wileypetersenlaw.com

<image003.png>

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<201203 DRAFT_NPRI v. Cannizzaro et al._Proposed Order Granting MTD 12.7.20.docx>

From: McCarty, Colleen E. <CMcCarty@foxrothschild.com>
Sent: Monday, December 7, 2020 11:43 AM
To: jblum@wileypetersenlaw.com; 'Bradley Schrager'; 'Powers, Kevin'; Forbush, Deanna L.; 'Daniel Bravo'; 'Nita Armendariz'; gcardinal@unr.edu; 'Berna Rhodes-Ford'
Cc: ibautista@wileypetersenlaw.com; Martinez, Natasha
Subject: RE: [EXT] A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Jon,

As set forth in our communications to you and in the letter to chambers, dated December 4, 2020, we have respectfully requested that the Court hold all proposed orders in this matter until the Court resolves the pending Motion for Clarification on or before December 17, 2020 and NPRI has the opportunity thereafter to provide input to complete the necessary orders. NPRI seeks to include the Court's clarifications in each order ultimately entered by the Court as a result of its November 18, 2020 Minute Order.

Colleen McCarty

From: jblum@wileypetersenlaw.com <jblum@wileypetersenlaw.com>
Sent: Monday, December 7, 2020 9:37 AM
To: 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Powers, Kevin' <kpowers@lcb.state.nv.us>; Forbush, Deanna L. <DForbush@foxrothschild.com>; McCarty, Colleen E. <CMcCarty@foxrothschild.com>; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>
Cc: ibautista@wileypetersenlaw.com
Subject: [EXT] A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

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Thanks,
Jon

Jonathan D. Blum, Esq.



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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Nevada Policy Research
7 Institute, Plaintiff(s)

CASE NO: A-20-817757-C

8 vs.

DEPT. NO. Department 24

9 Nicole Cannizzaro, Defendant(s)

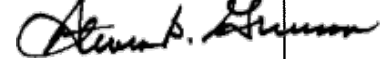
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11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
14 recipients registered for e-Service on the above entitled case as listed below:

Service Date: 12/8/2020

15 Bradley Schrager	bschrager@wrslawyers.com
16 Dannielle Fresquez	dfresquez@wrslawyers.com
17 Daniel Bravo	dbravo@wrslawyers.com
18 Christie Rehfeld	crehfeld@wrslawyers.com
19 Kevin Powers	kpowers@lcb.state.nv.us
20 Deanna Forbush	dforbush@foxrothschild.com
21 Colleen McCarty	cmccarty@foxrothschild.com
22 Natasha Martinez	nmartinez@foxrothschild.com
23 Ivette Bautista	ibautista@wileypetersenlaw.com
24 Jonathan Blum	jblum@wileypetersenlaw.com
25 Chastity Dugenia	cdugenia@wileypetersenlaw.com

1	Berna Rhodes-Ford	Berna.Rhodes-Ford@nsc.edu
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3	Gary Cardinal	gcardinal@unr.edu
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NEO

JONATHAN D. BLUM, ESQ.

Nevada Bar No. 09515

WILEY PETERSEN

1050 Indigo Dr., Suite 200B

Las Vegas, Nevada 89145

Telephone No. (702) 910-3329

Fax: (702) 553-3467

jblum@wileypetersenlaw.com

Attorney for Defendants,

Jason Frierson and Nicole Cannizzaro

DISTRICT COURT

COUNTY OF CLARK, NEVADA

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA
DOUGLASSBOONE,
an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
the Nevada State Assembly and Regional
Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; DINA
NEAL, an individual engaging in dual
employment with the Nevada State Assembly
and Nevada State College; JAMES
OHRENSCHALL, an individual engaging in
dual employment with the Nevada State

CASE No.: A-20-817757-C

DEPT. No.: 24

**NOTICE OF ENTRY OF OMNIBUS
ORDER GRANTING MOTIONS TO
DISMISS**

1 Senate and Clark County Public Defender;
2 MELANIE SCHEIBLE an individual
3 engaging in dual employment with the
4 Nevada State Senate and Clark County
5 District Attorney; TERESA
6 BENITEZTHOMPSON,
7 an individual engaging in dual
8 employment with the Nevada State Assembly
9 and University of Nevada, Reno; JILL
10 TOLLES, an individual engaging in dual
11 employment with the Nevada State Assembly
12 and University of Nevada, Reno; and
13 SELENA TORRES, an individual engaging
14 in dual employment with the Nevada State
15 Assembly and Clark County School District,
16

17 Defendants.

18 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Omnibus Order
19 Granting Motions to Dismiss was entered in the above-entitled matter on the 8th day of December
20 2020, a copy of which is attached hereto.

21 DATED this 8 of December 2020.

22 **WILEY PETERSEN**

23 JONATHAN D. BLUM, ESQ.
24 Nevada Bar No. 09515
25 1050 Indigo Dr., Suite 200B
26 Las Vegas, Nevada 89145
27 Telephone No. (702) 910-3329
28 Facsimile: (702) 553-3467
jblum@wileypetersenlaw.com

*Attorney for Defendants,
Jason Frierson and Nicole Cannizzaro*

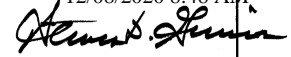
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CERTIFICATE OF SERVICE

I hereby certify that I an employee of WILEY PETERSEN, and the 8th day of December 2020, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF OMNIBUS ORDER GRANTING MOTIONS TO DISMISS** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court’s facilities to those parties listed on the Court’s Master Service List.

/s/ Ivette Bautista
An Employee of WILEY PETERSEN


CLERK OF THE COURT

ORDR

JONATHAN D. BLUM, ESQ.
Nevada Bar No. 09515

WILEY PETERSEN

1050 Indigo Dr., Suite 200B
Las Vegas, Nevada 89145
Telephone No. (702) 910-3329
Fax: (702) 553-3467
jblum@wileypetersenlaw.com

*Attorney for Defendants,
Jason Frierson and Nicole Cannizzaro*

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
District Attorney; KASINA DOUGLASS-
BOONE,

an individual engaging in dual
employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly
and Clark County Public Defender;
OSVALDO FUMO, an individual engaging
in dual employment with the Nevada State
Assembly and University of Nevada, Las
Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with
the Nevada State Senate and University of
Nevada Reno; GLEN LEAVITT, an
individual engaging in dual employment with
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Transportation Commission; BRITTNEY
MILLER, an individual engaging in dual
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and Clark County School District; DINA
NEAL, an individual engaging in dual
employment with the Nevada State Assembly
and Nevada State College; JAMES
OHRENSCHALL, an individual engaging in
dual employment with the Nevada State

Case No.: A-20-817757-C

Dept. No.: 24

**OMNIBUS ORDER GRANTING
MOTIONS TO DISMISS**

1 Senate and Clark County Public Defender;
2 MELANIE SCHEIBLE an individual
3 engaging in dual employment with the
4 Nevada State Senate and Clark County
5 District Attorney; TERESA BENITEZ-
6 THOMPSON,
7 an individual engaging in dual
8 employment with the Nevada State Assembly
9 and University of Nevada, Reno; JILL
10 TOLLES, an individual engaging in dual
11 employment with the Nevada State Assembly
12 and University of Nevada, Reno; and
13 SELENA TORRES, an individual engaging
14 in dual employment with the Nevada State
15 Assembly and Clark County School District,

16 Defendants.

17
18 In this action, Plaintiff Nevada Policy Research Institute (“NPRI”) has alleged that the
19 individual Defendants are persons simultaneously holding elected offices in the Nevada Legislature
20 and paid positions with the executive branch of the Nevada State Government or with local
21 governments in violation of the separation-of-powers provision in Article 3, Section 1 of the Nevada
22 Constitution. Defendants filed Motions to Dismiss as follows: Motion to Dismiss filed by Defendant
23 Brittney Miller on September 18, 2020; Motion to Dismiss filed by Defendants Osvaldo Fumo, Heidi
24 Seevers Gansert, and Dina Neal on September 28, 2020; Motion to Dismiss filed by Defendant Jason
25 Frierson on October 5, 2020; and, Motion to Dismiss filed by Defendant Nicole Cannizzaro on October
26 19, 2020 (collectively, the “Motions to Dismiss”). Each of the defendants that filed a motion to dismiss
27 also filed a joinder to the other Motions to Dismiss.

28 The Court having read and considered the pleadings and briefs filed by the parties, and for good
cause appearing finds as follows:

Pursuant to EDCR 2.23 (c) and (d), this matter was decided on the briefs and pleadings filed by
the parties without oral argument because the Court deems oral argument unnecessary.

Standing is the controlling issue here and while other issues are discussed, standing is the
determinative issue above all else. Here, NPRI simply lacks standing to bring this suit. It is an
organization rather than a particularly-aggrieved individual harmed by any alleged dual employment
by any defendant. It is quite clear that NPRI does not allege any particularized harm beyond that of any

1 ordinary taxpayer, and that is not enough to give standing sufficient for NPRI to maintain this suit. *See*
2 *Katz v. Incline Village General Improvement District*, 414 P.3d 300, 2018 WL 1129140 (unpublished
3 decision), Nev. S. Ct. Case No. 70440 (Feb. 26, 2018) (“This court recently reaffirmed the general rule
4 that a taxpayer lacks standing when he or she has not suffered a special or peculiar injury different
5 from that sustained by the general public.”).

6 NPRI’s Opposition does not make persuasive arguments regarding standing, suggesting that an
7 evidentiary hearing would need to be conducted but not offering any theory as to how such a hearing
8 would demonstrate particularized harm or otherwise lead to a finding that it has standing to pursue this
9 case against Defendants.

10 Neither is the Court persuaded that NPRI comes within the recent *Schwartz* public-interest
11 exception to Nevada’s standing doctrine. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894
12 (2016) (recognizing “an exception to [the] injury requirement in certain cases involving issues of public
13 importance.”). To establish standing under the public-interest exception: (1) the case must involve an
14 issue of significant public importance; (2) the case must involve a challenge to a legislative expenditure
15 or appropriation on the basis that it violates a specific provision of the Nevada Constitution; and (3)
16 the plaintiff must be an “appropriate” party, meaning that there is no one else in a better position who
17 will likely bring an action and that the plaintiff is capable of fully advocating his or her position in
18 court. *Id.*

19 Even granting, *arguendo*, that this matter is one of public importance, NPRI is not directly
20 challenging a legislative appropriation or expenditure that can be enjoined in this action. In *Schwartz*,
21 the challenged legislative expenditure at issue involved multi-million dollar educational expenditures
22 projected over decades, alleged to be unconstitutionally diverted from appropriate state education
23 funds, which persuaded the Nevada Supreme Court that parents of children in Nevada’s public school
24 system had standing to maintain suit under the public-interest exception without meeting the
25 particularized-injury requirement. It was the legislative expenditure, and the entirety of the
26 circumstances, that established the public-interest exception in *Schwartz* and exempted the parents
27 from meeting the particularized-injury requirement.

28 Here, at least in response to Defendant Miller’s motion, NPRI avers that her *per diem* or

1 legislative salary is the challenged “legislative appropriation” satisfying that prong of a *Schwartz*
2 analysis. But the present suit is about “dual employment” as a violation of Nevada’s separation-of-
3 powers provision, not about legislative pay; NPRI is not suing the paymasters of legislators to enjoin
4 such payments for the services of legislators; and NPRI blows hot and cold on whether or not it is suing
5 the Defendants as legislators at all, appearing to prefer to cast this action as against executive branch
6 and local government employees when convenient, and against legislators when not. Indeed, NPRI
7 seeks, unsuccessfully, to create a wholly-new and separate category of defendant here, sued neither in
8 his or her official capacity as legislator nor as public employee, in an attempt to disqualify institutional
9 attorneys from representing Defendants, a maneuver that the Court rejected in its order denying NPRI’s
10 motion to disqualify the attorneys for the Nevada State Higher Education System.

11 Further, NPRI cannot demonstrate that it is the “appropriate” party here, beyond its general
12 policy disagreement with legislators holding positions of public employment with the state executive
13 branch or with local governments. Historically, in the numerous suits NPRI has either brought or
14 assisted in bringing on this subject, it has demonstrated that it has been able to enlist individuals who
15 might provide a more colorable claim of particularized harm, but NPRI has simply opted not to do so
16 in this case to enhance the possibility of finding that counsel represents someone with actual standing.
17 NPRI even states in its papers that it has individual members ready and willing to seek the employment
18 positions of Defendants, demonstrating that it is not the sole and appropriate party to bring this suit,
19 especially given the direction provided by the Nevada Supreme Court in *Heller v. Legislature*, 120
20 Nev. 456, 472-473, 93 P.3d 746, 757 (2004), that an appropriate action raising the “dual service issue”
21 under Nevada’s separation-of-powers provision “could be sought by someone with a legally protectible
22 interest, such as a person seeking the executive branch position held by the legislator.” *Id.* (internal
23 quotation and citation omitted).

24 Meeting neither the basic elements of standing in Nevada nor at least two of the three prongs
25 of the analysis in *Schwartz*, NPRI clearly lacks standing to bring this suit.

26 ///

27 ///

28 ///

ORDER

IT IS HEREBY ORDERED that the Motions to Dismiss are **GRANTED**.

IT IS FURTHER ORDERED that the Joinders of the other Defendants are also **GRANTED**.

IT IS HEREBY FURTHER ORDERED that the hearing on this matter set for November 19,
2020 is hereby **VACATED**.
Dated this 8th day of December, 2020



Approved as to form and content by:

FOX ROTHSCHILD LLP

**GENERAL COUNSEL NEVADA STATE
COLLEGE** E08 FB5 9880 C605
Jim Crockett
District Court Judge

Refused to Sign Order

DEANNA L. FORBUSH, ESQ.
Nevada Bar No. 06646
COLEEN E. MCCARTY, ESQ.
Nevada Bar No. 13186
1980 Festival Plaza Drive, Suite 700
Las Vegas Nevada 89135

*Attorneys for Plaintiff,
Nevada Policy Research Institute*

/s/ Berna L. Rhodes-Ford

BERNA L. RHODES-FORD, ESQ.
Nevada Bar No. 07879
1300 Nevada State Drive. RSC 374
Henderson, Nevada 89002

*Attorneys for Defendants,
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

**ASSISTANT GENERAL COUNSEL
UNIVERSITY OF NEVADA, RENO**

**WOLF RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

/s/ Gary A. Cardinal

GARY A. CARDINAL, ESQ.
Nevada Bar No. 00076
1664 North Virginia Street/MS 0550
Reno, Nevada 89557

*Attorneys for Defendants,
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and Dina Neal*

/s/ Bradley Schrager

BRADLEY SCHRAGER, ESQ.
Nevada Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

*Attorneys for Defendants,
Brittney Miller and Selena Torres*

\\

\\

\\

\\

1 **LEGISLATIVE COUNSEL BUREAU,**
2 **LEGAL DIVISION**

3 /s/ Kevin C. Powers

4 KEVIN C. POWERS, ESQ.

5 Nevada Bar No. 6781

6 401 S. Carson St.

7 Carson City, Nevada 89701

8 *Attorneys for Intervenor-Defendant*
9 *Legislature of the State of Nevada*

10 *Respectfully submitted by:*

11 **WILEY PETERSEN**

12 JONATHAN D. BLUM, ESQ.

13 Nevada Bar No. 09515

14 1050 Indigo Dr., Suite 200B

15 Las Vegas, Nevada 89145

16 Telephone No. (702) 910-3329

17 Fax: (702) 553-3467

18 jblum@wileypetersenlaw.com

19 *Attorneys for Defendants,*
20 *Jason Frierson and Nicole Cannizzaro*

From: Gary A Cardinal <gcardinal@unr.edu>
Sent: Monday, December 7, 2020 9:39 AM
To: 'jblum@wileypetersenlaw.com'; 'Bradley Schrager'; 'Powers, Kevin'; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo'; 'Nita Armendariz'; 'Berna Rhodes-Ford'
Cc: ibautista@wileypetersenlaw.com
Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Jon,
You have permission to attach my signature.
Thank you,
Gary

GARY A. CARDINAL

Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street
Mail Stop 0550
Reno, NV 89557
Tel: (775) 784-3495
Fax: (775) 327-2202
gcardinal@unr.edu

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From: jblum@wileypetersenlaw.com <jblum@wileypetersenlaw.com>
Sent: Monday, December 07, 2020 9:37 AM
To: 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Powers, Kevin' <kpowers@lcb.state.nv.us>; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; Gary A Cardinal <gcardinal@unr.edu>; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>
Cc: ibautista@wileypetersenlaw.com
Subject: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Counsel,
I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

Deanna and Colleen, I understand you will not be signing, but if you can respond confirming the same, that would be helpful.

I plan to submit this today.

Thanks,

Jon

Jonathan D. Blum, Esq.



1050 Indigo Drive, Suite 200B

Las Vegas, Nevada 89145

Office 702.910.3329 | Mobile 702.443.0677

jblum@wileypetersenlaw.com

www.wileypetersenlaw.com



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From: Bradley Schrager <BSchrager@wrslawyers.com>
Sent: Monday, December 7, 2020 9:40 AM
To: 'jblum@wileypetersenlaw.com'; 'Powers, Kevin'; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; Daniel Bravo; 'Nita Armendariz'; gcardinal@unr.edu; 'Berna Rhodes-Ford'
Cc: ibautista@wileypetersenlaw.com
Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Please affix ours.

Bradley S. Schrager
Areas of Practice: Politics & Government – Appeals & Writs – Wage & Labor
Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP
3556 E. Russell Rd, Las Vegas, Nevada 89120
702.639.5102
bschrager@wrslawyers.com

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From: jblum@wileypetersenlaw.com [mailto:jblum@wileypetersenlaw.com]
Sent: Monday, December 07, 2020 9:37 AM
To: Bradley Schrager; 'Powers, Kevin'; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; Daniel Bravo; 'Nita Armendariz'; gcardinal@unr.edu; 'Berna Rhodes-Ford'
Cc: ibautista@wileypetersenlaw.com
Subject: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

CAUTION:EXTERNAL EMAIL

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From: Powers, Kevin <kpowers@lcb.state.nv.us>

Sent: Monday, December 7, 2020 11:24 AM

To: jblum@wileypetersenlaw.com; 'Bradley Schrager' <BSchrager@wrslawyers.com>; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>

Cc: ibautista@wileypetersenlaw.com

Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

LCB Legal has reviewed the proposed Omnibus Order Granting Motions to Dismiss, and I agree to the use of the my electronic signature for the proposed order.

Thanks.

Kevin C. Powers

General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701-4747
(775) 684-6830
(775) 684-6761-Fax

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From: jblum@wileypetersenlaw.com <jblum@wileypetersenlaw.com>

Sent: Monday, December 07, 2020 9:37 AM

To: 'Bradley Schrager' <BSchrager@wrslawyers.com>; Powers, Kevin <kpowers@lcb.state.nv.us>; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>

Cc: ibautista@wileypetersenlaw.com

Subject: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Counsel,

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I plan to submit this today.

Thanks,
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Jonathan D. Blum, Esq.



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jblum@wileypetersenlaw.com
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From: Berna Rhodes-Ford <Berna.Rhodes-Ford@nsc.edu>
Sent: Monday, December 7, 2020 2:41 PM
To: jblum@wileypetersenlaw.com
Cc: Bradley Schragger; Powers, Kevin; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; Daniel Bravo; Nita Armendariz; gcardinal@unr.edu; ibautista@wileypetersenlaw.com
Subject: Re: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

You may affix my e-signature.

Berna L. Rhodes-Ford
office [702.992.2378](tel:702.992.2378)
Berna.Rhodes-Ford@nsc.edu

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On Dec 7, 2020, at 9:37 AM, jblum@wileypetersenlaw.com wrote:

Counsel,
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Thanks,
Jon

Jonathan D. Blum, Esq.

<image001.jpg>
1050 Indigo Drive, Suite 200B
Las Vegas, Nevada 89145
Office 702.910.3329 | Mobile 702.443.0677

jblum@wileypetersenlaw.com
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<image003.png>

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<201203 DRAFT_NPRI v. Cannizzaro et al._Proposed Order Granting MTD 12.7.20.docx>

From: McCarty, Colleen E. <CMcCarty@foxrothschild.com>
Sent: Monday, December 7, 2020 11:43 AM
To: jblum@wileypetersenlaw.com; 'Bradley Schrager'; 'Powers, Kevin'; Forbush, Deanna L.; 'Daniel Bravo'; 'Nita Armendariz'; gcardinal@unr.edu; 'Berna Rhodes-Ford'
Cc: ibautista@wileypetersenlaw.com; Martinez, Natasha
Subject: RE: [EXT] A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Jon,

As set forth in our communications to you and in the letter to chambers, dated December 4, 2020, we have respectfully requested that the Court hold all proposed orders in this matter until the Court resolves the pending Motion for Clarification on or before December 17, 2020 and NPRI has the opportunity thereafter to provide input to complete the necessary orders. NPRI seeks to include the Court's clarifications in each order ultimately entered by the Court as a result of its November 18, 2020 Minute Order.

Colleen McCarty

From: jblum@wileypetersenlaw.com <jblum@wileypetersenlaw.com>
Sent: Monday, December 7, 2020 9:37 AM
To: 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Powers, Kevin' <kpowers@lcb.state.nv.us>; Forbush, Deanna L. <DForbush@foxrothschild.com>; McCarty, Colleen E. <CMcCarty@foxrothschild.com>; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>
Cc: ibautista@wileypetersenlaw.com
Subject: [EXT] A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Nevada Policy Research
Institute, Plaintiff(s)

CASE NO: A-20-817757-C

7 vs.

DEPT. NO. Department 24

8
9 Nicole Cannizzaro, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/8/2020

15 Bradley Schrager	bschrager@wrslawyers.com
16 Dannielle Fresquez	dfresquez@wrslawyers.com
17 Daniel Bravo	dbravo@wrslawyers.com
18 Christie Rehfeld	crehfeld@wrslawyers.com
19 Kevin Powers	kpowers@lcb.state.nv.us
20 Deanna Forbush	dforbush@foxrothschild.com
21 Colleen McCarty	cmccarty@foxrothschild.com
22 Natasha Martinez	nmartinez@foxrothschild.com
23 Ivette Bautista	ibautista@wileypetersenlaw.com
24 Jonathan Blum	jblum@wileypetersenlaw.com
25 Chastity Dugenia	cdugenia@wileypetersenlaw.com

1	Berna Rhodes-Ford	Berna.Rhodes-Ford@nsc.edu
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3	Gary Cardinal	gcardinal@unr.edu
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