

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Appellant,

vs.

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 Senate and Nevada State
College and College of Southern Nevada;
JAMES OHRENSCHALL, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
Public Defender; and SELENA TORRES,
and individual engaging in dual employment
with the Nevada State Assembly and a Clark
County Public Charter School,

Respondent,

and

Legislature of the State of Nevada,

Intervenor-Respondent.

Supreme Court Case No.: 85935

Electronically Filed
Jan 11 2023 01:44 PM
[District Court Case No.:
A-20-817757-C] Elizabeth A. Brown
Clerk of Supreme Court

DOCKETING STATEMENT

1. Judicial District: Eighth Judicial District, Department VIII

County: Clark

Judge: The Honorable Jessica K. Peterson

District Court Case No.: A-20-817757-C

2. Attorney(s) filing this docketing statement:

Attorneys: Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq.

Telephone: (702) 262-6899

Firm: Fox Rothschild LLP

Address: 1980 Festival Plaza Drive, Suite 700, Las Vegas, NV 89135

Client: Nevada Policy Research Institute (“NPRI”)

3. Attorney(s) representing Respondents:

1) Attorneys: Berna L. Rhodes-Ford, Esq.

Telephone: (702) 992-2378

Firm: Nevada State College

Address: 1300 Nevada State Drive, RSC 374, Henderson, NV 89002

Clients: Respondent, Dina Neal

2) Attorneys: Bradley Schrager, Esq., Royi Moas, Esq., Daniel Bravo, Esq.

Telephone: (702) 639-5102

Firm: Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP

Address: 3556 E. Russell Road, Second Floor, Las Vegas, NV 89120

Clients: Respondents, Brittney Miller and Selena Torres

3) Attorneys: Jonathan D. Blum, Esq.

Telephone: (702) 910-3329

Firm: Wiley Petersen

Address: 1050 Indigo Drive, Suite 200B, Las Vegas, NV 89145

Client: Respondent James Ohrenschall

4) Attorneys: Kevin C. Powers, Esq.

Telephone: (775) 684-6830

Firm: Legislative Counsel Bureau, Legal Division

Address: 401 S. Carson Street, Carson City, NV 89701

Client: Intervenor-Respondent, Legislature of the State of Nevada

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input checked="" type="checkbox"/> Dismissal |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgement | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCp 60b relief | <input checked="" type="checkbox"/> Other: See below |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Modification |

Other Dismissal: Merits decision for dismissal based on finding no common law incompatibility or separation-of-powers violations for remaining parties

5. Does this appeal raise issues concerning any of the following? N/A

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Nevada Policy Research Institute v. Cannizzaro, et al., Case No. 82341

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition: N/A

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

Appellant, NPRI, filed the underlying Amended Complaint for Declaratory and Injunctive Relief (“Amended Complaint”) in the public interest to address the ongoing constitutional violations pursuant to Nev. Const. art. 3, §1(1), 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. The Amended Complaint alleges that Defendants’ dual employment expressly violates the Separation of Powers requirement and undermines the ethics of their legislative service by creating conflicts, concentrating power, and diluting the separation of powers. *See* Amended Complaint at ¶ 4.

The Honorable Jim Crockett initially dismissed the district court litigation on December 8, 2020, based on a finding that NPRI lacked standing to bring the lawsuit. NPRI appealed the district court’s first dismissal, and the Supreme Court

reversed and remanded the matter on April 21, 2022, after electing to apply the public-importance exception and confer standing on NPRI, finding that NPRI is an appropriate party and that the issue in this case implicates separation of powers under the Nevada Constitution, is likely to recur, and is of such significant public importance as to require resolution for future guidance. *See* Case No. 82341.

Upon remand, the four (4) remaining Defendants – Brittney Miller, Dina Neal, James Ohrenschall, and Selena Torres – whom the district court identified as either an educator or a public defender, filed motions to dismiss and joinders thereto, seeking a second dismissal of the litigation on various procedural grounds. NPRI sought to strike the motions to dismiss and joinders as successive and impermissible. Two Defendants – Brittney Miller and Selena Torres – also sought to have their claims severed. The district court denied the motion to strike substantively and denied the motion to sever as moot, but granted the motions to dismiss and joinders thereto, finding the allegations in NPRI’s Amended Complaint insufficient to establish the elements of a claim for relief. *See* Order dismissing the district court litigation in its entirety, entered January 4, 2023 (“Order of Dismissal”), at 7:19 – 21. In lieu of addressing the specific arguments of the parties, the Honorable Jessica K. Peterson now presiding, made a *sua sponte* merits determination based on the legal conclusion that Nevada has no specific constitutional or statutory prohibition against dual public employment and, thus,

required the evaluation of three (3) factors, inclusive of the common law doctrine of “incompatible offices,” whether the executive branch employment is with a state entity or local political subdivision, and, if the employment is with a state entity, whether the position is that of an employee or an officer. *See id.* at 8:1 – 12.

Based on its analysis of the factors it identified, the district court held that: (1) no officer or employee of a state or local government may also serve as a state legislator if the roles are not compatible, and it is the purview of the court to determine compatibility; (2) those employed by local government entities are not a part of the state executive branch and therefore may serve in the legislative branch providing the roles are compatible; and (3) public officers of the state executive branch may not serve in the legislature; however, those who are public employees may, providing the roles are compatible. *See Order of Dismissal* at 27:12 – 18.

In applying these holdings to dismiss the remaining Defendants, the district court first found that there is no common law incompatibility issue for an individual to be employed as a county public school teacher, a public defender, or a professor at a state college and simultaneously serve as a state legislator, as there is no conflict between the positions and no prejudice suffered by NPRI based on the dual employment. *See Order of Dismissal* at 11:23 – 12:2. Further, the district court determined Nevada’s separation-of-powers clause does not apply to the remaining local government employees – Brittney Miller, James Ohrenschaal, and

Selena Torres because it does not apply to an employee of local political subdivision who does not hold an incompatible dual position, or to the remaining State government employee – Dina Neal – because an employee of a state entity who does not exercise a sovereign function of the executive branch. *See id.* at 16:12 – 21; *see also* at 25:2 – 26:4.

9. Issues on appeal. State concisely the principal issues in this appeal (attach separate sheets as necessary):

This appeal of the district court’s final judgment dismissing NPRI’s Amended Complaint follows on the pure question of law now ripe for appellate determination of: (i) whether Defendants’ dual employment violates Nevada’s separation-of-powers clause, Nev. Const. art. 3, § 1(1), and (ii) whether the district court erred in denying NPRI’s motion to strike all motions to dismiss and joinders as successive and improper.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issue raised. N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130? N/A

☐ Yes

☐ No

If not, explain: N/A

12. Other issues. Does this appeal involve any of the following issues?

- ☐ Reversal of well-settled Nevada precedent (identify the cases(s))
- ☐ An issue arising under the United States and/or Nevada Constitutions
- X A substantial issue of first impression
- X An issue of public policy
- X An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain:

This appeal seeks to obtain a final determination of whether it is an ongoing constitutional violation, pursuant to Nev. Const. art. 3, §1(1), for Respondents, and each of them, to engage in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments. The matter raises an issue of first impression, as well as a question of statewide public importance, and would necessarily require en banc consideration to maintain uniformity of this Court's decisions.

13. Assignment to the Court of Appeals or retention in the Supreme Court?

Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

Nevada Policy Research Institute respectfully asserts this appeal, which arises from a case originating in the Eighth Judicial District Court, is

presumptively retained by the Supreme Court pursuant to NRAP 17(11) and NRAP 17(12) because, as noted above, the matter raises an issue of first impression, as well as a question of statewide public importance, for which future guidance is necessary,

14. Trial. If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse himself/herself from participation in this appeal? If so, which Justice? N/A

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from.

Order of the district court entered January 4, 2023, denying motion to strike and granting motions to dismiss.

17. Date written notice of entry of judgment or order was served.

Written notice of entry of the district court's Order served January 5, 2023.

Was service by: ☐ Delivery x Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59): N/A

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing

☐ NRCP 52(b) Date of filing:

☐ NRCP 59 Date of filing:

(b) Date of entry of written order resolving tolling motion:

(c) Date written notice of entry of order resolving tolling motion was served:

Was service by:

- ☐ Delivery
☐ Mail/electronic/fax

19. Date notice of appeal filed.

Notice of Appeal of the district court's Order filed January 6, 2023.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other:

NRAP 4(a)(1).

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appeal from:

(a)

- | | | | |
|--------------------------|------------------|--------------------------|--------------|
| X | NRAP 3A(b)(1) | <input type="checkbox"/> | NRS 38.205 |
| <input type="checkbox"/> | NRAP 3A(b)(2) | <input type="checkbox"/> | NRS 233B.150 |
| <input type="checkbox"/> | NRAP 3A(b)(3) | <input type="checkbox"/> | NRS 703.376 |
| <input type="checkbox"/> | Other (specify): | | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) allows an appeal to be taken from the final judgment or order of a district court. The district court's Order at issue in this appeal dismissed all matters in dispute raised by NPRI's Amended Complaint. There is nothing remaining to be adjudicated by the parties.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

1. Plaintiff: Nevada Policy Research Institute
2. Defendants: Brittney Miller, Dina Neal, James Ohrenschall, and Selena Torres

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Additional Defendants in the district court action – Nicole Cannizzaro, Kasina Douglass-Boone, Jason Frierson, Osvaldo Fumo, Heidi Seevers Gansert, Glen Leavitt, Melanie Scheible, Teresa Benitez-Thompson, and Jill Tolles – were all previously dismissed from the action at various times by either the district court or this Court, upon ceasing their complained-of dual service.

23. Give a brief description (3 to 5 words) of each party’s separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

NPRI’s Amended Complaint asserted claims for Declaratory and Injunctive Relief against persons alleged to be engaging in dual service in violation of Nevada’s separation-of-powers clause, Nev. Const. art. 3, § 1(1). The district court dismissed all claims on substantive grounds by its Order entered January 4, 2023.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

X Yes ☐ No

25. If you answered “No” to question 24, complete the following: N/A

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered “No” to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)): N/A

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Order of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Nevada Policy Research Institute	Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq.
Date: January 11, 2023	<u>/s/ Deanna L. Forbush</u> Signature of counsel of record
<u>State of Nevada, County of Clark</u> State and county where signed	

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January 2023, I caused the foregoing **DOCKETING STATEMENT** to be served on all parties to this action, pursuant to NRAP 25(c)(1).

Berna L. Rhodes-Ford, General Counsel
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Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu
Attorney for Defendant
Dina Neal

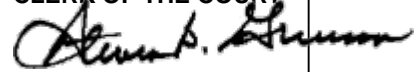
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/s/

An Employee of Fox Rothschild LLP



ACOM

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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.: 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.
28

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

19. 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

20. 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.

21. 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)

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

23. 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 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. Upon information and belief, Defendants disagree with Plaintiff's position stated above.

24. Plaintiff seeks relief pursuant to NRS 30.010, *et seq.*, in the form of 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. A declaration resolving the actual controversy between Plaintiff and

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

25. 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.

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

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

27. Defendants are persons simultaneously holding 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.

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 and irreparable harm will occur to the rights provided under this provision of the Nevada Constitution.

29. There exists no adequate remedy at law to prevent the constitutional violation caused by Defendants simultaneously holding 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.

30. 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.*

31. 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.

///

///

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

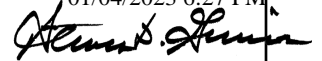
20 1980 Festival Plaza Dr., Suite 700

21 Las Vegas, Nevada 89135

22 Telephone: (702) 262-6899

23 Attorneys for Plaintiff

24 Nevada Policy Research Institute



CLERK OF THE COURT

1 **ORDR**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 NEVADA POLICY RESEARCH
7 INSTITUTE, a Nevada domestic
8 nonprofit corporation,

9 Plaintiff,

10 vs.

11 BRITTNEY MILLER, an individual
12 engaging in dual employment with the
13 Nevada State Assembly and Clark County
14 School District; DINA NEAL, an
15 individual engaging in dual employment with
16 the Nevada State Senate and Nevada State
17 College and College of Southern Nevada;
18 JAMES OHRENSCHALL, an individual
19 engaging in dual employment with the
20 Nevada State Senate and Clark County Public
21 Defender; and SELENA TORRES, an
22 individual engaging in dual employment with
23 the Nevada State Assembly and a Clark
24 County Public Charter School,

25 Defendants,

26 and

27 Legislature of the State of Nevada,

28 Intervenor-Defendant.

CASE NO: A-20-817757-C

DEPT NO: VIII

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On April 21, 2022, the Nevada Supreme Court reversed the district court’s order, narrowly expanding the public-importance exception laid out in Schwartz v. Lopez, 132 Nev. 732, 382 P.3d 886 (2016), applying the exception to “cases where a party seeks to protect the essential nature of a government in which the three distinct departments, . . . legislative, executive, and judicial, remain within the bounds of their constitutional powers.” Nevada Policy Research Institute, Inc. v. Cannizzaro, 507 P.3d 1203 (2022); *citing* State ex rel. Coll v. Johnson, 990 P.2d 1277, 1284 (N.M. 1999). The case was remanded to this Court for further proceedings on the claims.

Between June 28, 2022 and August 1, 2022 the following Motions, Oppositions and Replies were filed: (1) Defendants Brittney Miller and Selena Torres’s Motion to Sever Pursuant to NRCMP 21; (2) Nevada Legislature’s Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief; (3) Defendant James Ohrenschall’s Motion to Dismiss; (4) NSHE Defendant Dina Neal’s Motion to Dismiss Pursuant to NRCMP 12(b)(5); (5) Defendants Brittney Miller and Selena Torres’s Joinder to Nevada Legislature’s Motion to Dismiss; (6) NSHE Defendant Dina Neal’s Joinder to Legislative Counsel Bureau’s Nevada Legislature’s Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief; (7) Defendants Brittney Miller and Selena

1 Torres's Joinder to Defendant James Ohrenschall's Motion to Dismiss; (8) Defendants Brittney
2 Miller and Selena Torres's Joinder to Defendant Dina Neal's Motion to Dismiss; (9) Defendant
3 James Ohrenschall's Joinder to NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to
4 NRCP 12(b)(5); and (10) Defendant James Ohrenschall's Joinder in Part, to Legislature of the
5 State of Nevada's Motion to Dismiss Complaint; (11) Plaintiff's Motion to Strike NSHE
6 Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5); (12) Plaintiff's Motion to
7 Strike Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and
8 Injunctive Relief; and(13) Plaintiff's Motion to Strike All Joinders Thereto. On August 4, 2022
9 the Court heard oral argument on all of the foregoing Motions, Oppositions and Replies thereto.
10 Counsel present at the hearing were Colleen E. McCarty, Esq. and Deanna Forbush, Esq. for the
11 Plaintiff; Bradley S. Schrager, Esq., Jonathan D. Blum, Esq., and Berna L. Rhoades-Ford, Esq. for
12 the Defendants; and Kevin C. Powers, Esq. for the Intervenor Defendant.

14 The Court took the matters under advisement and now issues the following Findings of
15 Fact, Conclusions of Law and Order.

16
17 ***Current Parties***

18 The Defendants in the case have changed as individuals have left public employment or
19 have chosen not to run for reelection. Currently, the Defendants to the case, based on the Amended
20 Complaint, are (1) Brittney Miller, who is a member of the Nevada State Assembly and holds a
21 paid teaching position with Clark County School District; (2) Selena Torres, who is a member of
22 the Nevada State Assembly and holds a paid teaching position with Clark County School District;
23 (3) Dina Neal, who is a member of the Nevada State Senate and holds a paid position as an adjunct
24 professor with Nevada State College; (4) James Ohrenschall, who is a member of the Nevada State
25 Senate and holds a paid position as a deputy public defender in Clark County. The Nevada State
26 Legislature filed a Motion to Intervene, which was granted in December 2020 on the same day the
27 Court granted the Omnibus Motion to Dismiss.

1 *Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive*
2 *Relief*

3
4 Intervenor-Defendant Legislature of the State of Nevada moved to dismiss NPRI's
5 Amended Complaint. The Intervenor alleges that the court does not have subject matter
6 jurisdiction under NRCP 12(b)(1) because NPRI failed to comply with NRS Chapter 41 in that it
7 did not invoke the conditional waiver of sovereign immunity. The Intervenor further alleges that
8 the Plaintiff should have also brought suit against the appropriate State entity or political
9 subdivision pursuant to NRS 41.031, NRS 41.0337, and NRS 41.039. In addition, the Intervenor
10 alleges that NPRI's claims should be dismissed because NPRI failed to join all necessary parties
11 pursuant to NRCP 12(b)(6), and NRCP 19, which requires the joinder of all persons who qualify
12 as necessary parties and who are needed for a just adjudication of the litigation. Specifically, the
13 Legislature argued that it would be necessary to join all of the Judges who serve as professors at
14 UNLV and UNR because arguably if Senators and Assemblypersons are violating the separation
15 of powers doctrine by teaching and serving in that capacity then Judges would be as well.

16 This Court finds that Intervenor Nevada Legislature is mistaken in its reference to NRS 41
17 in the case at hand. NRS 41.031 refers to liability in relation to a tort claim and this case is one of
18 equity, with the Plaintiff seeking declaratory and injunctive relief related to constitutional questions
19 and not damages related to tort liability. Therefore, the Court finds the argument regarding a lack
20 of subject matter jurisdiction in relation to NRS Chapter 41 to be without merit.

21
22 *Defendant James Ohrenschall's Motion to Dismiss*

23 Defendant Ohrenschall, a Nevada State Senator and Public Defender for Clark County,
24 moves to dismiss the Amended Complaint pursuant to NRCP 12(b)(5) and 12(b)(6) for failure to
25 state a claim and failure to join required parties under NRCP 19. In addition, Ohrenschall has also
26 joined the other parties' motions to dismiss. Defendant Ohrenschall's first argument is that the
27 Nevada Constitution separation-of-powers clause does not apply to local government employees,
28

1 citing both case law and an opinion published by the Nevada Attorney General. Ohrenschall
2 further alleges that even if the separation-of-powers doctrine were to apply to local governments,
3 his role as a Public Defender in the Juvenile Division is not one of a public officer, but rather a
4 public employee.
5

6
7 ***Defendant Dina Neal's Motion to Dismiss***

8 Defendant Dina Neal, who serves as an adjunct professor at Nevada State College ("NSC")
9 while also serving as a Nevada State Senator, alleges that she does not exercise any powers of the
10 executive branch by virtue of her employment with NSC and therefore is not in violation of the
11 separation-of-powers clause and moves for dismissal based on NRCP 12(b)(5). Neal alleges that
12 the issue is whether her position with NSC is one of a public officer or a public employee and she
13 is a public employee because she does not exercise sovereign duties of the executive branch nor
14 was her position created by law. Neal alleges that because the Amended Complaint does not allege
15 that Neal is a public official or that she exercises sovereign or constitutional powers, and there are
16 no factual allegations from which such conclusions might reasonably be drawn, it does not state a
17 claim upon which relief may be granted.
18

19 ***Defendants Brittney Miller and Selena Torres's Motion to Sever Pursuant to NRCP 21¹***

20 Defendants Miller and Torres ("Teacher Defendants"), both of whom are public school
21 teachers, filed their motion seeking to sever themselves from the lawsuit because they allege that
22 they should not be subject to trial alongside public employees of widely differing classifications
23 as there is no one-size-fits-all analysis that can be applied to all defendants in this action. Teacher
24 Defendants rely on NRCP 21 as the legal basis for their argument and cite to A Cab, LLC v.
25 Murray, 501 P.3d 961, 974 (Nev. 2021) regarding the Nevada Supreme Court's guidance as to
26 when severance is proper. Teacher Defendants argue that it will require focused, factual inquiries
27

28 ¹ As the Court is granting the Motions to Dismiss to which Miller and Torres joined, the Court will deny the Motion to Sever as it is moot.

1 into the employment status, duties, and activities of each individual to resolve this case. They
2 further allege that the claims against them do not arise out of the same transactions or occurrences
3 as they do for the other defendants, and they do not present common questions of law or fact.
4 Finally, Teacher Defendants allege that judicial economy would be facilitated by the severance
5 and their claims would require different witnesses and documentary proof due to their unique
6 status from other defendants.
7

8
9 ***Plaintiff's Motion to Strike: (1) NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to***
10 ***NRCP 12(b)(5); (2) Nevada Legislature's Motion to Dismiss Amended Complaint for***
11 ***Declaratory and Injunctive Relief; and (3) All Joinders thereto***

12 In response to the aforementioned motions, Plaintiff NPRI filed a motion to strike
13 Defendant Neal's motion to dismiss, the Intervenor's motion to dismiss, and all joinders thereto.
14 NPRI alleges that under NRCP 12(g)(2), the only party who is eligible to move for dismissal is
15 Defendant Ohrenschall because he did not previously move for dismissal and the other parties are
16 not allowed to make another motion raising a defense or objection that was available to the party
17 but omitted from its earlier motion. NPRI did not include Ohrenschall's motion to dismiss in its
18 motion to strike.

19 After Judge Crockett dismissed the case due to lack of standing, he did not have jurisdiction
20 to address the other arguments raised in the motions. However, all but one of the issues were raised
21 in the various motions to dismiss that were considered by Judge Crockett.² Therefore, the Motion
22 to Strike is without merit as the arguments were all raised in the Defendants' initial Motions to
23 Dismiss and NRCP 12(g)(2) does not apply. Moreover, "[u]pon remand from an appellate court,
24 the lower court is required to proceed from the point at which the error occurred." Giancola v.
25 Azem, 109 N.E.3d 1194, 1200 (Ohio 2018) (quoting State ex rel. Douglas v. Burlew, 833 N.E.2d
26

27 ² The issue that was not raised in the first round of motions to dismiss was the Nevada Legislature's argument
28 relating to NRS 41. As the Court explained earlier, the argument was without merit as the statute deals with tort
liability, not constitutional questions.

1 293, 295 (Ohio 2005)). Therefore, the parties are returned to the position they were in and this
2 Court the Court is doing as the Nevada Supreme Court instructed and is reviewing the case on the
3 merits, particularly whether the law supports the claims in the Amended Complaint and whether
4 there is a claim upon which relief may be granted.
5

6 DISCUSSION

7
8 A complaint must set forth sufficient facts to establish all necessary elements of a claim
9 for relief. Hay v. Hay, 100 Nev. 196, 198 678 P.2d 672, 674 (1984). A motion to dismiss is properly
10 granted when even where it appears to a certainty that taking all of the allegations in the Complaint
11 as true, the allegations are insufficient to establish the elements of a claim for relief. *See* Brent G.
12 Theobald Const., Inc., v. Richardson Const., Inc., 122 Nev. 1163, 1166, 147 P.3d 238, 241
13 (2006)(*abrogated on other grounds by* Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224
14 (2008)).

15 The Amended Complaint in this case seeks declaratory and injunctive relief precluding
16 anyone who serves as an educator or a public defender³ from serving as a paid legislator. After
17 reviewing the Motions, Oppositions, Replies and Joinders thereto, listening to the arguments of
18 Counsel, and a thorough review of all of the cases cited therein plus additional multijurisdictional
19 research, and for the reasons stated below, the Court finds that the allegations in Plaintiffs
20 Complaint are insufficient to establish the elements of a claim for relief and therefore, GRANTS
21 the Defendants' Motions.

22 The issue before the Court is whether it is a violation of the separation-of-powers clause of
23 the Nevada State Constitution for an individual to serve in the Nevada Legislature while
24 concurrently employed by a state or local government entity. ⁴
25

26 ³ As stated above, the Defendants have changed and thus those are the only two positions currently at issue. The
27 Court notes that the Plaintiffs are seeking Leave to Amend their Complaint to add additional Defendants, for the
28 reasons stated herein, that Motion will likely become moot based upon the Court's decision in this matter.

⁴ Although the Nevada Legislature also sought dismissal for failure to join necessary parties, as the Court is finding
that there is not a violation of the separation-of-powers, the Court declines to address the Rule 19 issues.

1 While many states have specific constitutional or statutory prohibitions against dual public
2 employment, Nevada is not one of those states. Therefore, in order to answer this question the
3 Court has reviewed the words of and intent behind the Nevada Constitution and existing case law
4 both from this jurisdiction and other jurisdictions whose Constitution mirrors the language used
5 by the Nevada framers. This Court finds that three factors must be evaluated to determine whether
6 an individual's dual employment violates the separation-of-powers clause of the Constitution.
7 First, the Court must deem whether the dual roles are incompatible based on the common law
8 doctrine of incompatible offices. Next, the Court must look at whether the individual legislator's
9 employment is with a state entity or a local political subdivision. Finally, if the roles are compatible
10 and the individual works for a state entity, then the Court must determine whether the position
11 with the state entity is that of an employee or an officer.
12

13 14 **Common Law Doctrine of "Incompatible Offices"**

15 To date, Nevada courts have not dealt directly with the common law doctrine of
16 incompatible offices; however, other states have. The New Jersey Supreme Court explained in
17 Schear v. City of Elizabeth, 41 N.J. 321, 326, 196 A.2d 774, 776 (1964), that the doctrine of
18 incompatible public offices was developed through the common law. The Court went on to say
19 "[i]ncompatibility exists when there is a conflict or inconsistency in the functions of the two
20 offices, i.e., where 'one office is subordinate to another, or subject to its supervision or control, or
21 the duties clash, inviting the incumbent to prefer one obligation to another.'" Id. citing Reilly v.
22 Ozzard, 33 N.J. 529, 543, 166 A.2d 360, 367 (1960). In Schear, property owners and taxpayers of
23 the City of Elizabeth challenged a resolution of the Planning Board, which was formed based on a
24 state statute, alleging that there was an incompatibility of office issue resulting from the fact that
25 one member of the Planning Board was also the City Attorney. The Plaintiffs in Schear argued
26 that the duty of a member of the Planning Board to participate fully and fairly in the determination
27 of a blight problem was inconsistent with his obligation as City Attorney to provide independent
28

1 and impartial advice regarding the issue. In this case, the Court looked at the Statute and
2 determined that the legislature contemplated a person such as the City Attorney may serve on the
3 Planning Board and that no incompatibility existed between the positions. The Court analyzed the
4 specific facts of the case when it upheld the lower court's ruling that there was not conflict. After
5 the Planning Board decision was reached, the City Attorney did not give legal advice to the
6 governing body about the matter nor did the City Council seek his opinion regarding the legality
7 of the Board's action. The trial court relied on the restrictive provision of the statute and the
8 common law in finding no conflict existed and therefore the plaintiffs suffered no prejudice.
9

10 The Hawaii Supreme Court has also addressed the common law doctrine of incompatible
11 offices. In In re Water Use Permit Applications, 94 Haw. 97, 120, 9 P.3d 409, 432 (2000), the
12 Court stated that the doctrine of incompatible public offices "applies where the functions of the
13 offices concerned are inherently inconsistent, as where there are conflicting interests, or where
14 public policy dictates that one person may not retain both offices."⁵ In reaching its decision in
15 Water Use, the Court looked to State v. Villeza, 85 Haw. 258, 942 P.2d 522 (1997), which
16 explained the common law doctrine of incompatible offices as prohibiting an individual from
17 serving in dual capacity "[i]f one office is subordinate to the other or the functions of the offices
18 are inherently inconsistent and repugnant to each other." Whether one office is incompatible with
19 another depends on the rights, duties, or obligations connected with or flowing from the offices. If
20 one office is subordinate to the other or the functions of the offices are inherently inconsistent and
21 repugnant to each other, the offices are incompatible. Id. at 270, 534 (internal citations omitted).

22 In Villeza, the defendant alleged that because the sentencing judge was appointed to and
23 served as the administrative director for the court that the doctrine of incompatible offices resulted
24 in him automatically vacating the first office [of judge], therefore relinquishing his authority to
25 sentence the defendant. The Villeza Court stated that an office would be incompatible with the
26 office of judge if it created a conflict of interest or a lack (or appearance) of impartiality,
27

28 ⁵ See also Mott v. Horstmann, 36 Cal. 2d 388, 391-92, 224 P.2d 11, 13 (1950).

1 specifically it would be incompatible if it challenged judicial integrity and offended traditional
2 notions of the necessary impartiality of the judiciary. The Villeza Court held that the offices of
3 circuit court judge and administrative director were not incompatible at common law because
4 judicial integrity was not threatened in the case.
5

6 Aside from any specific constitutional or statutory prohibitions, incompatibility depends
7 on the character and relation of the offices and not on the matter of physical inability to discharge
8 the duties of both of them. The question is whether one office is subordinated to the other, or the
9 performance of one interferes with the performance of the duties of the other, or whether the
10 functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both
11 offices is detrimental to the public interest. Polley v. Fortenberry, 268 Ky. 369, 105 S.W.2d 143,
12 144–45 (1937).⁶ In Polley, the Kentucky Supreme Court analyzed whether the positions of
13 maintenance supervisor for the state highway department and member of the county board of
14 education were incompatible under the common law. The Court first determined that they were
15 both offices, but there was no constitution or statutory authority that would prevent the plaintiff
16 Polley from serving in both roles. Kentucky law required that if a person accepts an office
17 incompatible with the one he already occupies that he must vacate the first office when assuming
18 the second. Therefore, the Court looked to the common law of incompatible offices to determine
19 if the two roles were incompatible. The Court found that neither position was subordinate to the
20 other nor would the performance of one position require the person to “pass upon the validity of
21 his acts” in the other position. The Court held that it was clear that the two positions were not
22 inherently inconsistent or repugnant nor a detriment to the public interest.

23 It varies by jurisdiction whether the common law rule against incompatibility applies to
24 only offices or includes public employment as well.⁷ Due to the public policy issues of
25

26 ⁶ See also Russell v. Worcester Cnty., 323 Mass. 717, 719, 84 N.E.2d 123, 124 (1949).

27 ⁷ See Dupras v. Cnty. of Clinton, 213 A.D.2d 952, 953, 624 N.Y.S.2d 309, 309 (1995)(New York recognizes that the
28 doctrine of incompatible offices applies to employees as well as officers.); Eldridge v. Sierra View Loc. Hosp. Dist.,
224 Cal. App. 3d 311, 319, 273 Cal. Rptr. 654, 660 (Ct. App. 1990)(California declined to extend the doctrine to a
scenario where one position is a public office and the other employment.)

1 incompatible public office and public employment being coupled that may arise, this Court finds
2 that the common law doctrine applies to public offices as well as public employment in
3 determining whether an individual employed by a public entity may serve as a state legislator.
4

5
6 ***It is the Role of the Court to Determine if Offices Are Incompatible.***

7 “Whether two public offices are incompatible is a question of law to be determined by this
8 Court upon examining the nature of the offices and their relationship to one another.” Felkner v.
9 Chariho Reg'l Sch. Comm., 968 A.2d 865, 873 (R.I. 2009).⁸

10 In State v. Second Jud. Dist. Ct. in & for Cnty. of Washoe, 134 Nev. 783, 787–88, 432
11 P.3d 154, 159 (2018), the Supreme Court reaffirmed, based on the Nevada Constitution separation
12 of powers doctrine, that it is prohibited for one branch of government to impinge on the functions
13 of another.” *See* Nev. Const. art. 3, § 1(1). In the decision, the Court noted that a prosecutor acts
14 within the executive realm in making charging decisions based on violation of the State’s laws. *Id.*
15 *citing* Stromberg v. Second Jud. Dist. Ct. of State ex rel. Cnty. of Washoe, 125 Nev. 1, 200 P.3d
16 509 (2009). A District Attorney’s Office brings charges on behalf of the State against those who
17 have allegedly violated the laws of the State and the Legislature enacts such laws. Therefore,
18 serving in the Legislature while simultaneously employed as a member of a county district
19 attorney’s office is incompatible based on the common law doctrine. In the case at hand, both of
20 the named Defendants who were identified as being employed by the Clark County District
21 Attorney’s Office, Nicole Cannizzaro and Melanie Scheible, have since left their public
22 employment, therefore they are no longer parties to the case.

23 As for the current Defendants, this Court finds that there is no common law incompatibility
24 issue for an individual to be employed as a county public school teacher, a public defender, or a
25 professor at a state college and simultaneously serve as a state legislator. Based on Schear, the
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27 ⁸ *See also* LaGrange City Council v. Hall Bros. Co. of Oldham Cnty., 3 S.W.3d 765, 769 (Ky. Ct. App. 1999);
28 Reilly, 33 N.J. 529, 166 A.2d 360; People, on Complaint of Chapman, v. Rapsey, 16 Cal. 2d 636, 641, 107 P.2d
388, 391 (1940); Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67, 71 (N.D. 1975).

1 Court finds that there is no conflict between the positions nor does the Plaintiff suffer prejudice
2 based on their dual employment. After analyzing the holding in Villeza, the Court finds that the
3 integrity of the legislative and executive branches is not threatened by a public school teacher, a
4 public defender, or a professor simultaneously serving as a legislator. And, a public school teacher,
5 a public defender, nor a professor have the discretionary power to review the actions of a legislator
6 and a legislator does not have the discretionary power to review the actions taken by an educator
7 or a public defender. Therefore, the dual employment of Defendants Miller, Torres, Ohrenschall,
8 and Neal are found not to be incompatible under the common law doctrine.
9

10
11 **Historical Guidance Regarding the Applicability of the Nevada Separation-of-Powers Clause**
12 **to Local Political Subdivisions**

13 Nevada's separation-of-powers clause, contained in Article 3, Section 1 of the Nevada
14 Constitution, provides that “[t]he powers of the Government of the State of Nevada shall be divided
15 into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons
16 charged with the exercise of powers properly belonging to one of these departments shall exercise
17 any functions, appertaining to either of the others, except in the cases expressly directed or
18 permitted in this constitution.” The Nevada Supreme Court has held that the separation of powers
19 doctrine is the most important foundation for preserving and protecting liberty by preventing the
20 accumulation of power in any one branch of government. Secretary of State v. Nevada State
21 Legislature, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Constitution further embodies this
22 concept of limited government by specifically delineating the powers granted to the three distinct
23 and coequal branches of government, as set forth in Article 4 (legislative), Article 5 (executive),
24 and Article 6 (judicial). *See* Comm'n on Ethics v. Hardy, 125 Nev. 285, 292, 212 P.3d 1098, 1103
25 (2009).
26
27
28

1 ***The Nevada Constitution Was Based on the California Constitution and California Courts Have***
2 ***Decided That the Constitutional Separation-of-Powers Clause Does Not Apply to Employees of***
3 ***Local Government Entities***
4

5 In 2001, the Nevada Supreme Court recognized that the rules of statutory construction
6 apply when interpreting constitutional provisions. “[W]hen a statute is derived from a sister state,
7 it is presumably adopted with the construction given it by the highest court of the sister state.”
8 Thus, since Nevada relied upon the California Constitution as a basis for developing the Nevada
9 Constitution, it is appropriate for us to look to the California Supreme Court's interpretation of [the
10 same provisions] in the California Constitution. State ex rel. Harvey v. Second Jud. Dist. Ct., 117
11 Nev. 754, 763, 32 P.3d 1263, 1269 (2001). In fact, Article 3, Section 1 of the Nevada Constitution
12 is identical to the original separation-of-powers clause contained in Article 3, Section 1 of the
13 California Constitution,⁹ so this Court will look to California Court decisions regarding whether
14 the separation-of-powers clause applies to local governments.

15 In People ex rel. Attorney General v. Provines, (34 Cal. 520) (1868), the California
16 Supreme Court analyzed the issue of whether the separation-of-powers clause applied to local
17 political subdivisions. The Court held that the Constitution was formed for the purpose of
18 establishing a State Government, contrasting it to local, county or municipal governments.¹⁰
19 Simply put, the Court found that the framers of the California Constitution did not contemplate
20 that the state government executive branch included local government. Therefore, California's
21 separation of powers doctrine did not apply to local governments or its employees.

22 The Nevada Attorney General’s Office (“AG”) and the Nevada Legislative Counsel Bureau
23 (“LCB”) have both issued multiple opinions relevant to the matter at hand. AG Sandoval
24 recognized that the Supreme Court has not addressed this specific issue but has emphasized the
25

26 ⁹ The State of California slightly amended their separation-of-powers clause in 1972 after voters approved
27 Proposition 1A, which transformed California legislators from citizen legislators to full time employees of the
Legislative Branch. *See* California Proposition 1A, 1966.

28 ¹⁰ The Court explained that local governments are necessary; however, the Constitution does not of itself create or
establish any local or municipal governments. Provines, 34 Cal. at 520.

1 importance of the separation-of-powers doctrine in Galloway v. Truesdell, 83 Nev. 13, 422 P.2d
2 237 (1967) and Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 874, 879, 878 P.2d 913 (1994).
3 In Galloway, the Nevada Supreme Court analyzed what constitutes legislative, executive, and
4 judicial powers in order to determine whether a statute (NRS 122.070) required a district judge to
5 perform non-judicial powers. The Court held that the statute in question required a member of the
6 judicial branch to perform legislative functions and was therefore unconstitutional as it violated
7 the separation-of-powers clause of the Nevada Constitution. Galloway, 83 Nev. at 31, 422 P.2d at
8 249. In Whitehead, the Court addressed the issue of whether the State Attorney General serving as
9 counsel for the Nevada Commission on Judicial Discipline violated the constitutional separation-
10 of-powers provision. Petitioner Whitehead argued that the Attorney General is an elected,
11 constitutional officer of the executive branch and therefore not permitted by the separation-of-
12 powers clause of the Constitution to represent the Commission in the exercise of its powers related
13 to judicial discipline. The Court agreed with Petitioner and held that there were multiple instances
14 of conflict of interest and it was unconstitutional for an elected officer of the executive branch to
15 represent the Commission in judicial discipline matters nor “prosecute” a judge before the
16 Commission. The Court relied on its decision in Galloway in holding that “one department cannot
17 exercise the power of the other two” without violating the separation-of-powers clause of the
18 Constitution. Whitehead, 110 Nev. at 880, P.2d. at 917. In the case at hand, this Court recognizes
19 the importance of the separation-of-powers clause raised by the Galloway and Whitehead Courts;
20 however, it distinguishes Galloway as the issue at hand is not whether one branch is being required
21 to perform powers constitutionally granted to another branch and Whitehead is dealing with an
22 elected officer of the executive branch encroaching upon the powers of the judicial branch. While
23 these cases provide valuable insight into the importance of the separation-of-powers clause, they
24 do not directly inform the concern of dual employment at issue in this case.
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28

1
2 Returning to the AG Opinions,¹¹ two of them were in direct conflict regarding whether a
3 school district employee may simultaneously serve in the state legislature; however, the second
4 opinion, published in 1971, overrode the previous decision, which was not supported by legal
5 authority.¹² The AG Opinions have provided that, based on the intent of the framers of the Nevada
6 Constitution, employees of local political subdivisions are not in violation of the separation-of-
7 powers clause when they serve as state legislators. See Op. Nev. Att'y Gen. No. 401 (April 20,
8 1967); Op. Nev. Att'y Gen. No. 71-4 (January 11, 1971). However, there is conflict between the
9 opinions of the AG and the LCB when it comes to state employees and in 2004, the Nevada
10 Secretary of State asked then Attorney General Brian Sandoval to provide guidance as to whether
11 a state or local government employee is eligible to simultaneously serve as a member of the Nevada
12 State Legislature (dual service) without violating the Nevada Constitution's separation of powers
13 doctrine in order to try to parse out the conflicting opinions between the AG and LCB. 2004 Nev.
14 Op. Att'y Gen. No. 03 (Mar. 1, 2004). AG Sandoval also observed that [o]ther states are not
15 consistent in their regulation, prohibition, and allowance of dual service. They address dual service
16 through various combinations of constitutional, statutory, and common-law restrictions, making
17 this a complex and conflicting issue of law and policy.

18 In coming to its decision that employees of local government entities are not bound by the
19 separation-of-powers clause, the AG first looked to the United States Supreme Court for the main
20 purpose of separation-of-powers, which is “[t]he fundamental necessity of maintaining each of the
21 three general departments of government entirely free from the control or coercive influence,
22 direct or indirect, of either of the others[.]” Humphrey's Ex'r v. United States, 295 U.S. 602, 629,
23 55 S. Ct. 869, 874 (1935). The AG reasoned that [h]istorically the requirement of the separation
24 of powers was never applied to local governmental organizations. Thus, not only municipal
25 corporations but counties, townships, *school districts*, drainage districts, and the like are frequently
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27 ¹¹ These Opinions were referenced in the Supreme Court decision, footnote 4. See Cannizzaro, 507 P.3d at 1209.

28 ¹² 2004 Nev. Op. Att'y Gen. No. 03 (Mar. 1, 2004), footnote 6.

1 organized with only a single commission with all the powers, legislative, executive, and judicial,
2 in the commission. The compelling argument in favor of this is that the closeness of local
3 authorities to popular control affords an adequate sanction and protection. Op. Nev. Att'y Gen. No.
4 401 (April 20, 1967).

5
6 In finding that employees of local school districts who also served in the legislature did not
7 violate the separation-of-powers clause,¹³ the AG reached its conclusion by relying on legal
8 precedent from California, Colorado, and Maryland, each with constitutional separation of powers
9 clauses almost identical to the Nevada Constitution. These cases¹⁴ each held that the separation of
10 powers clause of their respective constitutions did not apply to local government employees. Op.
11 Nev. Att'y Gen. No. 71-4 (January 11, 1971).

12 While the AG's Opinions are in no way binding, this Court agrees with the AG in its
13 analysis that the findings in Provines, as well as precedent from other jurisdictions with similar
14 constitutional separation-of-powers clauses, provide strong support for the contention that Article
15 3, Section 1 of the Nevada Constitution does not apply to local political subdivisions. Therefore,
16 as long as an individual employed by a local political subdivision does not hold an incompatible
17 dual position, their dual employment is not prohibited by the separation-of-powers clause of the
18 Nevada Constitution. In the case at hand, the Teacher Defendants, employed by Clark County
19 School District, and Defendant Ohrenschall, employed by the Clark County Public Defender's
20 Office, are not in violation of the separation-of-powers clause by operation of their dual
21 employment. However, if an individual is dually employed by a state entity, and the roles they
22

23 ¹³ Op. Nev. Att'y Gen. No. 71-4 effectively overruled Op. Nev. Att'y Gen. No. 59 (May 9, 1955), which concluded
24 that local school districts were part of the executive branch of government and therefore could not employ a member
25 of the legislative branch under NEV. CONST. art. 3 § 1.

26 ¹⁴ Mariposa Cnty. v. Merced Irr. Dist., 32 Cal. 2d 467, 476–77, 196 P.2d 920, 926 (1948) (Moreover it is settled that
27 the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as
28 distinguished from departments of the state government.); Peterson v. McNichols, 128 Colo. 137, 142, 260 P.2d
938, 941 (1953) (The finding of the trial court that the ordinance usurps a judicial function and is contrary to Article
III of the Constitution of the State of Colorado is inept in application to this litigation. The constitutional provision
to which reference is made relates to state government and is not to be applied here in matters of purely local
concern . . .); and Pressman v. D'Alesandro, 193 Md. 672, 679, 69 A.2d 453, 454 (1949) (The constitutional
requirement of separation of powers is not applicable to local government.)

1 occupy are not incompatible under the common law, such as NSHE Defendant Neal, a third factor
2 must be considered, whether they are a public officer or a public employee.
3

4 **Treatment of Public Officers and Public Employees Under the Law When It Comes to** 5 **Separation-of-Powers** 6

7 The final factor in our analysis deals with how public officers and public employees are
8 treated differently under the law. There is a split of authority between other jurisdictions as well
9 as between our own AG and LCB when it comes to how to define a public officer. The key
10 differences lie in whether the court or advising entity look at the function or powers appertaining
11 to the position rather than the role (or classification) of it.
12

13 ***Function or Powers Appertaining To a Position***

14 The separation-of-powers clause of the Utah Constitution¹⁵ embodies the same language
15 as the Nevada Constitution, including the concepts of “powers properly belonging to” and
16 “functions appertaining to” found in the second part of the separation-of-powers clause, and in In
17 re Young, 1999 UT 6, 976 P.2d 581, the Utah Supreme Court examined the meaning behind these
18 phrases. The Young Court accurately noted that the second part of the clause is not plain in its
19 meaning, particularly when “considered in the context of the real world of government.” Id. at ¶11,
20 585. The Court noted that its case law over a century has not taken a serious look at this aspect of
21 the separation-of-powers clause, so it elected to provide meaning to it in Young. Id. at ¶ 12, 585.
22 After surveying the related cases decided by it, the Utah Supreme Court determined that “the most
23 that can be said categorically is that for powers or functions to fall within the reach of the [second
24 part of the separation-of-powers clause], they must be so inherently legislative, executive or
25

26 ¹⁵ The powers of the government of the State of Utah shall be divided into three distinct departments, the
27 Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging
28 to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases
herein expressly directed or permitted. Utah Const. art. V, § 1.

1 judicial in character that they must be exercised exclusively by their respective departments.”¹⁶
2 And, the Court noted that when defining the functions or powers which are exclusive to one
3 department, that it had also used the terms “primary,” “core,” or “essential.” Id. at ¶ 14, 586. After
4 this analysis of the case law, the Court determined that there is a “necessary corollary to the
5 doctrine that some powers or functions belong exclusively to the members of one branch is that
6 there must be powers and functions which may, in appearance, have characteristics of an inherent
7 function of one branch but which may be permissibly exercised by another branch.” Id. (internal
8 citations omitted). Finally, the Court held that “when the power exercised or the function
9 performed is one that we determine is not exclusive to a branch, it is not “appertaining to” that
10 branch and does not fall within the reach of the [second part of the separation-of-powers clause].
11 Id.

12
13 In Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428 (2007), the Nevada Supreme Court
14 spelled out the inherent powers of each branch of government, stating that the legislative power,
15 which is vested in the state Legislature, refers to the broad authority to enact, amend, and repeal
16 laws; the executive power, vested in the Governor, encompasses the responsibility to carry out and
17 enforce those laws (*i.e.*, to administrate); and the judicial power is vested in the state court
18 system carrying with it the capability or potential capacity to exercise a judicial function to hear
19 and determine justiciable controversies. Halverson, 123 Nev. at 260, 163 P.3d at 439.

20 In the case before this Court, it is clear to this Court that the powers “appertaining to” each
21 branch of the Nevada government are the inherent or primary powers as outlined in the
22 Constitution and Halverson. It is clear that the function of a public school teacher is not to
23 administrate the laws nor is it the function of a public defender to administrate the laws.¹⁷ Rather

24
25 ¹⁶ Citing Taylor v. Lee, 119 Utah 302, 315, 226 P.2d 531, 537 (1951).

26 ¹⁷ In Defendant Legislature’s Motion to Dismiss, they allege that pursuant to NRCP 19, judges serving as professors
27 must be included in the suit as necessary parties. When a judge serves in the role of professor, she is not performing
28 a primary duty of the executive branch of government, meaning she is not carrying out or enforcing the laws.
Therefore, there is no violation of the separation-of-powers clause when a member of the judiciary serves as a
professor at a NSHE institution. However, if a judge were to seek election as a legislator, it would clearly be
unconstitutional as it would violate the separation-of-powers clause as one individual would be carrying out the
primary function of two separate branches of state government.

1 the function of a teacher is to teach and the function of a public defender is to defend someone
2 charged with a crime. As such, neither is enacting, amending, or repealing laws in their roles as
3 educators or public defenders. Along this same line of reasoning, this Court finds that a member
4 of a district attorney's office would be in violation of the separation-of-powers clause as that
5 individual would be exercising the primary function of the legislative branch (enacting, amending,
6 and repealing laws) as well as the primary function of the executive branch (carrying out and
7 enforcing laws).

8
9 In State ex rel. Stratton v. Roswell Indep. Sch., 1991-NMCA-013, 111 N.M. 495, 806 P.2d
10 1085, the New Mexico Supreme Court decided an issue on point with the case at hand. In Roswell,
11 the Court had to determine if a public school teacher and administrator were state employees, based
12 on whether school districts were "arms of the state." The Court recognized that the state maintains
13 a great degree of control over local school districts; however, also noted that it would be absurd to
14 say that regulatory schemes could transform a political subdivision, business, or profession into
15 state government. Id. at 502, 1092. New Mexico is a sparsely populated state with a citizen
16 legislature, as is Nevada, and the Court looked to the New Jersey Supreme Court's holding in
17 Reilly, 33 N.J. 529, 166 A.2d 360, in holding that all citizen legislators, whether employed publicly
18 or privately, will likely confront a conflict of interest between their livelihood and a legislative
19 proposal at some time. In analyzing the separation-of-powers clause of New Mexico's
20 Constitution,¹⁸ the Court determined that the issue of whether the public school personnel
21 simultaneously serving as legislators violated the separation-of-powers clause could be resolved
22 by determining whether they were "charged with the exercise of powers." The New Mexico Court
23 then looked to a Montana Supreme Court decision in which the Court developed a separation of
24 powers analysis that distinguished between a public officer who is invested with sovereign powers
25 and a public employee who is not. State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411

26
27 ¹⁸ "The powers of the government of this state are divided into three distinct departments, the legislative, executive
28 and judicial, and 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, except as in this
constitution otherwise expressly directed or permitted." N.M. Const. art. III, § 1.

1 (1927). New Mexico adopted the five-part test to determine whether an employee is a public officer
2 as laid out in Hawkins in State v. Quinn, 1930-NMSC-065, 35 N.M. 62, 290 P. 786. The Montana
3 test adopted by New Mexico is “to constitute a position of public employment a public office of a
4 civil nature, it must be created by the Constitution or through legislative act; must possess a
5 delegation of a portion of the sovereign power of government to be exercised for the benefit of the
6 public; must have some permanency and continuity, and not be only temporary or occasional; and
7 its powers and duties must be derived from legislative authority and be performed independently
8 and without the control of a superior power, other than the law, except in case of inferior officers
9 specifically placed under the control of a superior officer or body, and be entered upon by taking
10 an oath and giving an official bond, and be held by virtue of a commission or other written
11 authority.” Id. at ¶ 5, 787. A latter New Mexico case stressed that the most important factor of the
12 Hawkins test is that to be a public officer, the person must be invested with sovereign power. State
13 ex rel. Gibson v. Fernandez, 40 N.M. 288, 292, 58 P.2d 1197, 1200 (1936).

14
15 In relying on the Hawkins test, the Roswell Court determined the separation-of-powers
16 clause of their constitution applied only to public officers, not employees. The Roswell Court
17 further held that public school teachers and administrators are not “public officers” because they
18 do not establish policy for the local school districts or for the state department of education.
19 Roswell, 1991-NMCA-013, ¶ 35, 111 N.M. at 505, 806 P.2d at 1095.

20 The separation-of-powers clause in the Nevada Constitution uses the same language as
21 New Mexico’s as it refers to one branch being prohibited from the “exercise of powers” of another
22 branch. Public school teachers, public defenders, and professors at an NSHE institutions are not
23 invested with sovereign powers and do not establish policy for their employers.

24 In the Roswell Court’s analysis of whether an individual is a public officer or a public
25 employee, one of the factors in the Hawkins test as well as an American Jurisprudence citation¹⁹

26
27 ¹⁹ 63A Am.Jur.2d *Public Officers and Employees* § 12, at 676 (1984) (“the characteristics of public office include
28 creation of the office by statute or constitution, exercise of some portion of the sovereign power, a continuing
position not occasional or contractual, a fixed term of office, an oath, liability for misfeasance or nonfeasance, and
independence beyond that of employees[;] a public employment, on the other hand, is a position in the public

1 indicate than the requirement to take an oath may be taken into consideration to determine if an
2 individual is a public officer. The Nevada Supreme Court addressed this in State v. Cole, 38 Nev.
3 215, 148 P. 551 (1915) when it stated that taking an oath is some indication by which to determine
4 if a position is an office; however, the Court held that based on the Nevada Constitution that all
5 officers shall take an oath. Id. at 215, 553. Nevada is one of fourteen states that constitutionally
6 requires an academic loyalty oath to be administered to public educators.²⁰ However, the oath
7 signed by an educator when they seek licensure references “office or position”²¹ and when this is
8 evaluated under Cole, this Court finds that the academic loyalty oath does not constitute the
9 position of public educator being classified as a public office.
10

11 The Nevada Supreme Court has laid out the characteristics of a public office, as opposed
12 to public employment, in multiple cases. In State ex rel. Mathews v. Murray, 70 Nev. 116, 120–
13 21, 258 P.2d 982, 984 (1953), the Court established that in Nevada it is the function of a position,
14 rather than its classification, that defines whether it is a public office or public employment. The
15 Court recognized that the nature of a public office as distinguished from mere employment is the
16 subject of a considerable body of authority, and many criteria of determination are suggested by
17 the courts. Upon one point at least, the authorities uniformly appear to concur. A public office is
18 distinguishable from other forms of employment in that its holder has by the sovereign been
19 invested with some portion of the *sovereign functions of government*. Id. at 120-21, 984 (emphasis
20 added). The Mathews Court relied on its decision in Cole, to further define a public office as one
21 that does not spring into existence spontaneously, rather it is brought into existence, either under
22 the terms of the Constitution, by legislative enactment, or by some municipal body, pursuant to

23 service which lacks sufficient of the foregoing elements or characteristics to make it an office.” Roswell, 1991-
24 NMCA-013, ¶ 34, 111 N.M. at 505, 806 P.2d at 1095.

25 ²⁰ Nev. Const. art. XI, § 5; Gabriel J. Chin & Saira Rao, Pledging Allegiance to the Constitution: The First
Amendment and Loyalty Oaths for Faculty at Private Universities, 64 U. Pitt. L. Rev. 431 (2003).

26 ²¹ Pursuant to NRS 391.080, all applicants for licensure as an educator must subscribe to the Oath of Office as
27 specified in the Nevada Constitution: I, _____, do solemnly swear (or affirm) that I will support, protect and defend
the constitution and government of the United States, and the constitution and government of the State of Nevada
against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same,
any ordinance, resolution or law of any state notwithstanding, and that I will well and faithfully perform all the
duties of the **office or position** on which I am about to enter, (if an oath) so help me God; (if an affirmation) under
the pains and penalties of perjury. Section 8, NV Educator License Application. (emphasis added)
28

1 authority delegated to it. Id. at 219, 552. The Mathews Court also recognized that the Cole Court
2 relied on secondary sources in its opinion to further define a public office in stating that “[a]ll
3 public offices must originally have been created by the sovereign as the foundation of
4 government”²² and “[t]he right, authority and duty conferred by law by which, for a given period,
5 either fixed by law or through the pleasure of the creating power of government, an individual is
6 invested with some portion of the sovereign functions of the government, to be exercised by him
7 for the benefit of the public. The warrant to exercise powers is conferred, not by contract, but by
8 law.”²³ Mathews, 70 Nev. at 121, 258 P.2d at 984.
9

10 11 ***Role or Classification of a Position***

12 While the separation-of-powers clause of the Nebraska Constitution²⁴ is similar to
13 Nevada’s, the Nebraska Supreme Court has interpreted whether a position is one of public office
14 or public employment by role or classification rather than function or power. In State ex rel. Spire
15 v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991), the issue in front of the Nebraska Supreme
16 Court was whether *quo warranto* was an appropriate means to challenge the right of an assistant
17 professor at a state college to hold his position while also serving as a member of the state
18 legislature. Id. at 769, 406. In order to determine if the remedy was appropriate, the court had to
19 determine if assistant professor at a state college holds or exercises a “public office” within the
20 meaning of their *quo warranto* statute.²⁵ The Court relied on its decision in Eason v. Majors, 111
21 Neb. 288, 196 N.W. 133 (1923) in stating that “[w]hen a position based upon a provision of law
22

23 ²² 3 Cruise's Dig. p. 109, § 5.

24 ²³ Wyman on Public Offices, § 44.

25 ²⁴ The powers of the government of this state are divided into three distinct departments, the legislative, executive,
26 and judicial, and no person or collection of persons being one of these departments shall exercise any power
27 properly belonging to either of the others except as expressly directed or permitted in this Constitution. Neb. Const.
28 art. II, § 1.

²⁵ An information may be filed against any person unlawfully holding or exercising any public office or franchise
within this state, or any office in any corporation created by the laws of this state, or when any public officer has
done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this
state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or
forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law. Neb.
Rev. Stat. Ann. § 25-21,121 (West).

1 carries with it continuing duties of public concern which involve some exercise of the sovereign
2 power in their proper performance, the position may be said to be an office public in character.
3 Spire, 238 Neb. at 770, 472 N.W.2d at 406. As we can see from this, the Court was viewing the
4 “character” of the position rather than the function. The dissent in Spire is more aligned with the
5 decisions of the Nevada Supreme Court in that it looks to whether the legislator is exercising some
6 degree of the sovereign power of the state. Spire, 238 Neb. at 792, 472 N.W.2d at 418. Therefore,
7 in reconciling the definition of “public officer” in relation to Spire, the Nevada Supreme Court
8 language in Mathews and Cole mirrors the dissent rather than the majority opinion.²⁶

9
10 In 1957, the Oregon Supreme Court decided the case of Monaghan v. Sch. Dist. No. 1,
11 Clackamas Cnty., 211 Or. 360, 315 P.2d 797 (1957), holding that a school teacher may not also
12 serve as a state legislator because it violates the separation-of-powers clause of the Oregon
13 Constitution.²⁷ The Oregon Court defined “function” in a broad sense in that it held that if a person
14 was classified as performing any role in a branch of government, they would be precluded from
15 performing any role in a different branch. Id. at 373, 804.

16 However, in 1958, the voters of the state passed a referendum amending the Constitution,
17 which superseded the decision in Monaghan. The Oregon Legislature proposed a further
18 amendment as Senate Joint Resolution 203, which was submitted to voters as Measure 87 and was
19 approved November 4, 2014. The amended Oregon Constitution specifically allows “(1) A person
20 employed by any board or commission established by law to supervise and coordinate the activities
21 of Oregon's institutions of post-secondary education, a person employed by a public university as
22 defined by law or a member or employee of any school board is eligible to serve as a member of
23 the Legislative Assembly, and membership in the Legislative Assembly does not prevent the
24 person from being employed by any board or commission established by law to supervise and
25

26 See Mathews, 70 Nev. at 120-21, 258 P.2d at 984; Cole, 38 Nev. at 219, 148 P. at 552.

27 The powers of the Government shall be divided into three separate branches, the Legislative, the Executive,
including the administrative, and the Judicial; and no person charged with official duties under one of these
branches, shall exercise any of the functions of another, except as in this Constitution expressly provided. Or. Const.
art. III, § 1.

1 coordinate the activities of Oregon's post-secondary institutions of education or by a public
2 university as defined by law, or from being a member or employee of a school board; and (2) A
3 person serving as a judge of any court of this state may be employed by the Oregon National Guard
4 for the purpose of performing military service or may be employed by any public university as
5 defined by law for the purpose of teaching, and the employment does not prevent the person from
6 serving as a judge.”²⁸ Both the Oregon voters and the Oregon Legislature made an implicit finding
7 that a school teacher serving as a state legislator does not violate the separation-of-powers clause
8 of the State Constitution.
9

10 What we have learned from Nebraska and Oregon is that some courts distinguish whether
11 a position is a public office rather than public employment is based on the role or classification
12 rather than the function or powers of the positions held. Oregon has also shown us that a voter-
13 enacted constitutional amendment may supersede the interpretation by a court.

14 In Nevada, there is disagreement between the AG and LCB when it comes to whether
15 public employees that fall under the executive branch of the state government are prohibited from
16 serving in the state legislature by the separation-of-powers clause. The AG provided guidance that
17 employees of the Nevada State Highway Patrol (“NSHP”) and Nevada Department of
18 Transportation (“NDOT”) would be precluded from service in the legislature;²⁹ however, the LCB
19 issued opinions that found that employees of the State Department of Agriculture (“DOA”) and
20 University and Community College System of Nevada (“NSHE”)³⁰ could serve in the legislature
21 as long as they were a public employee and not a public officer.³¹

22 The AG based its argument on its finding that the role of employee of the NSHP helps
23 perform the administrative functions of the state executive branch of government and, therefore,
24 he is a member of the executive branch and the separation-of-powers clause would preclude him
25

26
27 ²⁸ Or. Const. art. XV, § 8

²⁹ See Op. Nev. Att’y Gen. No. 168 (May 22, 1974); Ltr. Nev. Att’y Gen. (January 28, 2002).

³⁰ The University and Community College System of Nevada is now called the Nevada System of Higher Education.

³¹ Legislative Counsel Bureau Opinion - February 4, 2002; Legislative Counsel Bureau Opinion - January 23, 2003.

1 from serving in the legislature.³² While the AG did not issue an official opinion as to the NDOT
2 question, it did issue a letter in which it stated that it disagreed with the LCB's Opinion that the
3 NDOT employee could run for partisan office and maintain his employment.³³
4

5 The issue at the heart of the disagreement between the AG and LCB is one of function
6 versus classification. The LCB has opined that the separation-of-powers clause applies to public
7 officers but not public employees, therefore it is a matter of function, relying on the common law
8 doctrine of incompatible offices as well as NRS 281.044, NRS 284.770, and NRS 284.143.
9 However, the AG's opinions have relied on an argument that the classification of an employee that
10 falls under the umbrella of the executive branch is what triggers the separation-of-powers. Both
11 the AG and LCB have asked for judicial determination on this issue.

12 In relying on Matthews in its DOA Opinion, the LCB opined "the position of Senior
13 Petroleum Chemist with the DOA is a position created by administrative authority and discretion,
14 not by statute. Moreover, based on the statutory structure of the DOA, we believe that most
15 employees of the DOA do not exercise any of the sovereign functions of the state. Rather, those
16 employees simply implement the policies made by higher-ranking state officials."³⁴

17 The AG disagreed with the LCB in its use of Matthews because the Court never analyzed
18 whether Mr. Murray's dual employment violated Nevada's constitutional separation of powers
19 doctrine. However, the LCB relied on Matthews to define the parameters of a public employee
20 compared to a public official, not to determine the applicability of the separation-of-powers clause
21 to public employees. This Court, like LCB, relies on Matthews to provide guidance on
22 distinguishing public employees from public officers as a step in the analysis of whether a person
23 employed by the state is subject to the separation-of-powers clause of the Constitution.

24 Based on the classification instructions provided by the Mathews Court, this Court finds
25 that a professor at a NSHE institution is a public employee and not a public officer. Therefore,
26

27 ³² Attorney General's Opinion No. 183, dated July 9, 1952.

28 ³³ Ltr. Nev. Att'y Gen. (January 28, 2002).

³⁴ Legislative Counsel Bureau Opinion - February 4, 2002.

1 NSHE Defendant Neal’s simultaneous employment as an adjunct professor at NSC and her service
2 as a state legislator does not violate the separation-of-powers clause of the Nevada Constitution
3 because she does not exercise a sovereign function of the executive branch in her position as
4 Adjunct Professor at Nevada State College. This Court also finds that public school teachers and
5 public defenders employed by local political subdivisions are public employees and therefore the
6 Teacher Defendants and Defendant Ohrenschall’s employment with Clark County and service as
7 state legislators do not violate the separation-of-powers clause of the Constitution because they do
8 not exercise sovereign functions of the executive branch.
9

10 CONCLUSION

11
12 The Nevada Legislature has known of the Attorney General’s Opinion No. 71-4, which
13 stated that the separation-of-powers clause of the Nevada Constitution did not apply to local
14 government employees, for over fifty years. With this knowledge, it has chosen not to act on the
15 issue by enacting a statute that would ban dual employment as addressed in the Opinion. Therefore,
16 this Court views this inaction as the intent of the Legislature to not enact such a law. *See Roswell*,
17 1991-NMCA-013, ¶ 24, 111 N.M. at 502-03, 806 P.2d at 1092-93.³⁵

18 The legislatures of states such as Louisiana, Connecticut, and Massachusetts have enacted
19 statutes that prohibit dual employment.³⁶ Connecticut and South Carolina have even spelled a dual
20 job ban out in their constitution.³⁷ There are multiple examples of how other state legislatures
21 have confronted this issue and if it was the intent of the Nevada Legislature to ban dual
22 employment and override common law, it is in their power to do so. The New Jersey Supreme
23 Court came to the same conclusion when it held “that the common law did not bar the dual
24 officeholding involved in this case, and that the question whether it should be barred in the public
25

26 ³⁵ *See also Water Use*, 94 Haw. at 120, 9 P.3d at 432 (The legislature may nevertheless override this rule as it deems
appropriate or necessary.).

27 ³⁶ *See Foti v. Holliday*, 2009-0093 (La. 10/30/09), 27 So. 3d 813, 819; *Stolberg v. Caldwell*, 175 Conn. 586, 604,
402 A.2d 763, 772–73 (1978); *Osetek v. City of Chicopee*, 370 Mass. 110, 112, 345 N.E.2d 897, 899 (1976).

28 ³⁷ *See Stolberg*, 175 Conn. at 604, 402 A.2d at 772–73; *S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank*,
403 S.C. 640, 646–48, 744 S.E.2d 521, 524–25 (2013).

1 interest reposes in the power and responsibility of the legislative department.” Reilly, 33 N.J. at
2 543, 166 A.2d at 372. Likewise, it is in the power of the voters of Nevada to amend the Constitution
3 if they desire to ban dual public employment.³⁸ Or, Nevada voters may follow the lead of Oregon
4 voters and amend the constitution to allow for various types of dual public employment.
5

6 Until either of these events occur, this Court finds that three factors must be evaluated to
7 determine whether an individual’s dual employment violates the separation-of-powers clause of
8 the Nevada Constitution. First, the Court must deem whether the dual roles are incompatible based
9 on the common law doctrine of incompatible offices. Next, the Court must look at whether the
10 individual legislator’s employment is with a state entity or a local political subdivision. Finally, if
11 the roles are compatible and the individual works for a state entity, then the Court must determine
12 whether the position with the state entity is that of an employee or an officer. Based on the analysis
13 of these factors, this Court holds that (1) no officer or employee of a state or local government may
14 also serve as a state legislator if the roles are not compatible and it is the purview of the court to
15 determine compatibility; (2) those employed by local government entities are not a part of the state
16 executive branch and therefore may serve in the legislative branch providing the roles are
17 compatible; and (3) public officers of the state executive branch may not serve in the legislature;
18 however, those who are public employees may, providing the roles are compatible.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26
27 ³⁸ See also Ackerman Dairy Inc. v. Kandle, 54 N.J. 71, 75–76, 253 A.2d 466, 469 (1969)(The holding of
28 two offices which are incompatible under the common law may be permitted by a state constitution as a state’s
constitution overrides the common law.)

1 As a result of these findings and accepting the charge of the Plaintiff's Amended Complaint
2 as true, this Court finds that Plaintiff NPRI has not established elements of a claim that would
3 grant them relief.
4

5
6 BASED ON THE FOREGOING, the Court ORDERS that Defendant Ohrenschall's
7 Motion to Dismiss is GRANTED;

8 The Court FURTHER ORDERS that NSHE Defendant Neal's Motion to Dismiss is
9 GRANTED;

10 The Court FURTHER ORDERS that Defendant Nevada State Legislature's Motion to
11 Dismiss is DENIED for the reasons as indicated in footnote 4 above;

12 The Court FURTHER ORDERS that the Joinders filed by co-Defendants, to the extent that
13 they dealt with the separation-of-power issues are GRANTED;

14 The Court FURTHER ORDERS that the Motion to Sever filed by Teacher Defendants is
15 DENIED for the reasons as indicated in footnote 1 above; and

16 The Court FURTHER ORDERS that the Plaintiffs Motions to Strike are DENIED.
17

18 Dated this 4th day of January, 2023

19 
20

21 **JUDGE JESSICA K. PETERSON**
22 **Jessica K. Peterson**
District Court Judge

23 **AFFIRMATION**

Pursuant to NRS 239B.030

24 The undersigned does hereby affirm that the
25 preceding Order filed in District Court case number
26 A818973 **DOES NOT** contain the social security
27 number of any person.

28 /s/ Jessica K Peterson

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Nevada Policy Research
7 Institute, Plaintiff(s)

8 vs.

9 Nicole Cannizzaro, Defendant(s)

CASE NO: A-20-817757-C

DEPT. NO. Department 8

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
14 recipients registered for e-Service on the above entitled case as listed below:

Service Date: 1/4/2023

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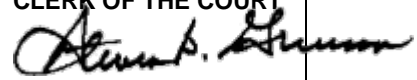
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*Attorneys for Defendants,
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DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,

vs.

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;
SELENA TORRES, an individual engaging
in dual employment with the Nevada State
Assembly and Clark County School District;
and THE LEGISLATURE OF THE STATE
OF NEVADA,

Defendants,

and

LEGISLATURE OF THE STATE OF
NEVADA,

Intervenor-Defendant.

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

NOTICE OF ENTRY OF ORDER

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DATED this 5th day of January, 2023.

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

EXHIBIT 1

EXHIBIT 1

1 **ORDR**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 NEVADA POLICY RESEARCH
7 INSTITUTE, a Nevada domestic
8 nonprofit corporation,

9 Plaintiff,

10 vs.

11 BRITTNEY MILLER, an individual
12 engaging in dual employment with the
13 Nevada State Assembly and Clark County
14 School District; DINA NEAL, an
15 individual engaging in dual employment with
16 the Nevada State Senate and Nevada State
17 College and College of Southern Nevada;
18 JAMES OHRENSCHALL, an individual
19 engaging in dual employment with the
20 Nevada State Senate and Clark County Public
21 Defender; and SELENA TORRES, an
22 individual engaging in dual employment with
23 the Nevada State Assembly and a Clark
24 County Public Charter School,

25 Defendants,

26 and

27 Legislature of the State of Nevada,

28 Intervenor-Defendant.

CASE NO: A-20-817757-C

DEPT NO: VIII

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On April 21, 2022, the Nevada Supreme Court reversed the district court’s order, narrowly expanding the public-importance exception laid out in Schwartz v. Lopez, 132 Nev. 732, 382 P.3d 886 (2016), applying the exception to “cases where a party seeks to protect the essential nature of a government in which the three distinct departments, . . . legislative, executive, and judicial, remain within the bounds of their constitutional powers.” Nevada Policy Research Institute, Inc. v. Cannizzaro, 507 P.3d 1203 (2022); *citing* State ex rel. Coll v. Johnson, 990 P.2d 1277, 1284 (N.M. 1999). The case was remanded to this Court for further proceedings on the claims.

Between June 28, 2022 and August 1, 2022 the following Motions, Oppositions and Replies were filed: (1) Defendants Brittney Miller and Selena Torres’s Motion to Sever Pursuant to NRCMP 21; (2) Nevada Legislature’s Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief; (3) Defendant James Ohrenschall’s Motion to Dismiss; (4) NSHE Defendant Dina Neal’s Motion to Dismiss Pursuant to NRCMP 12(b)(5); (5) Defendants Brittney Miller and Selena Torres’s Joinder to Nevada Legislature’s Motion to Dismiss; (6) NSHE Defendant Dina Neal’s Joinder to Legislative Counsel Bureau’s Nevada Legislature’s Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief; (7) Defendants Brittney Miller and Selena

1 Torres's Joinder to Defendant James Ohrenschall's Motion to Dismiss; (8) Defendants Brittney
2 Miller and Selena Torres's Joinder to Defendant Dina Neal's Motion to Dismiss; (9) Defendant
3 James Ohrenschall's Joinder to NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to
4 NRCP 12(b)(5); and (10) Defendant James Ohrenschall's Joinder in Part, to Legislature of the
5 State of Nevada's Motion to Dismiss Complaint; (11) Plaintiff's Motion to Strike NSHE
6 Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5); (12) Plaintiff's Motion to
7 Strike Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and
8 Injunctive Relief; and(13) Plaintiff's Motion to Strike All Joinders Thereto. On August 4, 2022
9 the Court heard oral argument on all of the foregoing Motions, Oppositions and Replies thereto.
10 Counsel present at the hearing were Colleen E. McCarty, Esq. and Deanna Forbush, Esq. for the
11 Plaintiff; Bradley S. Schrager, Esq., Jonathan D. Blum, Esq., and Berna L. Rhoades-Ford, Esq. for
12 the Defendants; and Kevin C. Powers, Esq. for the Intervenor Defendant.
13

14 The Court took the matters under advisement and now issues the following Findings of
15 Fact, Conclusions of Law and Order.
16

17 ***Current Parties***

18 The Defendants in the case have changed as individuals have left public employment or
19 have chosen not to run for reelection. Currently, the Defendants to the case, based on the Amended
20 Complaint, are (1) Brittney Miller, who is a member of the Nevada State Assembly and holds a
21 paid teaching position with Clark County School District; (2) Selena Torres, who is a member of
22 the Nevada State Assembly and holds a paid teaching position with Clark County School District;
23 (3) Dina Neal, who is a member of the Nevada State Senate and holds a paid position as an adjunct
24 professor with Nevada State College; (4) James Ohrenschall, who is a member of the Nevada State
25 Senate and holds a paid position as a deputy public defender in Clark County. The Nevada State
26 Legislature filed a Motion to Intervene, which was granted in December 2020 on the same day the
27 Court granted the Omnibus Motion to Dismiss.
28

1 *Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive*
2 *Relief*

3
4 Intervenor-Defendant Legislature of the State of Nevada moved to dismiss NPRI's
5 Amended Complaint. The Intervenor alleges that the court does not have subject matter
6 jurisdiction under NRCP 12(b)(1) because NPRI failed to comply with NRS Chapter 41 in that it
7 did not invoke the conditional waiver of sovereign immunity. The Intervenor further alleges that
8 the Plaintiff should have also brought suit against the appropriate State entity or political
9 subdivision pursuant to NRS 41.031, NRS 41.0337, and NRS 41.039. In addition, the Intervenor
10 alleges that NPRI's claims should be dismissed because NPRI failed to join all necessary parties
11 pursuant to NRCP 12(b)(6), and NRCP 19, which requires the joinder of all persons who qualify
12 as necessary parties and who are needed for a just adjudication of the litigation. Specifically, the
13 Legislature argued that it would be necessary to join all of the Judges who serve as professors at
14 UNLV and UNR because arguably if Senators and Assemblypersons are violating the separation
15 of powers doctrine by teaching and serving in that capacity then Judges would be as well.

16 This Court finds that Intervenor Nevada Legislature is mistaken in its reference to NRS 41
17 in the case at hand. NRS 41.031 refers to liability in relation to a tort claim and this case is one of
18 equity, with the Plaintiff seeking declaratory and injunctive relief related to constitutional questions
19 and not damages related to tort liability. Therefore, the Court finds the argument regarding a lack
20 of subject matter jurisdiction in relation to NRS Chapter 41 to be without merit.

21
22 *Defendant James Ohrenschall's Motion to Dismiss*

23 Defendant Ohrenschall, a Nevada State Senator and Public Defender for Clark County,
24 moves to dismiss the Amended Complaint pursuant to NRCP 12(b)(5) and 12(b)(6) for failure to
25 state a claim and failure to join required parties under NRCP 19. In addition, Ohrenschall has also
26 joined the other parties' motions to dismiss. Defendant Ohrenschall's first argument is that the
27 Nevada Constitution separation-of-powers clause does not apply to local government employees,
28

1 citing both case law and an opinion published by the Nevada Attorney General. Ohrenscha
2 further alleges that even if the separation-of-powers doctrine were to apply to local governments,
3 his role as a Public Defender in the Juvenile Division is not one of a public officer, but rather a
4 public employee.
5

6
7 ***Defendant Dina Neal’s Motion to Dismiss***

8 Defendant Dina Neal, who serves as an adjunct professor at Nevada State College (“NSC”)
9 while also serving as a Nevada State Senator, alleges that she does not exercise any powers of the
10 executive branch by virtue of her employment with NSC and therefore is not in violation of the
11 separation-of-powers clause and moves for dismissal based on NRCP 12(b)(5). Neal alleges that
12 the issue is whether her position with NSC is one of a public officer or a public employee and she
13 is a public employee because she does not exercise sovereign duties of the executive branch nor
14 was her position created by law. Neal alleges that because the Amended Complaint does not allege
15 that Neal is a public official or that she exercises sovereign or constitutional powers, and there are
16 no factual allegations from which such conclusions might reasonably be drawn, it does not state a
17 claim upon which relief may be granted.
18

19 ***Defendants Brittney Miller and Selena Torres’s Motion to Sever Pursuant to NRCP 21¹***

20 Defendants Miller and Torres (“Teacher Defendants”), both of whom are public school
21 teachers, filed their motion seeking to sever themselves from the lawsuit because they allege that
22 they should not be subject to trial alongside public employees of widely differing classifications
23 as there is no one-size-fits-all analysis that can be applied to all defendants in this action. Teacher
24 Defendants rely on NRCP 21 as the legal basis for their argument and cite to A Cab, LLC v.
25 Murray, 501 P.3d 961, 974 (Nev. 2021) regarding the Nevada Supreme Court’s guidance as to
26 when severance is proper. Teacher Defendants argue that it will require focused, factual inquiries
27

28 ¹ As the Court is granting the Motions to Dismiss to which Miller and Torres joined, the Court will deny the Motion to Sever as it is moot.

1 into the employment status, duties, and activities of each individual to resolve this case. They
2 further allege that the claims against them do not arise out of the same transactions or occurrences
3 as they do for the other defendants, and they do not present common questions of law or fact.
4 Finally, Teacher Defendants allege that judicial economy would be facilitated by the severance
5 and their claims would require different witnesses and documentary proof due to their unique
6 status from other defendants.
7

8
9 ***Plaintiff's Motion to Strike: (1) NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to***
10 ***NRCP 12(b)(5); (2) Nevada Legislature's Motion to Dismiss Amended Complaint for***
11 ***Declaratory and Injunctive Relief; and (3) All Joinders thereto***

12 In response to the aforementioned motions, Plaintiff NPRI filed a motion to strike
13 Defendant Neal's motion to dismiss, the Intervenor's motion to dismiss, and all joinders thereto.
14 NPRI alleges that under NRCP 12(g)(2), the only party who is eligible to move for dismissal is
15 Defendant Ohrenschall because he did not previously move for dismissal and the other parties are
16 not allowed to make another motion raising a defense or objection that was available to the party
17 but omitted from its earlier motion. NPRI did not include Ohrenschall's motion to dismiss in its
18 motion to strike.

19 After Judge Crockett dismissed the case due to lack of standing, he did not have jurisdiction
20 to address the other arguments raised in the motions. However, all but one of the issues were raised
21 in the various motions to dismiss that were considered by Judge Crockett.² Therefore, the Motion
22 to Strike is without merit as the arguments were all raised in the Defendants' initial Motions to
23 Dismiss and NRCP 12(g)(2) does not apply. Moreover, "[u]pon remand from an appellate court,
24 the lower court is required to proceed from the point at which the error occurred." Giancola v.
25 Azem, 109 N.E.3d 1194, 1200 (Ohio 2018) (quoting State ex rel. Douglas v. Burlew, 833 N.E.2d
26

27 ² The issue that was not raised in the first round of motions to dismiss was the Nevada Legislature's argument
28 relating to NRS 41. As the Court explained earlier, the argument was without merit as the statute deals with tort
liability, not constitutional questions.

1 293, 295 (Ohio 2005)). Therefore, the parties are returned to the position they were in and this
2 Court the Court is doing as the Nevada Supreme Court instructed and is reviewing the case on the
3 merits, particularly whether the law supports the claims in the Amended Complaint and whether
4 there is a claim upon which relief may be granted.
5

6 DISCUSSION

7
8 A complaint must set forth sufficient facts to establish all necessary elements of a claim
9 for relief. Hay v. Hay, 100 Nev. 196, 198 678 P.2d 672, 674 (1984). A motion to dismiss is properly
10 granted when even where it appears to a certainty that taking all of the allegations in the Complaint
11 as true, the allegations are insufficient to establish the elements of a claim for relief. *See* Brent G.
12 Theobald Const., Inc., v. Richardson Const., Inc., 122 Nev. 1163, 1166, 147 P.3d 238, 241
13 (2006)(*abrogated on other grounds by* Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224
14 (2008)).

15 The Amended Complaint in this case seeks declaratory and injunctive relief precluding
16 anyone who serves as an educator or a public defender³ from serving as a paid legislator. After
17 reviewing the Motions, Oppositions, Replies and Joinders thereto, listening to the arguments of
18 Counsel, and a thorough review of all of the cases cited therein plus additional multijurisdictional
19 research, and for the reasons stated below, the Court finds that the allegations in Plaintiffs
20 Complaint are insufficient to establish the elements of a claim for relief and therefore, GRANTS
21 the Defendants' Motions.

22 The issue before the Court is whether it is a violation of the separation-of-powers clause of
23 the Nevada State Constitution for an individual to serve in the Nevada Legislature while
24 concurrently employed by a state or local government entity. ⁴
25

26 ³ As stated above, the Defendants have changed and thus those are the only two positions currently at issue. The
27 Court notes that the Plaintiffs are seeking Leave to Amend their Complaint to add additional Defendants, for the
28 reasons stated herein, that Motion will likely become moot based upon the Court's decision in this matter.

⁴ Although the Nevada Legislature also sought dismissal for failure to join necessary parties, as the Court is finding
that there is not a violation of the separation-of-powers, the Court declines to address the Rule 19 issues.

1 While many states have specific constitutional or statutory prohibitions against dual public
2 employment, Nevada is not one of those states. Therefore, in order to answer this question the
3 Court has reviewed the words of and intent behind the Nevada Constitution and existing case law
4 both from this jurisdiction and other jurisdictions whose Constitution mirrors the language used
5 by the Nevada framers. This Court finds that three factors must be evaluated to determine whether
6 an individual's dual employment violates the separation-of-powers clause of the Constitution.
7 First, the Court must deem whether the dual roles are incompatible based on the common law
8 doctrine of incompatible offices. Next, the Court must look at whether the individual legislator's
9 employment is with a state entity or a local political subdivision. Finally, if the roles are compatible
10 and the individual works for a state entity, then the Court must determine whether the position
11 with the state entity is that of an employee or an officer.
12

13 14 **Common Law Doctrine of "Incompatible Offices"**

15 To date, Nevada courts have not dealt directly with the common law doctrine of
16 incompatible offices; however, other states have. The New Jersey Supreme Court explained in
17 Schear v. City of Elizabeth, 41 N.J. 321, 326, 196 A.2d 774, 776 (1964), that the doctrine of
18 incompatible public offices was developed through the common law. The Court went on to say
19 "[i]ncompatibility exists when there is a conflict or inconsistency in the functions of the two
20 offices, i.e., where 'one office is subordinate to another, or subject to its supervision or control, or
21 the duties clash, inviting the incumbent to prefer one obligation to another.'" Id. citing Reilly v.
22 Ozzard, 33 N.J. 529, 543, 166 A.2d 360, 367 (1960). In Schear, property owners and taxpayers of
23 the City of Elizabeth challenged a resolution of the Planning Board, which was formed based on a
24 state statute, alleging that there was an incompatibility of office issue resulting from the fact that
25 one member of the Planning Board was also the City Attorney. The Plaintiffs in Schear argued
26 that the duty of a member of the Planning Board to participate fully and fairly in the determination
27 of a blight problem was inconsistent with his obligation as City Attorney to provide independent
28

1 and impartial advice regarding the issue. In this case, the Court looked at the Statute and
2 determined that the legislature contemplated a person such as the City Attorney may serve on the
3 Planning Board and that no incompatibility existed between the positions. The Court analyzed the
4 specific facts of the case when it upheld the lower court's ruling that there was not conflict. After
5 the Planning Board decision was reached, the City Attorney did not give legal advice to the
6 governing body about the matter nor did the City Council seek his opinion regarding the legality
7 of the Board's action. The trial court relied on the restrictive provision of the statute and the
8 common law in finding no conflict existed and therefore the plaintiffs suffered no prejudice.
9

10 The Hawaii Supreme Court has also addressed the common law doctrine of incompatible
11 offices. In In re Water Use Permit Applications, 94 Haw. 97, 120, 9 P.3d 409, 432 (2000), the
12 Court stated that the doctrine of incompatible public offices "applies where the functions of the
13 offices concerned are inherently inconsistent, as where there are conflicting interests, or where
14 public policy dictates that one person may not retain both offices."⁵ In reaching its decision in
15 Water Use, the Court looked to State v. Villeza, 85 Haw. 258, 942 P.2d 522 (1997), which
16 explained the common law doctrine of incompatible offices as prohibiting an individual from
17 serving in dual capacity "[i]f one office is subordinate to the other or the functions of the offices
18 are inherently inconsistent and repugnant to each other." Whether one office is incompatible with
19 another depends on the rights, duties, or obligations connected with or flowing from the offices. If
20 one office is subordinate to the other or the functions of the offices are inherently inconsistent and
21 repugnant to each other, the offices are incompatible. Id. at 270, 534 (internal citations omitted).

22 In Villeza, the defendant alleged that because the sentencing judge was appointed to and
23 served as the administrative director for the court that the doctrine of incompatible offices resulted
24 in him automatically vacating the first office [of judge], therefore relinquishing his authority to
25 sentence the defendant. The Villeza Court stated that an office would be incompatible with the
26 office of judge if it created a conflict of interest or a lack (or appearance) of impartiality,
27

28 ⁵ See also Mott v. Horstmann, 36 Cal. 2d 388, 391-92, 224 P.2d 11, 13 (1950).

1 specifically it would be incompatible if it challenged judicial integrity and offended traditional
2 notions of the necessary impartiality of the judiciary. The Villeza Court held that the offices of
3 circuit court judge and administrative director were not incompatible at common law because
4 judicial integrity was not threatened in the case.
5

6 Aside from any specific constitutional or statutory prohibitions, incompatibility depends
7 on the character and relation of the offices and not on the matter of physical inability to discharge
8 the duties of both of them. The question is whether one office is subordinated to the other, or the
9 performance of one interferes with the performance of the duties of the other, or whether the
10 functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both
11 offices is detrimental to the public interest. Polley v. Fortenberry, 268 Ky. 369, 105 S.W.2d 143,
12 144–45 (1937).⁶ In Polley, the Kentucky Supreme Court analyzed whether the positions of
13 maintenance supervisor for the state highway department and member of the county board of
14 education were incompatible under the common law. The Court first determined that they were
15 both offices, but there was no constitution or statutory authority that would prevent the plaintiff
16 Polley from serving in both roles. Kentucky law required that if a person accepts an office
17 incompatible with the one he already occupies that he must vacate the first office when assuming
18 the second. Therefore, the Court looked to the common law of incompatible offices to determine
19 if the two roles were incompatible. The Court found that neither position was subordinate to the
20 other nor would the performance of one position require the person to “pass upon the validity of
21 his acts” in the other position. The Court held that it was clear that the two positions were not
22 inherently inconsistent or repugnant nor a detriment to the public interest.

23 It varies by jurisdiction whether the common law rule against incompatibility applies to
24 only offices or includes public employment as well.⁷ Due to the public policy issues of
25

26 ⁶ See also Russell v. Worcester Cnty., 323 Mass. 717, 719, 84 N.E.2d 123, 124 (1949).

27 ⁷ See Dupras v. Cnty. of Clinton, 213 A.D.2d 952, 953, 624 N.Y.S.2d 309, 309 (1995)(New York recognizes that the
28 doctrine of incompatible offices applies to employees as well as officers.); Eldridge v. Sierra View Loc. Hosp. Dist.,
224 Cal. App. 3d 311, 319, 273 Cal. Rptr. 654, 660 (Ct. App. 1990)(California declined to extend the doctrine to a
scenario where one position is a public office and the other employment.)

1 incompatible public office and public employment being coupled that may arise, this Court finds
2 that the common law doctrine applies to public offices as well as public employment in
3 determining whether an individual employed by a public entity may serve as a state legislator.
4

5
6 ***It is the Role of the Court to Determine if Offices Are Incompatible.***

7 “Whether two public offices are incompatible is a question of law to be determined by this
8 Court upon examining the nature of the offices and their relationship to one another.” Felkner v.
9 Chariho Reg'l Sch. Comm., 968 A.2d 865, 873 (R.I. 2009).⁸

10 In State v. Second Jud. Dist. Ct. in & for Cnty. of Washoe, 134 Nev. 783, 787–88, 432
11 P.3d 154, 159 (2018), the Supreme Court reaffirmed, based on the Nevada Constitution separation
12 of powers doctrine, that it is prohibited for one branch of government to impinge on the functions
13 of another.” *See* Nev. Const. art. 3, § 1(1). In the decision, the Court noted that a prosecutor acts
14 within the executive realm in making charging decisions based on violation of the State’s laws. *Id.*
15 *citing* Stromberg v. Second Jud. Dist. Ct. of State ex rel. Cnty. of Washoe, 125 Nev. 1, 200 P.3d
16 509 (2009). A District Attorney’s Office brings charges on behalf of the State against those who
17 have allegedly violated the laws of the State and the Legislature enacts such laws. Therefore,
18 serving in the Legislature while simultaneously employed as a member of a county district
19 attorney’s office is incompatible based on the common law doctrine. In the case at hand, both of
20 the named Defendants who were identified as being employed by the Clark County District
21 Attorney’s Office, Nicole Cannizzaro and Melanie Scheible, have since left their public
22 employment, therefore they are no longer parties to the case.

23 As for the current Defendants, this Court finds that there is no common law incompatibility
24 issue for an individual to be employed as a county public school teacher, a public defender, or a
25 professor at a state college and simultaneously serve as a state legislator. Based on Schear, the
26

27 ⁸ *See also* LaGrange City Council v. Hall Bros. Co. of Oldham Cnty., 3 S.W.3d 765, 769 (Ky. Ct. App. 1999);
28 Reilly, 33 N.J. 529, 166 A.2d 360; People, on Complaint of Chapman, v. Rapsey, 16 Cal. 2d 636, 641, 107 P.2d
388, 391 (1940); Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67, 71 (N.D. 1975).

1 Court finds that there is no conflict between the positions nor does the Plaintiff suffer prejudice
2 based on their dual employment. After analyzing the holding in Villeza, the Court finds that the
3 integrity of the legislative and executive branches is not threatened by a public school teacher, a
4 public defender, or a professor simultaneously serving as a legislator. And, a public school teacher,
5 a public defender, nor a professor have the discretionary power to review the actions of a legislator
6 and a legislator does not have the discretionary power to review the actions taken by an educator
7 or a public defender. Therefore, the dual employment of Defendants Miller, Torres, Ohrenschall,
8 and Neal are found not to be incompatible under the common law doctrine.
9

10
11 **Historical Guidance Regarding the Applicability of the Nevada Separation-of-Powers Clause**
12 **to Local Political Subdivisions**

13 Nevada's separation-of-powers clause, contained in Article 3, Section 1 of the Nevada
14 Constitution, provides that “[t]he powers of the Government of the State of Nevada shall be divided
15 into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons
16 charged with the exercise of powers properly belonging to one of these departments shall exercise
17 any functions, appertaining to either of the others, except in the cases expressly directed or
18 permitted in this constitution.” The Nevada Supreme Court has held that the separation of powers
19 doctrine is the most important foundation for preserving and protecting liberty by preventing the
20 accumulation of power in any one branch of government. Secretary of State v. Nevada State
21 Legislature, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Constitution further embodies this
22 concept of limited government by specifically delineating the powers granted to the three distinct
23 and coequal branches of government, as set forth in Article 4 (legislative), Article 5 (executive),
24 and Article 6 (judicial). *See* Comm'n on Ethics v. Hardy, 125 Nev. 285, 292, 212 P.3d 1098, 1103
25 (2009).
26
27
28

1 ***The Nevada Constitution Was Based on the California Constitution and California Courts Have***
2 ***Decided That the Constitutional Separation-of-Powers Clause Does Not Apply to Employees of***
3 ***Local Government Entities***
4

5 In 2001, the Nevada Supreme Court recognized that the rules of statutory construction
6 apply when interpreting constitutional provisions. “[W]hen a statute is derived from a sister state,
7 it is presumably adopted with the construction given it by the highest court of the sister state.”
8 Thus, since Nevada relied upon the California Constitution as a basis for developing the Nevada
9 Constitution, it is appropriate for us to look to the California Supreme Court's interpretation of [the
10 same provisions] in the California Constitution. State ex rel. Harvey v. Second Jud. Dist. Ct., 117
11 Nev. 754, 763, 32 P.3d 1263, 1269 (2001). In fact, Article 3, Section 1 of the Nevada Constitution
12 is identical to the original separation-of-powers clause contained in Article 3, Section 1 of the
13 California Constitution,⁹ so this Court will look to California Court decisions regarding whether
14 the separation-of-powers clause applies to local governments.

15 In People ex rel. Attorney General v. Provines, (34 Cal. 520) (1868), the California
16 Supreme Court analyzed the issue of whether the separation-of-powers clause applied to local
17 political subdivisions. The Court held that the Constitution was formed for the purpose of
18 establishing a State Government, contrasting it to local, county or municipal governments.¹⁰
19 Simply put, the Court found that the framers of the California Constitution did not contemplate
20 that the state government executive branch included local government. Therefore, California's
21 separation of powers doctrine did not apply to local governments or its employees.

22 The Nevada Attorney General’s Office (“AG”) and the Nevada Legislative Counsel Bureau
23 (“LCB”) have both issued multiple opinions relevant to the matter at hand. AG Sandoval
24 recognized that the Supreme Court has not addressed this specific issue but has emphasized the
25

26 ⁹ The State of California slightly amended their separation-of-powers clause in 1972 after voters approved
27 Proposition 1A, which transformed California legislators from citizen legislators to full time employees of the
Legislative Branch. *See* California Proposition 1A, 1966.

28 ¹⁰ The Court explained that local governments are necessary; however, the Constitution does not of itself create or
establish any local or municipal governments. Provines, 34 Cal. at 520.

1 importance of the separation-of-powers doctrine in Galloway v. Truesdell, 83 Nev. 13, 422 P.2d
2 237 (1967) and Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 874, 879, 878 P.2d 913 (1994).
3 In Galloway, the Nevada Supreme Court analyzed what constitutes legislative, executive, and
4 judicial powers in order to determine whether a statute (NRS 122.070) required a district judge to
5 perform non-judicial powers. The Court held that the statute in question required a member of the
6 judicial branch to perform legislative functions and was therefore unconstitutional as it violated
7 the separation-of-powers clause of the Nevada Constitution. Galloway, 83 Nev. at 31, 422 P.2d at
8 249. In Whitehead, the Court addressed the issue of whether the State Attorney General serving as
9 counsel for the Nevada Commission on Judicial Discipline violated the constitutional separation-
10 of-powers provision. Petitioner Whitehead argued that the Attorney General is an elected,
11 constitutional officer of the executive branch and therefore not permitted by the separation-of-
12 powers clause of the Constitution to represent the Commission in the exercise of its powers related
13 to judicial discipline. The Court agreed with Petitioner and held that there were multiple instances
14 of conflict of interest and it was unconstitutional for an elected officer of the executive branch to
15 represent the Commission in judicial discipline matters nor “prosecute” a judge before the
16 Commission. The Court relied on its decision in Galloway in holding that “one department cannot
17 exercise the power of the other two” without violating the separation-of-powers clause of the
18 Constitution. Whitehead, 110 Nev. at 880, P.2d. at 917. In the case at hand, this Court recognizes
19 the importance of the separation-of-powers clause raised by the Galloway and Whitehead Courts;
20 however, it distinguishes Galloway as the issue at hand is not whether one branch is being required
21 to perform powers constitutionally granted to another branch and Whitehead is dealing with an
22 elected officer of the executive branch encroaching upon the powers of the judicial branch. While
23 these cases provide valuable insight into the importance of the separation-of-powers clause, they
24 do not directly inform the concern of dual employment at issue in this case.
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2 Returning to the AG Opinions,¹¹ two of them were in direct conflict regarding whether a
3 school district employee may simultaneously serve in the state legislature; however, the second
4 opinion, published in 1971, overrode the previous decision, which was not supported by legal
5 authority.¹² The AG Opinions have provided that, based on the intent of the framers of the Nevada
6 Constitution, employees of local political subdivisions are not in violation of the separation-of-
7 powers clause when they serve as state legislators. See Op. Nev. Att'y Gen. No. 401 (April 20,
8 1967); Op. Nev. Att'y Gen. No. 71-4 (January 11, 1971). However, there is conflict between the
9 opinions of the AG and the LCB when it comes to state employees and in 2004, the Nevada
10 Secretary of State asked then Attorney General Brian Sandoval to provide guidance as to whether
11 a state or local government employee is eligible to simultaneously serve as a member of the Nevada
12 State Legislature (dual service) without violating the Nevada Constitution's separation of powers
13 doctrine in order to try to parse out the conflicting opinions between the AG and LCB. 2004 Nev.
14 Op. Att'y Gen. No. 03 (Mar. 1, 2004). AG Sandoval also observed that [o]ther states are not
15 consistent in their regulation, prohibition, and allowance of dual service. They address dual service
16 through various combinations of constitutional, statutory, and common-law restrictions, making
17 this a complex and conflicting issue of law and policy.

18 In coming to its decision that employees of local government entities are not bound by the
19 separation-of-powers clause, the AG first looked to the United States Supreme Court for the main
20 purpose of separation-of-powers, which is “[t]he fundamental necessity of maintaining each of the
21 three general departments of government entirely free from the control or coercive influence,
22 direct or indirect, of either of the others[.]” Humphrey's Ex'r v. United States, 295 U.S. 602, 629,
23 55 S. Ct. 869, 874 (1935). The AG reasoned that [h]istorically the requirement of the separation
24 of powers was never applied to local governmental organizations. Thus, not only municipal
25 corporations but counties, townships, *school districts*, drainage districts, and the like are frequently
26

27 ¹¹ These Opinions were referenced in the Supreme Court decision, footnote 4. See Cannizzaro, 507 P.3d at 1209.

28 ¹² 2004 Nev. Op. Att'y Gen. No. 03 (Mar. 1, 2004), footnote 6.

1 organized with only a single commission with all the powers, legislative, executive, and judicial,
2 in the commission. The compelling argument in favor of this is that the closeness of local
3 authorities to popular control affords an adequate sanction and protection. Op. Nev. Att'y Gen. No.
4 401 (April 20, 1967).

5
6 In finding that employees of local school districts who also served in the legislature did not
7 violate the separation-of-powers clause,¹³ the AG reached its conclusion by relying on legal
8 precedent from California, Colorado, and Maryland, each with constitutional separation of powers
9 clauses almost identical to the Nevada Constitution. These cases¹⁴ each held that the separation of
10 powers clause of their respective constitutions did not apply to local government employees. Op.
11 Nev. Att'y Gen. No. 71-4 (January 11, 1971).

12 While the AG's Opinions are in no way binding, this Court agrees with the AG in its
13 analysis that the findings in Provines, as well as precedent from other jurisdictions with similar
14 constitutional separation-of-powers clauses, provide strong support for the contention that Article
15 3, Section 1 of the Nevada Constitution does not apply to local political subdivisions. Therefore,
16 as long as an individual employed by a local political subdivision does not hold an incompatible
17 dual position, their dual employment is not prohibited by the separation-of-powers clause of the
18 Nevada Constitution. In the case at hand, the Teacher Defendants, employed by Clark County
19 School District, and Defendant Ohrenschall, employed by the Clark County Public Defender's
20 Office, are not in violation of the separation-of-powers clause by operation of their dual
21 employment. However, if an individual is dually employed by a state entity, and the roles they
22

23 ¹³ Op. Nev. Att'y Gen. No. 71-4 effectively overruled Op. Nev. Att'y Gen. No. 59 (May 9, 1955), which concluded
24 that local school districts were part of the executive branch of government and therefore could not employ a member
of the legislative branch under NEV. CONST. art. 3 § 1.

25 ¹⁴ Mariposa Cnty. v. Merced Irr. Dist., 32 Cal. 2d 467, 476–77, 196 P.2d 920, 926 (1948) (Moreover it is settled that
26 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.); Peterson v. McNichols, 128 Colo. 137, 142, 260 P.2d
27 938, 941 (1953) (The finding of the trial court that the ordinance usurps a judicial function and is contrary to Article
III of the Constitution of the State of Colorado is inept in application to this litigation. The constitutional provision
to which reference is made relates to state government and is not to be applied here in matters of purely local
28 concern . . .); and Pressman v. D'Alesandro, 193 Md. 672, 679, 69 A.2d 453, 454 (1949) (The constitutional
requirement of separation of powers is not applicable to local government.)

1 occupy are not incompatible under the common law, such as NSHE Defendant Neal, a third factor
2 must be considered, whether they are a public officer or a public employee.
3

4
5 **Treatment of Public Officers and Public Employees Under the Law When It Comes to**
6 **Separation-of-Powers**

7 The final factor in our analysis deals with how public officers and public employees are
8 treated differently under the law. There is a split of authority between other jurisdictions as well
9 as between our own AG and LCB when it comes to how to define a public officer. The key
10 differences lie in whether the court or advising entity look at the function or powers appertaining
11 to the position rather than the role (or classification) of it.
12

13 ***Function or Powers Appertaining To a Position***

14 The separation-of-powers clause of the Utah Constitution¹⁵ embodies the same language
15 as the Nevada Constitution, including the concepts of “powers properly belonging to” and
16 “functions appertaining to” found in the second part of the separation-of-powers clause, and in In
17 re Young, 1999 UT 6, 976 P.2d 581, the Utah Supreme Court examined the meaning behind these
18 phrases. The Young Court accurately noted that the second part of the clause is not plain in its
19 meaning, particularly when “considered in the context of the real world of government.” Id. at ¶11,
20 585. The Court noted that its case law over a century has not taken a serious look at this aspect of
21 the separation-of-powers clause, so it elected to provide meaning to it in Young. Id. at ¶ 12, 585.
22 After surveying the related cases decided by it, the Utah Supreme Court determined that “the most
23 that can be said categorically is that for powers or functions to fall within the reach of the [second
24 part of the separation-of-powers clause], they must be so inherently legislative, executive or
25

26 ¹⁵ The powers of the government of the State of Utah shall be divided into three distinct departments, the
27 Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging
28 to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases
herein expressly directed or permitted. Utah Const. art. V, § 1.

1 judicial in character that they must be exercised exclusively by their respective departments.”¹⁶
2 And, the Court noted that when defining the functions or powers which are exclusive to one
3 department, that it had also used the terms “primary,” “core,” or “essential.” Id. at ¶ 14, 586. After
4 this analysis of the case law, the Court determined that there is a “necessary corollary to the
5 doctrine that some powers or functions belong exclusively to the members of one branch is that
6 there must be powers and functions which may, in appearance, have characteristics of an inherent
7 function of one branch but which may be permissibly exercised by another branch.” Id. (internal
8 citations omitted). Finally, the Court held that “when the power exercised or the function
9 performed is one that we determine is not exclusive to a branch, it is not “appertaining to” that
10 branch and does not fall within the reach of the [second part of the separation-of-powers clause].
11 Id.

12
13 In Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428 (2007), the Nevada Supreme Court
14 spelled out the inherent powers of each branch of government, stating that the legislative power,
15 which is vested in the state Legislature, refers to the broad authority to enact, amend, and repeal
16 laws; the executive power, vested in the Governor, encompasses the responsibility to carry out and
17 enforce those laws (*i.e.*, to administrate); and the judicial power is vested in the state court
18 system carrying with it the capability or potential capacity to exercise a judicial function to hear
19 and determine justiciable controversies. Halverson, 123 Nev. at 260, 163 P.3d at 439.

20 In the case before this Court, it is clear to this Court that the powers “appertaining to” each
21 branch of the Nevada government are the inherent or primary powers as outlined in the
22 Constitution and Halverson. It is clear that the function of a public school teacher is not to
23 administrate the laws nor is it the function of a public defender to administrate the laws.¹⁷ Rather

24
25 ¹⁶ Citing Taylor v. Lee, 119 Utah 302, 315, 226 P.2d 531, 537 (1951).

26 ¹⁷ In Defendant Legislature’s Motion to Dismiss, they allege that pursuant to NRCP 19, judges serving as professors
27 must be included in the suit as necessary parties. When a judge serves in the role of professor, she is not performing
28 a primary duty of the executive branch of government, meaning she is not carrying out or enforcing the laws.
Therefore, there is no violation of the separation-of-powers clause when a member of the judiciary serves as a
professor at a NSHE institution. However, if a judge were to seek election as a legislator, it would clearly be
unconstitutional as it would violate the separation-of-powers clause as one individual would be carrying out the
primary function of two separate branches of state government.

1 the function of a teacher is to teach and the function of a public defender is to defend someone
2 charged with a crime. As such, neither is enacting, amending, or repealing laws in their roles as
3 educators or public defenders. Along this same line of reasoning, this Court finds that a member
4 of a district attorney's office would be in violation of the separation-of-powers clause as that
5 individual would be exercising the primary function of the legislative branch (enacting, amending,
6 and repealing laws) as well as the primary function of the executive branch (carrying out and
7 enforcing laws).
8

9 In State ex rel. Stratton v. Roswell Indep. Sch., 1991-NMCA-013, 111 N.M. 495, 806 P.2d
10 1085, the New Mexico Supreme Court decided an issue on point with the case at hand. In Roswell,
11 the Court had to determine if a public school teacher and administrator were state employees, based
12 on whether school districts were "arms of the state." The Court recognized that the state maintains
13 a great degree of control over local school districts; however, also noted that it would be absurd to
14 say that regulatory schemes could transform a political subdivision, business, or profession into
15 state government. Id. at 502, 1092. New Mexico is a sparsely populated state with a citizen
16 legislature, as is Nevada, and the Court looked to the New Jersey Supreme Court's holding in
17 Reilly, 33 N.J. 529, 166 A.2d 360, in holding that all citizen legislators, whether employed publicly
18 or privately, will likely confront a conflict of interest between their livelihood and a legislative
19 proposal at some time. In analyzing the separation-of-powers clause of New Mexico's
20 Constitution,¹⁸ the Court determined that the issue of whether the public school personnel
21 simultaneously serving as legislators violated the separation-of-powers clause could be resolved
22 by determining whether they were "charged with the exercise of powers." The New Mexico Court
23 then looked to a Montana Supreme Court decision in which the Court developed a separation of
24 powers analysis that distinguished between a public officer who is invested with sovereign powers
25 and a public employee who is not. State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411
26

27 ¹⁸ "The powers of the government of this state are divided into three distinct departments, the legislative, executive
28 and judicial, and 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, except as in this
constitution otherwise expressly directed or permitted." N.M. Const. art. III, § 1.

1 (1927). New Mexico adopted the five-part test to determine whether an employee is a public officer
2 as laid out in Hawkins in State v. Quinn, 1930-NMSC-065, 35 N.M. 62, 290 P. 786. The Montana
3 test adopted by New Mexico is “to constitute a position of public employment a public office of a
4 civil nature, it must be created by the Constitution or through legislative act; must possess a
5 delegation of a portion of the sovereign power of government to be exercised for the benefit of the
6 public; must have some permanency and continuity, and not be only temporary or occasional; and
7 its powers and duties must be derived from legislative authority and be performed independently
8 and without the control of a superior power, other than the law, except in case of inferior officers
9 specifically placed under the control of a superior officer or body, and be entered upon by taking
10 an oath and giving an official bond, and be held by virtue of a commission or other written
11 authority.” Id. at ¶ 5, 787. A latter New Mexico case stressed that the most important factor of the
12 Hawkins test is that to be a public officer, the person must be invested with sovereign power. State
13 ex rel. Gibson v. Fernandez, 40 N.M. 288, 292, 58 P.2d 1197, 1200 (1936).

14
15 In relying on the Hawkins test, the Roswell Court determined the separation-of-powers
16 clause of their constitution applied only to public officers, not employees. The Roswell Court
17 further held that public school teachers and administrators are not “public officers” because they
18 do not establish policy for the local school districts or for the state department of education.
19 Roswell, 1991-NMCA-013, ¶ 35, 111 N.M. at 505, 806 P.2d at 1095.

20 The separation-of-powers clause in the Nevada Constitution uses the same language as
21 New Mexico’s as it refers to one branch being prohibited from the “exercise of powers” of another
22 branch. Public school teachers, public defenders, and professors at an NSHE institutions are not
23 invested with sovereign powers and do not establish policy for their employers.

24 In the Roswell Court’s analysis of whether an individual is a public officer or a public
25 employee, one of the factors in the Hawkins test as well as an American Jurisprudence citation¹⁹

26
27 ¹⁹ 63A Am.Jur.2d *Public Officers and Employees* § 12, at 676 (1984) (“the characteristics of public office include
28 creation of the office by statute or constitution, exercise of some portion of the sovereign power, a continuing
position not occasional or contractual, a fixed term of office, an oath, liability for misfeasance or nonfeasance, and
independence beyond that of employees[;] a public employment, on the other hand, is a position in the public

1 indicate than the requirement to take an oath may be taken into consideration to determine if an
2 individual is a public officer. The Nevada Supreme Court addressed this in State v. Cole, 38 Nev.
3 215, 148 P. 551 (1915) when it stated that taking an oath is some indication by which to determine
4 if a position is an office; however, the Court held that based on the Nevada Constitution that all
5 officers shall take an oath. Id. at 215, 553. Nevada is one of fourteen states that constitutionally
6 requires an academic loyalty oath to be administered to public educators.²⁰ However, the oath
7 signed by an educator when they seek licensure references “office or position”²¹ and when this is
8 evaluated under Cole, this Court finds that the academic loyalty oath does not constitute the
9 position of public educator being classified as a public office.
10

11 The Nevada Supreme Court has laid out the characteristics of a public office, as opposed
12 to public employment, in multiple cases. In State ex rel. Mathews v. Murray, 70 Nev. 116, 120–
13 21, 258 P.2d 982, 984 (1953), the Court established that in Nevada it is the function of a position,
14 rather than its classification, that defines whether it is a public office or public employment. The
15 Court recognized that the nature of a public office as distinguished from mere employment is the
16 subject of a considerable body of authority, and many criteria of determination are suggested by
17 the courts. Upon one point at least, the authorities uniformly appear to concur. A public office is
18 distinguishable from other forms of employment in that its holder has by the sovereign been
19 invested with some portion of the *sovereign functions of government*. Id. at 120-21, 984 (emphasis
20 added). The Mathews Court relied on its decision in Cole, to further define a public office as one
21 that does not spring into existence spontaneously, rather it is brought into existence, either under
22 the terms of the Constitution, by legislative enactment, or by some municipal body, pursuant to

23 service which lacks sufficient of the foregoing elements or characteristics to make it an office.” Roswell, 1991-
24 NMCA-013, ¶ 34, 111 N.M. at 505, 806 P.2d at 1095.

25 ²⁰ Nev. Const. art. XI, § 5; Gabriel J. Chin & Saira Rao, Pledging Allegiance to the Constitution: The First
Amendment and Loyalty Oaths for Faculty at Private Universities, 64 U. Pitt. L. Rev. 431 (2003).

26 ²¹ Pursuant to NRS 391.080, all applicants for licensure as an educator must subscribe to the Oath of Office as
27 specified in the Nevada Constitution: I, _____, do solemnly swear (or affirm) that I will support, protect and defend
the constitution and government of the United States, and the constitution and government of the State of Nevada
against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same,
any ordinance, resolution or law of any state notwithstanding, and that I will well and faithfully perform all the
duties of the **office or position** on which I am about to enter, (if an oath) so help me God; (if an affirmation) under
the pains and penalties of perjury. Section 8, NV Educator License Application. (emphasis added)
28

1 authority delegated to it. Id. at 219, 552. The Mathews Court also recognized that the Cole Court
2 relied on secondary sources in its opinion to further define a public office in stating that “[a]ll
3 public offices must originally have been created by the sovereign as the foundation of
4 government”²² and “[t]he right, authority and duty conferred by law by which, for a given period,
5 either fixed by law or through the pleasure of the creating power of government, an individual is
6 invested with some portion of the sovereign functions of the government, to be exercised by him
7 for the benefit of the public. The warrant to exercise powers is conferred, not by contract, but by
8 law.”²³ Mathews, 70 Nev. at 121, 258 P.2d at 984.
9

10 11 ***Role or Classification of a Position***

12 While the separation-of-powers clause of the Nebraska Constitution²⁴ is similar to
13 Nevada’s, the Nebraska Supreme Court has interpreted whether a position is one of public office
14 or public employment by role or classification rather than function or power. In State ex rel. Spire
15 v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991), the issue in front of the Nebraska Supreme
16 Court was whether *quo warranto* was an appropriate means to challenge the right of an assistant
17 professor at a state college to hold his position while also serving as a member of the state
18 legislature. Id. at 769, 406. In order to determine if the remedy was appropriate, the court had to
19 determine if assistant professor at a state college holds or exercises a “public office” within the
20 meaning of their *quo warranto* statute.²⁵ The Court relied on its decision in Eason v. Majors, 111
21 Neb. 288, 196 N.W. 133 (1923) in stating that “[w]hen a position based upon a provision of law
22

23 ²² 3 Cruise's Dig. p. 109, § 5.

24 ²³ Wyman on Public Offices, § 44.

25 ²⁴ The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution. Neb. Const. art. II, § 1.

26 ²⁵ An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law. Neb. Rev. Stat. Ann. § 25-21,121 (West).
27
28

1 carries with it continuing duties of public concern which involve some exercise of the sovereign
2 power in their proper performance, the position may be said to be an office public in character.
3 Spire, 238 Neb. at 770, 472 N.W.2d at 406. As we can see from this, the Court was viewing the
4 “character” of the position rather than the function. The dissent in Spire is more aligned with the
5 decisions of the Nevada Supreme Court in that it looks to whether the legislator is exercising some
6 degree of the sovereign power of the state. Spire, 238 Neb. at 792, 472 N.W.2d at 418. Therefore,
7 in reconciling the definition of “public officer” in relation to Spire, the Nevada Supreme Court
8 language in Mathews and Cole mirrors the dissent rather than the majority opinion.²⁶

9
10 In 1957, the Oregon Supreme Court decided the case of Monaghan v. Sch. Dist. No. 1,
11 Clackamas Cnty., 211 Or. 360, 315 P.2d 797 (1957), holding that a school teacher may not also
12 serve as a state legislator because it violates the separation-of-powers clause of the Oregon
13 Constitution.²⁷ The Oregon Court defined “function” in a broad sense in that it held that if a person
14 was classified as performing any role in a branch of government, they would be precluded from
15 performing any role in a different branch. Id. at 373, 804.

16 However, in 1958, the voters of the state passed a referendum amending the Constitution,
17 which superseded the decision in Monaghan. The Oregon Legislature proposed a further
18 amendment as Senate Joint Resolution 203, which was submitted to voters as Measure 87 and was
19 approved November 4, 2014. The amended Oregon Constitution specifically allows “(1) A person
20 employed by any board or commission established by law to supervise and coordinate the activities
21 of Oregon's institutions of post-secondary education, a person employed by a public university as
22 defined by law or a member or employee of any school board is eligible to serve as a member of
23 the Legislative Assembly, and membership in the Legislative Assembly does not prevent the
24 person from being employed by any board or commission established by law to supervise and
25

26 ²⁶ See Mathews, 70 Nev. at 120-21, 258 P.2d at 984; Cole, 38 Nev. at 219, 148 P. at 552.

27 ²⁷ The powers of the Government shall be divided into three separate branches, the Legislative, the Executive,
28 including the administrative, and the Judicial; and no person charged with official duties under one of these
branches, shall exercise any of the functions of another, except as in this Constitution expressly provided. Or. Const.
art. III, § 1.

1 coordinate the activities of Oregon's post-secondary institutions of education or by a public
2 university as defined by law, or from being a member or employee of a school board; and (2) A
3 person serving as a judge of any court of this state may be employed by the Oregon National Guard
4 for the purpose of performing military service or may be employed by any public university as
5 defined by law for the purpose of teaching, and the employment does not prevent the person from
6 serving as a judge.”²⁸ Both the Oregon voters and the Oregon Legislature made an implicit finding
7 that a school teacher serving as a state legislator does not violate the separation-of-powers clause
8 of the State Constitution.
9

10 What we have learned from Nebraska and Oregon is that some courts distinguish whether
11 a position is a public office rather than public employment is based on the role or classification
12 rather than the function or powers of the positions held. Oregon has also shown us that a voter-
13 enacted constitutional amendment may supersede the interpretation by a court.

14 In Nevada, there is disagreement between the AG and LCB when it comes to whether
15 public employees that fall under the executive branch of the state government are prohibited from
16 serving in the state legislature by the separation-of-powers clause. The AG provided guidance that
17 employees of the Nevada State Highway Patrol (“NSHP”) and Nevada Department of
18 Transportation (“NDOT”) would be precluded from service in the legislature;²⁹ however, the LCB
19 issued opinions that found that employees of the State Department of Agriculture (“DOA”) and
20 University and Community College System of Nevada (“NSHE”)³⁰ could serve in the legislature
21 as long as they were a public employee and not a public officer.³¹

22 The AG based its argument on its finding that the role of employee of the NSHP helps
23 perform the administrative functions of the state executive branch of government and, therefore,
24 he is a member of the executive branch and the separation-of-powers clause would preclude him
25

26
27 ²⁸ Or. Const. art. XV, § 8

²⁹ See Op. Nev. Att’y Gen. No. 168 (May 22, 1974); Ltr. Nev. Att’y Gen. (January 28, 2002).

³⁰ The University and Community College System of Nevada is now called the Nevada System of Higher Education.

³¹ Legislative Counsel Bureau Opinion - February 4, 2002; Legislative Counsel Bureau Opinion - January 23, 2003.

1 from serving in the legislature.³² While the AG did not issue an official opinion as to the NDOT
2 question, it did issue a letter in which it stated that it disagreed with the LCB's Opinion that the
3 NDOT employee could run for partisan office and maintain his employment.³³
4

5 The issue at the heart of the disagreement between the AG and LCB is one of function
6 versus classification. The LCB has opined that the separation-of-powers clause applies to public
7 officers but not public employees, therefore it is a matter of function, relying on the common law
8 doctrine of incompatible offices as well as NRS 281.044, NRS 284.770, and NRS 284.143.
9 However, the AG's opinions have relied on an argument that the classification of an employee that
10 falls under the umbrella of the executive branch is what triggers the separation-of-powers. Both
11 the AG and LCB have asked for judicial determination on this issue.

12 In relying on Matthews in its DOA Opinion, the LCB opined "the position of Senior
13 Petroleum Chemist with the DOA is a position created by administrative authority and discretion,
14 not by statute. Moreover, based on the statutory structure of the DOA, we believe that most
15 employees of the DOA do not exercise any of the sovereign functions of the state. Rather, those
16 employees simply implement the policies made by higher-ranking state officials."³⁴

17 The AG disagreed with the LCB in its use of Matthews because the Court never analyzed
18 whether Mr. Murray's dual employment violated Nevada's constitutional separation of powers
19 doctrine. However, the LCB relied on Matthews to define the parameters of a public employee
20 compared to a public official, not to determine the applicability of the separation-of-powers clause
21 to public employees. This Court, like LCB, relies on Matthews to provide guidance on
22 distinguishing public employees from public officers as a step in the analysis of whether a person
23 employed by the state is subject to the separation-of-powers clause of the Constitution.

24 Based on the classification instructions provided by the Mathews Court, this Court finds
25 that a professor at a NSHE institution is a public employee and not a public officer. Therefore,
26

27 ³² Attorney General's Opinion No. 183, dated July 9, 1952.

28 ³³ Ltr. Nev. Att'y Gen. (January 28, 2002).

³⁴ Legislative Counsel Bureau Opinion - February 4, 2002.

1 NSHE Defendant Neal’s simultaneous employment as an adjunct professor at NSC and her service
2 as a state legislator does not violate the separation-of-powers clause of the Nevada Constitution
3 because she does not exercise a sovereign function of the executive branch in her position as
4 Adjunct Professor at Nevada State College. This Court also finds that public school teachers and
5 public defenders employed by local political subdivisions are public employees and therefore the
6 Teacher Defendants and Defendant Ohrenschall’s employment with Clark County and service as
7 state legislators do not violate the separation-of-powers clause of the Constitution because they do
8 not exercise sovereign functions of the executive branch.
9

10 CONCLUSION

11
12 The Nevada Legislature has known of the Attorney General’s Opinion No. 71-4, which
13 stated that the separation-of-powers clause of the Nevada Constitution did not apply to local
14 government employees, for over fifty years. With this knowledge, it has chosen not to act on the
15 issue by enacting a statute that would ban dual employment as addressed in the Opinion. Therefore,
16 this Court views this inaction as the intent of the Legislature to not enact such a law. *See Roswell*,
17 1991-NMCA-013, ¶ 24, 111 N.M. at 502-03, 806 P.2d at 1092-93.³⁵

18 The legislatures of states such as Louisiana, Connecticut, and Massachusetts have enacted
19 statutes that prohibit dual employment.³⁶ Connecticut and South Carolina have even spelled a dual
20 job ban out in their constitution.³⁷ There are multiple examples of how other state legislatures
21 have confronted this issue and if it was the intent of the Nevada Legislature to ban dual
22 employment and override common law, it is in their power to do so. The New Jersey Supreme
23 Court came to the same conclusion when it held “that the common law did not bar the dual
24 officeholding involved in this case, and that the question whether it should be barred in the public
25

26 ³⁵ See also *Water Use*, 94 Haw. at 120, 9 P.3d at 432 (The legislature may nevertheless override this rule as it deems
appropriate or necessary.).

27 ³⁶ See *Foti v. Holliday*, 2009-0093 (La. 10/30/09), 27 So. 3d 813, 819; *Stolberg v. Caldwell*, 175 Conn. 586, 604,
402 A.2d 763, 772–73 (1978); *Osetek v. City of Chicopee*, 370 Mass. 110, 112, 345 N.E.2d 897, 899 (1976).

28 ³⁷ See *Stolberg*, 175 Conn. at 604, 402 A.2d at 772–73; *S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank*,
403 S.C. 640, 646–48, 744 S.E.2d 521, 524–25 (2013).

1 interest reposes in the power and responsibility of the legislative department.” Reilly, 33 N.J. at
2 543, 166 A.2d at 372. Likewise, it is in the power of the voters of Nevada to amend the Constitution
3 if they desire to ban dual public employment.³⁸ Or, Nevada voters may follow the lead of Oregon
4 voters and amend the constitution to allow for various types of dual public employment.
5

6 Until either of these events occur, this Court finds that three factors must be evaluated to
7 determine whether an individual’s dual employment violates the separation-of-powers clause of
8 the Nevada Constitution. First, the Court must deem whether the dual roles are incompatible based
9 on the common law doctrine of incompatible offices. Next, the Court must look at whether the
10 individual legislator’s employment is with a state entity or a local political subdivision. Finally, if
11 the roles are compatible and the individual works for a state entity, then the Court must determine
12 whether the position with the state entity is that of an employee or an officer. Based on the analysis
13 of these factors, this Court holds that (1) no officer or employee of a state or local government may
14 also serve as a state legislator if the roles are not compatible and it is the purview of the court to
15 determine compatibility; (2) those employed by local government entities are not a part of the state
16 executive branch and therefore may serve in the legislative branch providing the roles are
17 compatible; and (3) public officers of the state executive branch may not serve in the legislature;
18 however, those who are public employees may, providing the roles are compatible.

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27 ³⁸ See also Ackerman Dairy Inc. v. Kandle, 54 N.J. 71, 75–76, 253 A.2d 466, 469 (1969)(The holding of
28 two offices which are incompatible under the common law may be permitted by a state constitution as a state’s
constitution overrides the common law.)

1 As a result of these findings and accepting the charge of the Plaintiff's Amended Complaint
2 as true, this Court finds that Plaintiff NPRI has not established elements of a claim that would
3 grant them relief.
4

5
6 BASED ON THE FOREGOING, the Court ORDERS that Defendant Ohrenschall's
7 Motion to Dismiss is GRANTED;

8 The Court FURTHER ORDERS that NSHE Defendant Neal's Motion to Dismiss is
9 GRANTED;

10 The Court FURTHER ORDERS that Defendant Nevada State Legislature's Motion to
11 Dismiss is DENIED for the reasons as indicated in footnote 4 above;

12 The Court FURTHER ORDERS that the Joinders filed by co-Defendants, to the extent that
13 they dealt with the separation-of-power issues are GRANTED;

14 The Court FURTHER ORDERS that the Motion to Sever filed by Teacher Defendants is
15 DENIED for the reasons as indicated in footnote 1 above; and

16 The Court FURTHER ORDERS that the Plaintiffs Motions to Strike are DENIED.
17

18 Dated this 4th day of January, 2023

19 
20

21 **JUDGE JESSICA K. PETERSON**
22 **Jessica K. Peterson**
23 **District Court Judge**

24 **AFFIRMATION**

25 Pursuant to NRS 239B.030

26 The undersigned does hereby affirm that the
27 preceding Order filed in District Court case number
28 A818973 DOES NOT contain the social security
number of any person.

/s/ Jessica K Peterson

1 **CSERV**

2
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 8

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: 1/4/2023

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