

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

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A-20-817757-C] Elizabeth A. Brown
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**APPELLANT’S MOTION TO
SUSPEND THE RULES
PURSUANT TO NRAP 2**

MOTION

Appellant, Nevada Policy Research Institute (“NPRI”), by and through its
attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq. of Fox
Rothschild LLP, hereby files its Motion to Suspend the Rules Pursuant to NRAP 2

and seeks therein an expedited briefing schedule and oral argument on the pure question of law whether Respondents’ dual service with the Legislative and Executive branches violates Nevada’s separation-of-powers clause, Nev. Const. art. 3, § 1(1). The Court’s review of the district court’s substantive decision to dismiss NPRI’s claims for Declaratory and Injunctive Relief will be reviewed *de novo*, as per *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) (holding questions of statutory construction, including the meaning and scope of a statute, are questions of law reviewed *de novo*), and should require minimal additional briefing prior to oral argument.

Further, this Court tellingly held, when remanding the matter previously upon its reversal of the district court’s original dismissal determination, that the separation-of-powers question concerning Respondents’ dual service remaining unresolved “could result in serious public injury – either by the continued allegedly unlawful service of the above-named officials, or by the refusal of qualified persons to run for office for fear of acting unconstitutionally – because this unsettled issue continues to arise.” *See Nev. Policy Research Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28 at *10 (2022). The matter remained under advisement following the August 4, 2022 hearing on all pending matters, until the district court issued its final judgment on January 4, 2023, leaving inadequate time for the “future guidance [] necessary because of the lack of judicial interpretation of Nevada’s separation-of-powers clause” to be given in advance of the 2022 General

Election. *See id.* at *10-11. The issue may still be resolved, however, before further serious public injury occurs.

Now that the district court, unlike its predecessor, has substantively addressed the separation-of-powers issue, the Court may make the necessary final determination whether dual service violates Nevada’s separation-of-powers clause, which expressly prohibits any one branch of government from encroaching on the functions of another. And, it is imperative that the court take this action during the upcoming 120-day legislative session, before such encroachments occur either during the session itself or upon Respondents return to Executive branch employment on or after June 5, 2023.

POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. Authority to Suspend the Rules.

Since 2015, NRAP 2 has permitted this Court, upon motion, to expedite its decision or for other good cause suspend any provision of the Rules in a particular case and order proceedings as the Court directs. NPRI respectfully asks for such consideration in the instant case, given the critical and time-sensitive separation-of-powers issue at the forefront of the instant appeal and the pending commencement of the 82nd Session of the Nevada Legislature, after which the Respondents will immediately return to engaging in the dual employment scenarios vigorously disputed herein.

B. An Expedited Briefing Schedule and Oral Argument Is Warranted.

To be clear, NPRI does not seek to challenge Respondents’ ability to serve in the Nevada Legislature. As this Court made clear over a decade ago in *Secretary of State (Heller) v. Nevada State Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), any attempt through a judicial proceeding to exclude or oust executive branch employees from the Legislature is, itself, barred by the separation-of-powers doctrine. 120 Nev. at 472, 93 P.3d at 756-57. In so holding, however, the Court provided clear guidance for how to properly challenge impermissible dual employment. Specifically, the Court endorsed two mechanisms for challenging what it deems the “dual service issue.” *Id.*, 120 Nev. at 472, 93 P.3d at 757. The Court stated that, “[t]he dual service issue may be raised as a separation-of-powers challenge to legislators working in the executive branch, as the qualifications of legislators employed in the executive branch are not constitutionally reserved to that branch.” *Id.* (citation omitted). The Court went on to opine that, “[s]uch a challenge might be well suited for quo warranto or a declaratory relief action filed in the district court.” *Id.* Declaratory and injunctive relief is exactly what NPRI sought and was substantively denied by the district court’s decision below.

Unlike her predecessor, however, the Honorable Jessica K. Peterson addressed the dual service issue head on and opened the door for this Court to do the same, albeit upon *de novo* review. In lieu of addressing the specific arguments

of the parties, the district court made a *sua sponte* merits determination based upon a legal conclusion that Nevada has no specific constitutional or statutory prohibition against dual public employment and, thus, the analysis 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* Order dismissing the district court litigation in its entirety, entered January 4, 2023 (“Order of Dismissal”), 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 Ohrenschall, 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 does not exercise a sovereign function of the executive branch. *See id.* at 16:12 – 21; *see also* at 25:2 – 26:4.

NPRI, as well as opposing counsel, did not argue these matters before the district court and it is anticipated both sides will seek to focus their briefings on the Nevada Constitution and all relevant binding or persuasive guidance as to its interpretation to enable the Court to successfully conduct the necessary *de novo* review.

C. Timing Is Everything.

The 82nd Session of the Nevada Legislature begins February 6, 2023. At that time, it is expected that Respondents will have taken leave from or otherwise suspended their Executive branch duties. And, while this will not stop the infringement of the latter upon the former, NPRI does not directly – because it may not directly – challenge Respondents’ participation in the Legislature. NPRI does, however, note the Court’s prior concern about the serious public injury that

would occur if Respondents continued in their allegedly unlawful dual service, and the sooner this issue is resolved the sooner the injury will cease. At minimum, though, Respondents should have clear guidance prior to the return to their respective Executive branch positions when the Legislature recesses on June 5, 2023. Thus, NPRI seeks suspension of the Rules to allow its appeal of the district court's substantive separation-of-powers determination, and related rulings, to conclude at the soonest possible opportunity.

Respondents previously opposed such a request by invoking NRS 1.310, which allows a Legislator who is party to a court action to request a continuance until 7 days after the conclusion of the legislative session. NRS 1.310(1) and (2). NPRI respectfully notes, however, that the statute also allows a party to successfully object to a continuance where it has “a substantial existing right or interest that will be defeated or abridged” and will “suffer substantial and immediate irreparable harm” if the continuance is granted. NRS 1.310(3). NPRI has shown these extraordinary circumstances herein, above, where Respondents' dual employment violates the Nevada Constitution, and the legislative session is the only time Respondents' Executive branch employment challenged by NPRI's lawsuit is otherwise suspended.

Finally, if the Court permits expedited briefing and oral argument to consider NPRI's appeal, such briefing will involve attorneys who are not Legislators and will have no impediment to following any schedule set herein.

II. CONCLUSION

Based on the foregoing, NPRI asks this Court to suspend the Rules, pursuant to NRAP 2, and during the upcoming 120-day period of the 82nd Session (2023) of the Nevada Legislature, issue an expedited briefing and oral argument schedule and allow the *de novo* review of the district court's final judgment on the merits of this long-standing separation-of-powers case to proceed to its imperative and time-sensitive conclusion.

Dated this 11th day of January 2023.

FOX ROTHSCHILD LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January 2023, I caused the foregoing
**APPELLANT'S MOTION TO SUSPEND THE RULES PURSUANT TO
NRAP 2** to be served on all parties to this action by electronically filing it with the
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