

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE,
INC., 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; SELENA TORRES, an
individual engaging in dual employment with
the Nevada State Assembly and a Clark County
Public Charter School; and THE
LEGISLATURE OF THE STATE OF
NEVADA,
Respondents.

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Case No. 85935

Appeal from Eighth Judicial
District Court, Clark County,
Nevada,
Case No. A-20-817757-C

**RESPONDENT LEGISLATURE'S OPPOSITION TO APPELLANT'S
MOTION TO SUSPEND THE RULES PURSUANT TO NRAP 2 AND
JOINDER IN RESPONDENT-LEGISLATORS' COUNTERMOTION
FOR LEGISLATIVE CONTINUANCE AS MATTER OF RIGHT
PURSUANT TO NRS 1.310**

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OPPOSITION AND JOINDER

Respondent Legislature of the State of Nevada (“Legislature”), by and through its counsel the Legal Division of the Legislative Counsel Bureau (“LCB Legal”) under NRS 218F.720, hereby files its opposition to Appellant’s motion to suspend the rules pursuant to NRAP 2 and its joinder in Respondent-Legislators’ counter-motion for a legislative continuance as a matter of right pursuant to NRS 1.310.

BACKGROUND

In its first amended complaint, Appellant Nevada Policy Research Institute (“NPRI”) alleged that Respondent-Legislators are persons simultaneously holding elected offices in the Legislature and paid positions with the state executive branch or with local governments in violation of the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution. In prior proceedings, the district court dismissed NPRI’s first amended complaint based on its lack of standing. However, NPRI appealed, and this Court reversed and remanded this case to the district court. Nev. Policy Research Inst. v. Cannizzaro, 138 Nev. Adv. Op. 28, 507 P.3d 1203 (2022) (“NPRI”). In its opinion, this Court held that NPRI has standing to bring its claims under the public-importance exception to traditional standing because NPRI is an appropriate party that “seeks to enforce a public

official's compliance with a public duty pursuant to the separation-of-powers clause.” NPRI, 507 P.3d at 1208.

In finding public-importance standing, this Court determined that NPRI is “represented by counsel who have competently advocated NPRI’s position and **named as defendants all of the individuals who currently serve in dual roles.**” NPRI, 507 P.3d at 1210 (emphasis added). However, on remand, the record was clarified, and it is now evident that NPRI failed to name as necessary party-defendants all individual legislators and judges who currently serve in dual roles with the state executive branch or local governments.

On July 1, 2022, the Legislature filed a motion to dismiss contending that the first amended complaint must be dismissed because NPRI failed to name all the individual legislators and judges currently serving in dual roles, given that such individuals are necessary party-defendants who are needed for a just adjudication of this action as required by the Due Process Clause, NRCP 19, and the Uniform Declaratory Judgments Act in NRS Chapter 30. (*Ex. 1 at 12-17*) In its motion to dismiss, the Legislature identified the following individual judges whom the Legislature believes hold paid positions with the state executive branch as adjunct professors at universities and colleges within the Nevada System of Higher Education (“NSHE”), just like Respondent-Legislator Dina Neal:

(1) Honorable Jerome T. Tao, Nevada Court of Appeals Judge and adjunct professor at William S. Boyd School of Law at the Univ. of Nev., Las Vegas; (2) Honorable Frank P. Sullivan, Clark County Family Court Judge and adjunct professor at William S. Boyd School of Law at the Univ. of Nev., Las Vegas; (3) Honorable Scott N. Freeman, Second Judicial District Court Judge and instructor at the Univ. of Nev., Reno; and (4) Honorable Dixie Grossman, Second Judicial District Court Judge and instructor at the Univ. of Nev., Reno. (*Ex. 1 at 4-5*)

Additionally, in its motion to dismiss, the Legislature contended that the first amended complaint also must be dismissed for lack of subject-matter jurisdiction because NPRI failed to comply with NRS Chapter 41's requirements to invoke the government's waiver of sovereign immunity as necessary to bring this action, given that NPRI failed to name as statutorily required party-defendants: (1) the state on relation of each particular department or other agency that employs the individual Respondent-Legislators who are state employees; and (2) each political subdivision that employs the individual Respondent-Legislators who are local employees. (*Ex. 1 at 8-12*)

Finally, in its motion to dismiss, the Legislature contended that the first amended complaint also must be dismissed because NPRI failed to name all the respective state and local government employers of all the individual legislators and judges currently serving in dual roles, given that such employers are necessary party-defendants who are needed for a just adjudication of this action as required by the Due Process Clause, NRCP 19, and the Uniform Declaratory Judgments Act in NRS Chapter 30. (*Ex. 1 at 12-17*)

When the Legislature filed its motion to dismiss, Respondent-Legislators Dina Neal and James Ohrenschall filed separate motions to dismiss. As part of their arguments, they each contended that, for several reasons, NPRI's separation-of-powers claims failed on the merits as a matter of law and that, as a result, NPRI's first amended complaint must be dismissed because it failed to state a claim upon which relief can be granted under NRCP 12(b)(5).

On Dec. 15, 2022, while the foregoing motions to dismiss were still pending before the district court, NPRI filed a motion for leave to file a second amended complaint (*Ex. 2*), asking the district court for permission to join the following individual legislators whom NPRI believes hold paid positions with the state executive branch or local governments:

- (1) Assembly member Natha C. Anderson (Washoe Cnty. Sch. Dist.);
- (2) Assembly member Reuben D'Silva (Clark Cnty. Sch. Dist.);
- (3) Assembly member Cecelia González (Univ. of Nev., Las Vegas);
- (4) Senator Lisa Krasner (Truckee Meadows Cmty. Coll.); (5) Assembly member Selena La Rue Hatch (Washoe Cnty. Sch. Dist.); (6) Assembly member David Orentlicher (Univ. of Nev., Las Vegas); and
- (7) Assembly member Shondra Summers-Armstrong (Reg'l Transp. Comm'n of S. Nev.)¹

¹ On Dec. 28, 2022, Assembly member Shondra Summers-Armstrong submitted a declaration to NPRI in which she declared, under penalty of perjury, that she does not "currently hold an employment position with any government agency, apart from my role as a state legislator." (*Ex. 3 ¶ 5*)

On Dec. 29, 2022, the Legislature filed an opposition to NPRI's motion for leave to file a second amended complaint and a countermotion to dismiss NPRI's first amended complaint (*Ex. 4*), contending that NPRI's proposed second amended complaint suffered from the same jurisdictional and legal deficiencies as its first amended complaint.

On Jan. 4, 2023, the district court entered an order (*Ex. 5*), resolving all pending motions except for: (1) NPRI's motion for leave to file a second amended complaint (*Ex. 2*); and (2) the Legislature's countermotion to dismiss NPRI's first amended complaint (*Ex. 4*).

In its order, the district court denied the Legislature's motion to dismiss for lack of subject-matter jurisdiction based on NPRI's failure to comply with NRS Chapter 41's requirements to invoke the government's waiver of sovereign immunity. The district court concluded that "NRS 41.031 refers to liability in relation to a tort claim and this case is one of equity, with [NPRI] seeking declaratory and injunctive relief related to constitutional questions and not damages related to tort liability." (*Ex. 5 at 4*)

Having determined that it could exercise subject-matter jurisdiction, the district court addressed the merits of NPRI's separation-of-powers claims. First, with regard to legislators holding positions of public employment with local governments, the district court concluded that:

Article 3, Section 1 of the Nevada Constitution does not apply to local political subdivisions. Therefore, as long as an individual employed by a local political subdivision does not hold an incompatible dual position, their dual employment is not prohibited by the separation-of-powers clause of the Nevada Constitution. In the case at hand, the Teacher Defendants, employed by Clark County School District, and Defendant Ohrenschall, employed by the Clark County Public Defender's Office, are not in violation of the separation-of-powers clause by operation of their dual employment.

(Ex. 5 at 16)

Second, with regard to legislators holding positions of public employment with the state executive branch, the district court concluded that:

[A] professor at a NSHE institution is a public employee and not a public officer. Therefore, NSHE Defendant Neal's simultaneous employment as an adjunct professor at NSC and her service as a state legislator does not violate the separation-of-powers clause of the Nevada Constitution because she does not exercise a sovereign function of the executive branch in her position as Adjunct Professor at Nevada State College. This Court also finds that public school teachers and public defenders employed by local political subdivisions are public employees and therefore the Teacher Defendants and Defendant Ohrenschall's employment with Clark County and service as state legislators do not violate the separation-of-powers clause of the Constitution because they do not exercise sovereign functions of the executive branch.

(Ex. 5 at 25-26)

Because the district court concluded that NPRI's separation-of-powers claims failed on the merits as a matter of law, the district court declined to address the Legislature's motion to dismiss based on NPRI's failure to join all necessary party-defendants. *(Ex. 5 at 7 n.4)* Nevertheless, although no judges were named as party-defendants in the litigation, the district court concluded that:

When a judge serves in the role of professor, she is not performing 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.

(Ex. 5 at 18 n.17)

Finally, although the district court noted that NPRI filed a motion for leave to file a second amended complaint, the district court stated that the motion “will likely become moot based upon the Court’s decision in this matter.” *(Ex. 5 at 7 n.3)* However, the district court did not decide NPRI’s motion for leave to file a second amended complaint or the Legislature’s countermotion to dismiss NPRI’s first amended complaint. On Jan. 6, 2023, NPRI filed its notice of appeal.

ARGUMENT

Contrary to NPRI’s suggestion that this appeal is limited to the merits of the dual-service issue, this appeal involves several jurisdictional, legal and procedural issues that—after a legislative continuance is granted as a matter of right pursuant to NRS 1.310—should be considered by this Court under its normal and ordinary appellate procedures without suspending any rules for expedited briefing and oral argument.

In its motion, NPRI suggests that this appeal is limited to “the pure question of law whether Respondents’ dual service with the Legislative and Executive branches violates Nevada’s separation-of-powers clause.” *(Mot. at 2)* Based on the district court’s order, the Legislature agrees that the district court reached the merits of the dual-service issue. Furthermore, if this Court determines that the district court had subject-matter jurisdiction to reach the merits of the dual-service

issue, the Legislature will ask this Court to affirm the district court's order on the merits. However, under well-established rules of judicial review, this Court will not review the merits of the dual-service issue unless it first determines that the district court had the necessary subject-matter jurisdiction to reach the merits of the issue. Landreth v. Malik, 127 Nev. 175, 179-80 (2011). Indeed, this Court must make such a jurisdictional determination *sua sponte*, regardless of whether the parties have raised or argued the jurisdictional issue, because the parties cannot confer subject-matter jurisdiction by waiver, acquiescence or consent. Id. If the district court did not have the necessary subject-matter jurisdiction, its decision on the merits of the dual-service issue is void. Id.

Furthermore, on appeal, the Legislature may raise any argument that would support affirmance of the district court's order dismissing NPRI's first amended complaint, "even if the district court rejected or did not consider the argument." Ford v. Showboat Operating Co., 110 Nev. 752, 755 (1994). If the district court lacked the necessary subject-matter jurisdiction to reach the merits of the dual-service issue, this Court may affirm the district court's order dismissing NPRI's first amended complaint because, under NRC 12(h)(3), the district court was required to "dismiss the action" on jurisdictional grounds.

In its order, the district court denied the Legislature's motion to dismiss for lack of subject-matter jurisdiction based on NPRI's failure to comply with NRS

Chapter 41's requirements to invoke the government's waiver of sovereign immunity because the district court concluded that "NRS 41.031 refers to liability in relation to a tort claim and this case is one of equity, with [NPRI] seeking declaratory and injunctive relief related to constitutional questions and not damages related to tort liability." (*Ex. 5 at 4*) However, this Court has held that NRS Chapter 41's requirements apply to all causes of action, including tort actions and **non-tort actions**, which would encompass NPRI's action for declaratory and injunctive relief. See Echeverria v. State, 137 Nev. Adv. Op. 49, 495 P.3d 471, 475-77 (2021). Additionally, in states like Nevada which have enacted the Uniform Declaratory Judgments Act, courts have held that the Uniform Act does not waive the state's sovereign immunity and that a plaintiff seeking declaratory and injunctive relief in an action against the state or its public employees must first find statutory authorization for such an action in the statutes governing the state's waiver of sovereign immunity. JHK, Inc. v. Neb. Dep't of Banking & Fin., 757 N.W.2d 515, 522 (Neb. Ct. App. 2008). Therefore, this appeal involves jurisdictional issues that this Court must address first before it can review the merits of the dual-service issue.

The district court also declined to address the Legislature's motion to dismiss based on NPRI's failure to join all necessary party-defendants. Under well-established rules of judicial review, this Court will not review the merits of the

dual-service issue unless it first determines that the district court ordered the joinder of all necessary party-defendants. Blaine Equip. Co. v. State Purchasing Div., 122 Nev. 860, 864-66 (2006). If the district court failed to order the joinder of all necessary party-defendants, its decision on the merits of the dual-service issue is void. Gladys Baker Olsen Family Tr. v. Dist. Ct., 110 Nev. 548, 552-54 (1994). Therefore, this appeal involves legal and procedural issues that this Court must address first before it can review the merits of the dual-service issue.

Finally, as thoroughly explained in Respondent-Legislators' opposition and counter-motion, NPRI fails to articulate any good cause, much less extraordinary circumstances, to justify suspending any rules for expedited briefing and oral argument, and the Legislature hereby joins in and adopts by reference all arguments in Respondent-Legislators' opposition and counter-motion. NRAP 28(i) ("[A]ny party may adopt by reference a part of another's brief.").

Accordingly, this Court should deny NPRI's motion and grant Respondent-Legislators' counter-motion because this appeal involves several jurisdictional, legal and procedural issues that—after a legislative continuance is granted as a matter of right pursuant to NRS 1.310—should be considered by this Court under its normal and ordinary appellate procedures without suspending any rules for expedited briefing and oral argument.

DATED: This **18th** day of January, 2023.

By: /s/ Kevin C. Powers

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 18th day of January, 2023, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Respondent Legislature's Opposition to Appellant's Motion to Suspend the Rules Pursuant to NRAP 2 and Joinder in Respondent-Legislators' Countermotion for Legislative Continuance as Matter of Right Pursuant to NRS 1.310, by means of the Nevada Supreme Court's electronic filing system, directed to:

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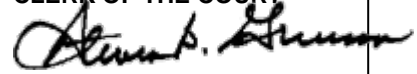
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EXHIBIT 1

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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 Senate 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.

Case No. A-20-817757-C

Dept. No. 8

HEARING REQUESTED

**NEVADA LEGISLATURE'S
MOTION TO DISMISS AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

MOTION TO DISMISS

The Legislature of the State of Nevada ("Legislature"), by and through its counsel the Legal Division of the Legislative Counsel Bureau ("LCB Legal") under NRS 218F.720, hereby files this Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief filed by Plaintiff Nevada Policy Research Institute ("NPRI") on July 28, 2020. This motion is made under NRCP 12 and EDCR 2.20 and is based upon the attached Memorandum of Points and Authorities, all pleadings,

documents and exhibits on file in this case and any oral arguments the Court may allow.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background.

This case involves NPRI's allegations that the individual Defendants are persons simultaneously holding elected offices in the Legislature and paid positions as public employees with the state executive branch or with local governments in violation of the separation-of-powers clause in Article 3, Section 1 of the Nevada Constitution. In the prior proceedings, the district court (former District Court Judge Jim Crockett presiding) dismissed NPRI's amended complaint based on its lack of standing. However, NPRI appealed, and the Nevada Supreme Court reversed and remanded this case to the district court in a published opinion. Nev. Policy Research Inst. v. Cannizzaro, 138 Nev. Adv. Op. 28, 507 P.3d 1203 (2022) ("NPRI"). The Supreme Court held that NPRI has standing to bring its claims under the public-importance exception to traditional standing because NPRI is an appropriate party that "seeks to enforce a public official's compliance with a public duty pursuant to the separation-of-powers clause." NPRI, 507 P.3d at 1208. Additionally, the Supreme Court held that: (1) NPRI failed to demonstrate that the district court abused its discretion in denying NPRI's motion to disqualify the official attorneys for the Nevada System of Higher Education ("NSHE") from representing its public employees in this litigation; and (2) NPRI waived its rights on appeal to challenge the district court's order granting permissive intervention to the Legislature. NPRI, 507 P.3d at 1211 n.5.

Because the prior proceedings in the district court and the Supreme Court are important to understanding the Legislature's current motion to dismiss, it is necessary to provide a thorough review of those prior proceedings. On July 9, 2020, NPRI filed its original complaint against several individuals who, at the time, were members of the Legislature and held paid positions as public employees with the state executive branch or with local governments. However, NPRI did not serve the summons and original complaint on any of the individual Defendants named in the original complaint.

1 On July 28, 2020, NPRI filed its amended complaint against several individuals who, at the time,
2 were members of the Legislature and held paid positions as public employees with the state executive
3 branch or with local governments. The individual Defendants named in the amended complaint were:
4 Nicole J. Cannizzaro, Kasina Douglass-Boone, Jason Frierson, Osvaldo Fumo, Heidi Seevers Gansert,
5 Glen Leavitt, Brittney Miller, Dina Neal, James Ohrenschall, Melanie Scheible, Teresa Benitez-
6 Thompson, Jill Tolles and Selena Torres. (Am. Compl. ¶¶ 7-19.) During the course of this litigation in
7 the district court and in the Supreme Court, the following individual Defendants were dismissed, without
8 prejudice, because they no longer are members of the Legislature or they no longer hold paid positions
9 as public employees with the state executive branch or with local governments, or because of both such
10 circumstances: Nicole J. Cannizzaro, Kasina Douglass-Boone, Jason Frierson, Osvaldo Fumo, Heidi
11 Seevers Gansert, Melanie Scheible and Teresa Benitez-Thompson. In addition, Glen Leavitt and Jill
12 Tolles were dismissed, without prejudice, because their legislative terms end on the day after the 2022
13 general election and they are not seeking reelection to their legislative offices.

14 As a result, the current individual Defendants are: (1) Brittney Miller who is a member of the
15 Nevada State Assembly and holds a paid position with a local governmental employer in Clark County
16 as a teacher; (2) Selena Torres who is a member of the Nevada State Assembly and holds a paid position
17 with a local governmental employer in Clark County as a teacher; (3) Dina Neal who is a member of the
18 Nevada State Senate and holds a paid position with the state executive branch as an adjunct professor at
19 Nevada State College within NSHE; and (4) James Ohrenschall who is a member of the Nevada State
20 Senate and holds a paid position with a local governmental employer in Clark County as a deputy public
21 defender employed under NRS 260.040.

22 In this case, Defendants Miller and Torres are represented by Bradley Schrage, Esq., Royi Moas,
23 Esq., and Daniel Bravo, Esq., of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP. On Sept. 18, 2020,
24 Defendant Miller filed her prior motion to dismiss the amended complaint, which was joined by

1 Defendant Torres on Oct. 6, 2020.¹ In the prior motion to dismiss, it was argued that: (1) NPRI lacked
2 standing to bring its claims; and (2) NPRI lacked subject-matter jurisdiction to bring its claims because
3 it failed to name each Defendant's respective state or local governmental employer as required by
4 NRS Chapter 41 in order to invoke the government's waiver of sovereign immunity. See Craig v.
5 Donnelly, 135 Nev. 37, 40 (Nev. Ct. App. 2019) (dismissing plaintiff's complaint for lack of subject-
6 matter jurisdiction under NRS Chapter 41 because plaintiff failed to name the State of Nevada as a
7 defendant in order to invoke the government's waiver of sovereign immunity). Because the district
8 court dismissed based on lack of standing in the prior proceedings, the district court did not address the
9 other arguments raised by Defendant Miller in the prior motion to dismiss.

10 In this case, Defendant Neal is represented by Berna L. Rhodes-Ford, General Counsel, Nevada
11 State College, within NSHE. On Sept. 24, 2020, Defendant Neal filed her prior motion to dismiss the
12 amended complaint.² In the prior motion to dismiss, it was argued that: (1) NPRI failed to state a claim
13 for violation of the separation-of-powers clause; (2) NPRI failed to state a claim for declaratory relief;
14 (3) NPRI failed to state a claim for injunctive relief; and (4) NPRI failed to join all necessary party-
15 defendants under NRCP 19 because NPRI failed to name those members of the judicial branch who hold
16 paid positions with the state executive branch as adjunct professors at universities and colleges within
17 NSHE, just like the members of the legislative branch who were named as party-defendants in this case
18 and who hold similar positions as adjunct professors at universities and colleges within NSHE. In
19 particular, the prior motion to dismiss identified the following members of the judicial branch as
20 necessary party-defendants: (1) Honorable Jerome T. Tao, Nevada Court of Appeals Judge and adjunct
21 professor at William S. Boyd School of Law at the University of Nevada, Las Vegas; (2) Honorable
22 Frank P. Sullivan, Clark County Family Court Judge and adjunct professor at William S. Boyd School

23 ¹ On Sept. 24, 2020, Defendant Neal joined in Defendant Miller's prior motion to dismiss, and
24 Defendant Neal also filed her prior motion to dismiss on that same date.

² On Oct. 6, 2020, Defendants Miller and Torres joined in Defendant Neal's prior motion to dismiss.

1 of Law at the University of Nevada, Las Vegas; (3) Honorable Scott N. Freeman, Second Judicial
2 District Court Judge and instructor at the University of Nevada, Reno; and (4) Honorable Dixie
3 Grossman, Second Judicial District Court Judge and instructor at the University of Nevada, Reno.
4 Because the district court dismissed based on lack of standing in the prior proceedings, the district court
5 did not address the other arguments raised by Defendant Neal in the prior motion to dismiss.

6 In this case, Defendant Ohrenschall is represented by Jonathan D. Blum, Esq., of Wiley Petersen.
7 In the prior proceedings, NPRI did not serve the summons and amended complaint on Defendant
8 Ohrenschall by personal service, and Defendant Ohrenschall did not enter an appearance. Instead, on
9 Nov. 4, 2020, the district court entered: (1) an order granting NPRI's motion for enlargement of time to
10 serve the summons and amended complaint on Defendant Ohrenschall; and (2) an order authorizing
11 service of Defendant Ohrenschall by publication. On Dec. 10, 2020, NPRI filed an affidavit of
12 publication regarding service of Defendant Ohrenschall by publication. After the Supreme Court's
13 remand, Defendant Ohrenschall entered an appearance as a party-defendant.

14 In this case, the Legislature is represented by Kevin C. Powers, General Counsel, LCB Legal. On
15 Dec. 8, 2020, the district court entered an order granting the Legislature's motion to intervene, and the
16 Legislature became entitled to all the rights of a party-defendant. Consequently, the Legislature became
17 entitled to file a motion to dismiss the amended complaint under NRCP 12 in the same manner as if the
18 Legislature had been named as a party-defendant in the amended complaint. However, before the
19 Legislature could file such a motion to dismiss in the prior proceedings, the district court dismissed the
20 amended complaint based on lack of standing, and the dismissal rendered any response to the amended
21 complaint by the Legislature moot at that time. Thereafter, NPRI filed a timely notice of appeal, which
22 divested the district court of jurisdiction over this case during the pendency of the appeal until the
23 Supreme Court issued its remittitur under NRAP 41 and remanded this case to the district court. After
24 the Supreme Court's remand, the Legislature filed this motion to dismiss the amended complaint.

1 **II. As an intervenor, the Legislature has all the rights of a party-defendant and is entitled**
2 **to file this motion to dismiss the amended complaint under NRCP 12 because, based on well-**
3 **established rules of appellate practice, the Supreme Court’s remand for further proceedings in**
4 **this case returned the parties to the same position they were in prior to the district court’s order**
5 **dismissing the amended complaint for lack of standing.**

6 In reviewing the rights of intervenors, the Supreme Court is guided by federal practice interpreting
7 the corresponding federal rules. See Hairr v. Dist. Ct., 132 Nev. 180, 186-88 (2016); Lawler v.
8 Ginochio, 94 Nev. 623, 626 (1978). Under federal practice, a proposed intervenor is not considered a
9 party until the district court enters an order granting the motion to intervene. See 7C Wright & Miller, et
10 al., Fed. Prac. & Proc. Civ. § 1920 (3d ed. & Westlaw Apr. 2022 update). However, after the district
11 court enters such an order, the intervenor has all the rights of a party, and “[t]he intervenor may move to
12 dismiss the proceeding and may challenge the subject-matter jurisdiction of the court.” Id. (footnotes
13 omitted); League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1304 (9th Cir. 1997) (“[A]s a
14 general rule, intervenors are permitted to litigate fully once admitted to a suit.”).

15 In this case, when the district court granted the Legislature’s motion to intervene on Dec. 8, 2020,
16 the Legislature became entitled to all the rights of a party-defendant. See NRS 218F.720(3) (“If the
17 Legislature intervenes in the action or proceeding, the Legislature has all the rights of a party.”).
18 Consequently, the Legislature became entitled to file a motion to dismiss the amended complaint under
19 NRCP 12 in the same manner as if the Legislature had been named as a party-defendant in the amended
20 complaint. See Bartlett v. Bishop of Nev., Corp., 59 Nev. 283, 298 (1939) (“The same rules govern
21 intervenor’s rights which govern those who originally sue or defend.”); Fed. Prac. & Proc. Civ., supra,
22 § 1920 (stating that after intervention, “the intervenor is treated as if the intervenor were an original
23 party and has equal standing with the original parties.”). However, before the Legislature could file
24 such a motion to dismiss in the prior proceedings, the district court dismissed the amended complaint
based on lack of standing, and the dismissal rendered any response to the amended complaint by the
Legislature moot at that time. Thereafter, NPRI filed a timely notice of appeal, which divested the

1 district court of jurisdiction over this case during the pendency of the appeal until the Supreme Court
2 issued its remittitur under NRAP 41 and remanded this case to the district court. See Mack-Manley v.
3 Manley, 122 Nev. 849, 855 (2006); Buffington v. State, 110 Nev. 124, 126 (1994) (“Jurisdiction in an
4 appeal is vested solely in the supreme court until the remittitur issues to the district court.”).

5 In its published opinion, the Supreme Court reversed the district court’s order dismissing the
6 amended complaint for lack of standing and remanded for “further proceedings” on NPRI’s claims.
7 NPRI, 507 P.3d at 1211. Based on well-established rules of appellate practice, “[u]pon remand from an
8 appellate court, the lower court is required to proceed from the point at which the error occurred.”
9 Giancola v. Azem, 109 N.E.3d 1194, 1200 (Ohio 2018) (quoting State ex rel. Douglas v. Burlew, 833
10 N.E.2d 293, 295 (Ohio 2005)). Thus, because the Supreme Court reversed the district court’s order
11 dismissing the amended complaint for lack of standing and remanded for further proceedings, it
12 “returned the parties to the same position they were in prior to the error,” and nothing precludes the
13 parties from raising their claims and defenses on remand, except for those which were expressly decided
14 in the published opinion and have become the law of the case. Giancola, 109 N.E.3d at 1200 (“Only
15 those legal questions resolved by a reviewing court are the law of that case.”). As explained by the
16 Oklahoma Supreme Court:

17 Where, on the judgment’s reversal, a cause is remanded, it returns to the trial court as if it
18 had never been decided, save only for the “settled law” of the case. **The parties are**
19 **relegated to their prejudgment status and are free to re-plead or re-press their claims**
20 **as well as defenses.** It is the settled-law-of-the-case doctrine that operates to bar relitigation
of (a) issues in a case which are finally settled by an appellate opinion or of (b) those the
aggrieved party failed to raise on appeal.

21 Smedsrud v. Powell, 61 P.3d 891, 896 (Okla. 2002) (emphasis added and footnotes omitted).

22 In this case, the Supreme Court expressly decided and settled the following issues which have
23 become the law of the case: (1) NPRI has standing to bring its claims under the public-importance
24 exception to traditional standing; and (2) NPRI failed to demonstrate that the district court abused its

1 discretion in denying the motion to disqualify NSHE's official attorneys. NPRI, 507 P.3d at 1211 & n.5.
2 In addition, because the Supreme Court expressly decided and settled that NPRI waived its rights on
3 appeal to challenge the district court's order granting permissive intervention, the Legislature's
4 intervention as a party-defendant has become the law of the case. Id.

5 Accordingly, based on well-established rules of appellate practice, the Supreme Court's remand
6 for further proceedings in this case returned the parties to the same position they were in prior to the
7 district court's order dismissing the amended complaint for lack of standing, and nothing precludes the
8 parties from raising their claims and defenses on remand, except for those which have become the law of
9 the case. Therefore, because the Legislature has all the rights of a party-defendant, it is entitled to file a
10 motion to dismiss the amended complaint under NRCP 12 and raise its claims and defenses on remand,
11 except for those which have become the law of the case.

12 **III. NPRI's claims must be dismissed for lack of subject-matter jurisdiction because NPRI**
13 **failed to comply with the statutory requirements under NRS Chapter 41 to invoke the conditional**
14 **waiver of sovereign immunity of the state and its state officers or employees and each political**
15 **subdivision and its local officers or employees.**

16 Under NRCP 12(b)(1), the Legislature is entitled to file a motion to dismiss the amended
17 complaint based on "lack of subject-matter jurisdiction." Further, under NRCP 12(h)(3), "[i]f the court
18 determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."
19 Therefore, the district court must dismiss the complaint when the lack of subject-matter jurisdiction is
20 apparent on the face of the complaint. Craig v. Donnelly, 135 Nev. 37, 39 (Nev. Ct. App. 2019).

21 In this case, the Court must dismiss the amended complaint for lack of subject-matter jurisdiction
22 because NPRI failed to comply with the statutory requirements under NRS Chapter 41 to invoke the
23 conditional waiver of sovereign immunity of: (1) the state and its state officers or employees; and
24 (2) each political subdivision and its local officers or employees. Specifically, in violation of
NRS Chapter 41, NPRI failed to bring this lawsuit in the name of: (1) the state on relation of each

1 particular department or other agency that employs the individual Defendants who are state employees;
2 and (2) each political subdivision that employs the individual Defendants who are local employees.
3 Craig, 135 Nev. at 39-40; NRS 41.031; NRS 41.0337; NRS 41.039.³

4 As part of our nation’s constitutional design, each state is an independent sovereign which enjoys
5 inherent sovereign immunity from lawsuits and liability for damages in its own state courts. Alden v.
6 Maine, 527 U.S. 706, 711-29 (1999); Echeverria v. State, 137 Nev. Adv. Op. 49, 495 P.3d 471, 475
7 (2021). Thus, “[t]he law is well settled that a state, which in the eye of the law is recognized as a
8 sovereign, cannot without its consent be sued by a citizen.” Hill v. Thomas, 70 Nev. 389, 401 (1954).
9 In other words, “the sovereign is immune from suit in the absence of a waiver of immunity.” Id.

10 Under the Nevada Constitution, sovereign immunity can be waived only by the Legislature
11 through the enactment of general laws. Nev. Const. art. 4, § 22 (“Provision may be made by general law
12 for bringing suit against the State as to all liabilities originating after the adoption of this Constitution.”);
13 Hardgrave v. State ex rel. Hwy. Dep’t, 80 Nev. 74, 76-78 (1964) (“We construe the words ‘general law’
14 as used in Section 22 to mean a general law passed by the legislature.”). Accordingly, “[i]t is the
15 legislature alone which has the power to waive immunity or to authorize such waiver.” Taylor v. State,
16 73 Nev. 151, 153 (1957). Consequently, “[i]t is not within the power of the courts . . . to strip the
17 sovereign of its armour.” Id.

18 When a legislative body waives sovereign immunity by statute, “the terms of its consent to be
19 sued in any court define that court’s **jurisdiction** to entertain the suit.” U.S. Dep’t of Treasury v. Hood,
20 101 Nev. 201, 204 (1985) (emphasis added). Thus, if a plaintiff files a lawsuit but fails to comply with
21 the statutory requirements to invoke the waiver of sovereign immunity, the court lacks subject-matter
22 jurisdiction to entertain the lawsuit. See Craig, 135 Nev. at 39-40; Wayment v. Holmes, 112 Nev. 232,
23 237-38 (1996).

24 ³ NRS 41.031, NRS 41.0337 and NRS 41.039 are reproduced in the Addendum following the
Memorandum of Points and Authorities.

1 In Nevada, by enacting NRS 41.0305 to 41.039, inclusive, the Legislature has provided for the
2 conditional waiver of sovereign immunity of: (1) the state and its state officers or employees; and
3 (2) each political subdivision and its local officers or employees. Hagblom v. State Dir. Mtr. Vehs., 93
4 Nev. 599, 601-04 (1977) (“The legislature has exposed the State of Nevada to liability by conditionally
5 waiving in certain instances governmental immunity from suit.”); Clark Cnty. Sch. Dist. v. Richardson
6 Constr., 123 Nev. 382, 389-90 (2007) (“Under the doctrine of sovereign immunity, generally, Nevada
7 and its political subdivisions enjoy blanket immunity from tort liability. The Legislature, however, has
8 waived this immunity on a limited basis.” (footnotes omitted)). The conditional waiver of sovereign
9 immunity applies to all causes of action, including tort actions and non-tort actions. Echeverria, 495
10 P.3d at 475-77. In order to invoke the conditional waiver of sovereign immunity, the plaintiff must
11 comply with the statutory requirements for bringing a lawsuit against: (1) the state and its state officers
12 or employees; or (2) a political subdivision and its local officers or employees. Craig, 135 Nev. at 39-
13 40; Wayment, 112 Nev. at 237-38.

14 In order to bring a lawsuit against the state or any of its state officers or employees for alleged
15 violations of the state constitution or state law, the plaintiff cannot bring the lawsuit solely against the
16 state officers or employees; instead, the plaintiff must also bring the lawsuit “in the name of the State of
17 Nevada on relation of the particular department, commission, board or other agency of the State whose
18 actions are the basis for the suit.” NRS 41.031; NRS 41.0337. The reason for this rule is that when the
19 plaintiff brings the lawsuit against the state officers or employees arising from the performance of public
20 duties in their official capacities, the lawsuit is effectively against the state itself, and the plaintiff must
21 comply with the statutory requirements to invoke the conditional waiver of sovereign immunity and
22 bring the lawsuit in the name of the state on relation of the particular department or other agency that
23 employs the state officers or employees. Craig, 135 Nev. at 39-40.

1 Similarly, in order to bring a lawsuit against a political subdivision or any of its local officers or
2 employees for alleged violations of the state constitution or state law, the plaintiff cannot bring the
3 lawsuit solely against the local officers or employees; instead, the plaintiff must also bring the lawsuit
4 against the political subdivision. NRS 41.031; NRS 41.0337; NRS 41.039. The reason for this rule is
5 that when the plaintiff brings the lawsuit against the local officers or employees arising from the
6 performance of public duties in their official capacities, the lawsuit is effectively against the political
7 subdivision itself, and the plaintiff must comply with the statutory requirements to invoke the
8 conditional waiver of sovereign immunity and bring the lawsuit against the political subdivision in
9 addition to the local officers or employees. See Craig, 135 Nev. at 39-40; Wayment, 112 Nev. at 237-
10 38.

11 In its published opinion in this litigation, the Supreme Court held—as the law of this case—that
12 NPRI has standing to bring its claims under the public-importance exception to traditional standing
13 because NPRI is an appropriate party that “seeks to enforce a public official’s compliance with a public
14 duty pursuant to the separation-of-powers clause.” NPRI, 507 P.3d at 1208. Therefore, it is the law of
15 this case that: (1) NPRI is bringing this lawsuit against the individual Defendants arising from the
16 performance of public duties in their official capacities; and (2) NPRI is seeking to enforce compliance
17 by the individual Defendants with the separation-of-powers clause based on alleged violations of that
18 clause in the performance of public duties in their official capacities.

19 Under such circumstances, the Court must dismiss the amended complaint for lack of subject-
20 matter jurisdiction because NPRI failed to comply with the statutory requirements under NRS Chapter
21 41 to invoke the conditional waiver of sovereign immunity of: (1) the state and its state officers or
22 employees; and (2) each political subdivision and its local officers or employees. Specifically, in
23 violation of NRS Chapter 41, NPRI failed to bring this lawsuit in the name of: (1) the state on relation of
24 each particular department or other agency that employs the individual Defendants who are state

1 employees; and (2) each political subdivision that employs the individual Defendants who are local
2 employees. Craig, 135 Nev. at 39-40; NRS 41.031; NRS 41.0337; NRS 41.039. Therefore, the Court
3 must dismiss NPRI's amended complaint because the lack of subject-matter jurisdiction is apparent on
4 the face of the amended complaint.

5 **IV. NPRI's claims must be dismissed because NPRI failed to join all necessary party-**
6 **defendants who are needed for a just adjudication of this action as required by the Due Process**
7 **Clause, NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30.**

8 Under NRCP 12(b)(6), the Legislature is entitled to file a motion to dismiss the amended
9 complaint based on the failure to join all necessary parties. In addition, the failure to join all necessary
10 parties may be raised by the court at any stage of the litigation. Johnson v. Johnson, 93 Nev. 655, 656
(1977); Blaine Equip. Co. v. State Purchasing Div., 122 Nev. 860, 864-66 (2006).

11 To comply with the Due Process Clause and NRCP 19, a plaintiff must join all necessary parties
12 that are needed for a just adjudication. Olsen Family Trust v. Dist. Ct., 110 Nev. 548, 552-54 (1994);
13 Univ. of Nev. v. Tarkanian, 95 Nev. 389, 395-98 (1979). The requirement to join all necessary parties
14 arises under the Due Process Clause as part of the fundamental guarantee of fairness in litigation. Under
15 the Due Process Clause, a person may not be deprived of his legal rights in a judicial proceeding unless
16 the person has been made a party to that proceeding. Martin v. Wilks, 490 U.S. 755, 758-62 (1989).
17 This constitutional rule stems from the "deep-rooted historic tradition that everyone should have his own
18 day in court." Id. at 762 (quoting 18 Wright & Miller, Fed. Prac. & Proc. Civ. § 4449 (1981)). Thus,
19 due process requires that all persons who have a material interest in the subject matter of the litigation be
20 joined as parties, so that those persons will have proper notice of the litigation and an opportunity to
21 protect their interests. Olsen Family Trust, 110 Nev. at 552-54; Tarkanian, 95 Nev. at 395-98.

22 The burden is on the plaintiff to join all necessary parties. Olsen Family Trust, 110 Nev. at 552-
23 54. The law does not impose any burden on a person to intervene voluntarily in an action when that
24 person has not been made a party to the action by service of process. Id. Thus, "[u]nless duly

1 summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment
2 recovered therein will not affect his legal rights.” Chase Nat’l Bank v. City of Norwalk, 291 U.S. 431,
3 441 (1934). Accordingly, due process is not satisfied by the fact that a person has knowledge of the
4 action and an opportunity to intervene. Martin, 490 U.S. at 762-65; Olsen Family Trust, 110 Nev. at
5 552-53. Instead, “[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to
6 intervene, is the method by which potential parties are subjected to the jurisdiction of the court and
7 bound by a judgment or decree.” Martin, 490 U.S. at 765; Olsen Family Trust, 110 Nev. at 553.

8 Because joinder of necessary parties is mandated by the Due Process Clause, courts have an
9 independent obligation to ensure that the relief requested by the plaintiff will not adversely affect the
10 interests of necessary parties that have not been joined. Tarkanian, 95 Nev. at 395-98; Blaine Equip.,
11 122 Nev. at 864-66. Accordingly, “a court must protect the interests of the parties not before it to avoid
12 possible prejudicial effect; failure of a court to protect those interests by joinder may amount to a
13 violation of due process.” R.J. Williams Co. v. Fort Belknap Hous. Auth., 92 F.R.D. 17, 21 (D. Mont.
14 1981). Moreover, if a court enters a judgment which substantially affects the rights of necessary parties
15 that have not been joined, such a judgment violates due process and is void. See Fletcher Aircraft Co. v.
16 Bond, 77 F.R.D. 47, 52 (C.D. Cal. 1977); Schwob v. Hemsath, 98 Nev. 293, 294-95 (1982); Johnson v.
17 Johnson, 93 Nev. 655, 658-59 (1977).

18 These fundamental principles of due process are reflected in NRCP 19 and the Uniform
19 Declaratory Judgments Act (“Uniform Act”) in NRS Chapter 30. First, the Uniform Act requires that
20 “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest
21 which would be affected by the declaration, and no declaration shall prejudice the rights of persons not
22 parties to the proceeding.” NRS 30.130.

23 Second, NRCP 19 requires the joinder of all persons who qualify as necessary parties and who are
24 needed for a just adjudication of the litigation. Because NRCP 19 is modeled on the federal joinder rule

1 in FRCP 19, the Supreme Court has determined that federal cases interpreting the federal joinder rule
2 are to be regarded as “persuasive authority” when interpreting Nevada’s joinder rule in NRCP 19.
3 Blaine Equip., 122 Nev. at 865 (quoting Nelson v. Heer, 121 Nev. 832, 834 (2005)).

4 Under NRCP 19(a)(1)(A), a person is considered a necessary party if “in that person’s absence,
5 the court cannot accord complete relief among existing parties.” In order for a court to provide complete
6 relief among the parties, the court must be able to enter a judgment that binds all persons who have a
7 material interest in the subject matter of the litigation. Blaine Equip., 122 Nev. at 865-66. But if there
8 are persons having such an interest who are not joined as parties, those persons would not be bound by
9 the court’s judgment, leaving open the possibility of additional lawsuits, relitigation of the same issues
10 and inconsistent or conflicting decisions regarding the same controversy. Id. Thus, the purpose of
11 requiring joinder of all necessary parties under NRCP 19(a)(1)(A) is to ensure that the court can render a
12 final and complete determination of the controversy that binds all interested parties, avoids piecemeal
13 determination of the issues and prevents a multiplicity of lawsuits. Tarkanian, 95 Nev. at 397; Young
14 Inv. Co. v. Reno Club, Inc., 66 Nev. 216, 222 (1949).

15 In its published opinion in this litigation, the Supreme Court determined that NPRI has standing to
16 bring its claims under the public-importance exception to traditional standing because “it is represented
17 by counsel who have competently advocated NPRI’s position and **named as defendants all of the**
18 **individuals who currently serve in dual roles.**” NPRI, 507 P.3d at 1210 (emphasis added).
19 Unfortunately, this statement is not accurate in this litigation because there are members of the judicial
20 branch and the legislative branch who currently serve in dual roles but who are not named as party-
21 defendants in this litigation.

22 As discussed previously, there are members of the judicial branch who hold paid positions with
23 the state executive branch as adjunct professors at universities and colleges within NSHE, just like
24 Defendant Neal. However, NPRI has not joined these members of the judicial branch as necessary

1 party-defendants in this case. In particular, Defendant Neal's prior motion to dismiss identified the
2 following members of the judicial branch as necessary party-defendants: (1) Honorable Jerome T. Tao,
3 Nevada Court of Appeals Judge and adjunct professor at William S. Boyd School of Law at the
4 University of Nevada, Las Vegas; (2) Honorable Frank P. Sullivan, Clark County Family Court Judge
5 and adjunct professor at William S. Boyd School of Law at the University of Nevada, Las Vegas; (3)
6 Honorable Scott N. Freeman, Second Judicial District Court Judge and instructor at the University of
7 Nevada, Reno; and (4) Honorable Dixie Grossman, Second Judicial District Court Judge and instructor
8 at the University of Nevada, Reno. As required by the Due Process Clause, NRCP 19 and the Uniform
9 Act, NPRI has the burden to join these members of the judicial branch as necessary party-defendants.
10 See Olsen Family Trust, 110 Nev. at 552-54.

11 Additionally, NPRI has the burden to: (1) identify any other members of the judicial branch who
12 currently serve in dual roles with NSHE or with any other state executive branch employer or local
13 government employer; and (2) join these members of the judicial branch as necessary party-defendants.
14 Likewise, NPRI has the burden to: (1) identify any other members of the legislative branch who
15 currently serve in dual roles with NSHE or with any other state executive branch employer or local
16 government employer; and (2) join these members of the legislative branch as necessary party-
17 defendants. Finally, after NPRI meets its burden to identify all members of the judicial branch and the
18 legislative branch who currently serve in dual roles and join them as necessary party-defendants, NPRI
19 has the burden to join all the respective state executive branch employers and local government
20 employers because they are also necessary party-defendants to this action.

21 In order for a judgment in this case to provide complete and effective relief, the judgment would
22 have to be binding on all those members who currently serve in dual roles and their state executive
23 branch employers and local government employers. However, under basic principles of due process, a
24 person cannot be bound by a judgment entered in an action unless the person has been made a party to

1 that action. See Martin, 490 U.S. at 758-62. Thus, unless all those members who currently serve in dual
2 roles and their state executive branch employers and local government employers are joined as
3 necessary party-defendants to this action, there cannot be “a complete decree to bind them all.” Olsen
4 Family Trust, 110 Nev. at 553.

5 In addition, under NRCP 19(a)(1)(B), a person is considered a necessary party if “that person
6 claims an interest relating to the subject of the action and is so situated that disposing of the action in the
7 person’s absence may: (i) as a practical matter impair or impede the person’s ability to protect the
8 interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or
9 otherwise inconsistent obligations because of the interest.” Because the purpose of the rule is to protect
10 necessary parties from being deprived of their interests without notice and an opportunity to be heard,
11 the “interest” requirement in the rule is liberally construed and applied in a practical manner. Aguilar v.
12 L.A. Cnty., 751 F.2d 1089, 1093 (9th Cir. 1985); Lopez v. MLK, Jr. Hosp., 97 F.R.D. 24, 29 (C.D. Cal.
13 1983). Thus, the rule does not require that a necessary party have an interest in the litigation which
14 would be the equivalent of a constitutionally protected property right. Id. The rule only requires that a
15 necessary party have an interest which could be impaired by the litigation “as a practical matter.” Id.

16 If the Court were to grant the relief requested by NPRI, such relief would clearly impair “as a
17 practical matter” the employment interests of all members of the judicial branch and the legislative
18 branch who currently serve in dual roles and would also clearly impair “as a practical matter” the
19 interests of their state executive branch employers and local government employers which have devoted
20 substantial time, effort and resources to developing and utilizing their skills and expertise as employees.
21 Under such circumstances, NPRI has the burden to join all members of the judicial branch and the
22 legislative branch who currently serve in dual roles and all the respective state executive branch
23 employers and local government employers because they are necessary party-defendants to this action.
24 Accordingly, NPRI’s claims must be dismissed because NPRI failed to join all necessary party-

1 defendants who are needed for a just adjudication of this action as required by the Due Process Clause,
2 NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30.

3 **CONCLUSION AND AFFIRMATION**

4 Based upon the foregoing, the Legislature respectfully requests that the Court enter an order
5 granting the Legislature's Motion to Dismiss.

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

8 DATED: This 30th day of June, 2022.

9 Respectfully submitted,

10 By: /s/ Kevin C. Powers

11 **KEVIN C. POWERS**

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Attorneys for Defendant Legislature of the State of Nevada

ADDENDUM

NRS 41.031 Waiver applies to State and its political subdivisions; naming State as defendant; service of process; State does not waive immunity conferred by Eleventh Amendment.

1. The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.010 or the limitations of NRS 41.032 to 41.036, inclusive. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.

2. An action may be brought under this section against the State of Nevada or any political subdivision of the State. In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit. An action against the State of Nevada must be filed in the county where the cause or some part thereof arose or in Carson City. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon:

(a) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and

(b) The person serving in the office of administrative head of the named agency.

3. The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.

NRS 41.0337 State or political subdivision to be named party defendant.

1. No tort action arising out of an act or omission within the scope of a person's public duties or employment may be brought against any present or former:

(a) Local judicial officer or state judicial officer;

(b) Officer or employee of the State or of any political subdivision;

(c) Immune contractor; or

(d) State Legislator,

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

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

(a) Local judicial officer or state judicial officer;

(b) Officer or employee of the State or of any political subdivision;

(c) Immune contractor; or

(d) State Legislator,

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

1 3. As used in this section:

2 (a) "Local judicial officer" has the meaning ascribed to it in NRS 41.03377.

3 (b) "State judicial officer" has the meaning ascribed to it in NRS 41.03385.

4 **NRS 41.039 Filing of valid claim against political subdivision condition precedent to**
5 **commencement of action against immune contractor, employee or officer.** An action which
6 is based on the conduct of any immune contractor, employee or appointed or elected officer of a
7 political subdivision of the State of Nevada while in the course of the person's employment or in
8 the performance of the person's official duties may not be filed against the immune contractor,
9 employee or officer unless, before the filing of the complaint in such an action, a valid claim has
10 been filed, pursuant to NRS 41.031 to 41.038, inclusive, against the political subdivision for which
11 the immune contractor, employee or officer was authorized to act.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 30th day of June, 2022, pursuant to NRCP 5(b) and NEFCR 9, I served a true and correct copy of the Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief, by means of the Eighth Judicial District Court's electronic filing system, directed to:

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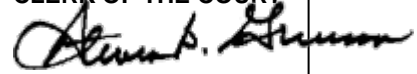
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EXHIBIT 2

EXHIBIT 2



MAMC

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Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NATHA C. ANDERSON, an individual engaging in
dual employment with the Nevada State Assembly
and Washoe County School District; REUBEN
D'SILVA, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County School District; CECELIA
GONZÁLEZ, an individual engaging in dual
employment with the Nevada State Assembly and
University of Nevada, Las Vegas; LISA
KRASNER, an individual engaging in dual
employment with the Nevada State Senate and
Truckee Meadows Community College; SELENA
LA RUE HATCH, an individual engaging in dual
employment with the Nevada State Assembly and
Washoe County School District; 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.: VIII

HEARING REQUESTED

**PLAINTIFF'S MOTION FOR LEAVE
TO FILE SECOND AMENDED
COMPLAINT AND TO AMEND
CAPTION IN CONFORMITY
THEREWITH**

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; DAVID ORENTLICHER, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Las Vegas; SHONDRA SUMMERS-ARMSTRONG, an individual engaging in dual employment with the Nevada State Assembly and Regional Transportation Commission; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and a Clark County Public Charter School,

Defendants,

and Legislature of the State of Nevada,

Intervenor-Defendant.

Pursuant to NRCP 15, Plaintiff Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Motion for Leave to File Second Amended Complaint (“Motion to Amend”).

Following certification of the 2022 General Election by the Nevada Supreme Court, NPRI reviewed the results and found seven (7) additional individuals who, at the time of hearing of this matter, will be simultaneously holding elected office in the Nevada State Legislature and paid positions in the Executive Branch, in alleged violation of the Separation of Powers requirement of the Nevada Constitution, Nevada Const. Art. 3, § 1, ¶ 1. NPRI seeks to file the Second Amended Complaint, a copy of which is attached hereto as **Exhibit 1**, to add these individuals to ensure their rights are properly adjudicated. Additionally, since the matter was originally filed, a number of Defendants have ceased engaging in dual service and have either been voluntarily dismissed by NPRI or dismissed by way of either stipulation or court order. NPRI further seeks amendment to amend the case caption to remove these former Defendants to avoid confusion in future proceedings.

1 This Motion to Amend is made and based on the following Memorandum of Points and
2 Authorities; the Declaration of Deanna L. Forbush included therein; the proposed Second Amended
3 Complaint attached thereto as **Exhibit 1**, all pleadings and papers already on file; and any oral
4 argument the Court may permit at a hearing of this matter.

5 Dated this 15th day of December, 2022.

6 **FOX ROTHSCHILD LLP**

7
8 By: /s/ Deanna L. Forbush

9 DEANNA L. FORBUSH

10 Nevada Bar No. 6646

11 COLLEEN E. MCCARTY

12 Nevada Bar No. 13186

13 1980 Festival Plaza Drive, Suite 700

14 Las Vegas, Nevada 89135

15 Telephone: (702) 262-6899

16 Attorneys for Plaintiff

17 Nevada Policy Research Institute

18 **DECLARATION OF DEANNA L. FORBUSH, ESQ. IN SUPPORT OF**
19 **MOTION TO AMEND**

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

21 1. I am an attorney licensed to practice law in the State of Nevada, and I am a Partner
22 with Fox Rothschild LLP, attorneys for Plaintiff, Nevada Policy Research Institute.

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

25 3. NPRI filed the instant action for declaratory and injunctive relief on July 9, 2020. At
26 that time, NPRI was aware of 13 individuals who were engaging in dual service by simultaneously
27 holding elected office in the Nevada State Legislature and paid positions with Nevada State or local
28 governments, in alleged violation of the Separation of Powers requirement of the Nevada
Constitution, Nevada Const. Art. 3, § 1, ¶ 1.

4. Over the course of this litigation, including while the matter was on appeal with the Nevada Supreme Court, nine 9 of the originally named Defendants, i.e. Nicole Cannizzaro, Kasina Douglass-Boone, Jason Frierson, Osvaldo Fumo, Heidi Seevers Gansert, Glen Leavitt, Melanie Scheible, Teresa Benitez-Thompson and Jill Tolles, ceased engaging in dual service and were dismissed by voluntary notice, stipulation or court order.

5. Following certification of the 2022 General Election, NPRI conducted a due diligence review of the results and determined that, in addition to the 4 Defendants remaining from the original pleading of this matter, there are seven 7 additional individuals, i.e. Natha C. Anderson, Reuben D'Silva, Cecelia González, Lisa Krasner, Selena La Rue Hatch, David Orentlicher and Shondra Summers-Armstrong, who will be simultaneously holding elected office in the Nevada State Legislature and paid positions with Nevada State or local governments at the time of the hearing of this matter.

6. NPRI respectfully seeks leave to file the Second Amended Complaint, attached hereto as **Exhibit 1**, and to amend the case caption in conformity therewith, to ensure all individuals who are similarly situated with regard to their alleged violation of the Separation of Powers requirement of the Nevada Constitution are properly named and adjudicated herein.

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

Dated this 15th day of December, 2022.

/s/ Deanna L. Forbush
DEANNA L. FORBUSH

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 NPRI filed its nonpartisan declaratory and injunctive relief action on July 9, 2020. It named
5 all individuals known at that time to be engaging in dual service by simultaneously holding elected
6 office in the Nevada State Legislature and paid positions in the Executive Branch, in alleged
7 violation of the Separation of Powers requirement of the Nevada Constitution, Nevada Const. Art. 3,
8 § 1, ¶ 1. Of the 13 individuals so named, 9 subsequently ceased engaging in dual service by either
9 leaving elected office or resigning from government employment and were subsequently dismissed
10 from the case. Their names, however, remain reflected in the case caption.
11

12 Following its review of the results of the 2022 General Election, which were certified by the
13 Nevada Supreme Court on November 22, 2022, NPRI identified 7 additional individuals who will be
14 engaging in dual service as of the date of hearing of this matter. By way of the instant Motion to
15 Amend, NPRI seeks to ensure all proper parties are present in the litigation going forward and that
16 the case caption properly reflects the same. NPRI does not seek to change its causes of action or
17 otherwise make any substantive changes to its complaint allegations. This is simply a
18 straightforward request that does not warrant opposition by any existing party and is appropriate to
19 be heard and granted on order shortening time.
20

21 **II.**

22 **STATEMENT OF FACTS**

23 The facts relevant to the instant Motion to Amend are contained within the Declaration of
24 Deanna L. Forbush, supra, and are incorporated by reference as though fully set forth herein.
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III.

LEGAL ARGUMENT

A. NPRI Meets the Legal Standard Applicable to a Motion to Amend.

1. Leave to Amend Is to Be Freely Given.

NRCP 15 provides that when ruling on a Motion to Amend, “[t]he court should freely give leave when justice so requires.” NRCP 15(a)(2). The Nevada appellate courts have held that “[t]he liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments....because denial of a proposed pleading amendment amounts to the denial of an opportunity to explore any potential merit it might have had.” *Gardner v. Eighth Judicial District Court*, 133 Nev. 730, 732, 405 P.3d 651, 654 (2017) (quoting *Nutton v. Sunset Station*, 131 Nev. 279, 292, 357 P.3d 966, 975 (Ct. App. 2015). The Nevada Supreme Court has further explained that “in the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant – the leave sought should be freely given.” *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105-06, 507 P.2d 138, 139 (1973) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962) (additional citation omitted)).

Thus, NRCP 15(a) contemplates the liberal amendment of pleadings, which means that most such motions ought to be granted unless a strong reason exists not to do so, such as prejudice to the opponent or lack of good faith by the moving party. *Stephens*, 89 Nev. at 105, 507 P.2d at 139.

2. Under This Standard, Leave to Amend Should Be Freely Granted in This Case.

No matter the outcome before this Court, this case will inevitably return to the Nevada Supreme Court for a final determination of whether Defendants’ dual employment in the Executive Branch while serving as elected members of the Legislature violates the separation of powers clause of the Nevada Constitution. So whether this Court ultimately agrees with NPRI that all dual employment service is precluded, or it makes a distinction between the types of service or for whom that service is provided to only grant in part NPRI’s requested relief, it is inevitable that someone

1 will appeal to obtain certainty on the issue that the Nevada Supreme Court has already noted is
2 sorely lacking. As such, the outcome here will impact all individuals engaging in dual service at the
3 time such decision is rendered. For this reason alone, the 7 individuals who are not yet parties to the
4 case – Natha C. Anderson, Reuben D’Silva, Cecelia González, Lisa Krasner, Selena La Rue Hatch,
5 David Orentlicher and Shondra Summers-Armstrong – should have the opportunity to appear as
6 parties and respond as needed concerning their dual service circumstances.

7
8 Additionally, no parties will be prejudiced by their addition to this litigation, where the
9 Nevada Legislature itself has already been permitted to intervene, and, along with the existing
10 parties, all Defendants are receiving full advocacy to which the new Defendants may add their voice
11 or simply seek joinder. Conversely, NPRI’s failure to join these necessary parties could have
12 negative procedural impacts. Further, despite its age, this case remains in its procedural infancy due
13 to the errant dismissal order by this Court’s predecessor that was subsequently reversed and
14 remanded by the Nevada Supreme Court, as well as the additional dismissal requests that remain
15 under advisement at the time of this filing. For this reason, there can be no prejudice to any of the
16 parties, where the case still remains in the responsive pleading stage, with only informal discovery
17 efforts having commenced to date. And, finally, leave is being sought timely and only for the
18 purposes of confirming the proper parties; no new claims or causes of action are proposed.

19
20 If leave to amend is not granted in the instant case, a just outcome may be prevented.
21 Accordingly, this Court should grant NPRI’s Motion to Amend, pursuant to NRCP 15, and permit
22 the filing of the proposed Second Amended Complaint attached hereto as **Exhibit 1**.

23
24 **B. NPRI’s Request to Amend the Case Caption Should Also Be Granted.**

25 As noted above, NPRI is now seeking relief in its Second Amended Complaint against 11
26 individual Defendants, a number which is reduced from the 13 Defendants originally named, but
27 which number is inclusive of only 4 original Defendants. The additional 7 Defendants are newly-
28 named, and such a significant change to the parties named herein justifies the Clerk of the Court

1 being ordered to replace the current caption with the caption reflected in the amended pleading.

2 NPRI notes, too, that the Nevada Legislature filed a similar request while the matter was
3 pending appeal with the Nevada Supreme Court. In that request, the stated basis was to ensure all
4 parties were properly named and the caption conformed to the operative pleading. *See* Notice
5 Requesting Clerk to Make Revisions to Appellate Record to Include Legislature of the State of
6 Nevada as Respondent and to Make Other Technical Revisions to Caption (“Notice to Amend
7 Caption”), filed January 30, 2021 in Supreme Court Case No. 82341. NPRI filed its Joinder to the
8 Notice to Amend Caption shortly thereafter on February 1, 2021, recognizing along with opposing
9 counsel the need for an accurate caption to avoid future confusion.
10

11 In keeping with the parties’ practice of ensuring pleading conformity then, and importantly,
12 to eliminate any confusion regarding to whom future rulings of this Court are applicable, NPRI
13 requests the Court permit amendment of the case caption upon the granting of its Motion to Amend.
14

15 IV.

16 CONCLUSION

17 Based upon the foregoing, NPRI respectfully requests the Court grant it leave to file the
18 Second Amended Complaint attached as **Exhibit 1** and to amend the caption of the case in
19 conformity therewith. NPRI’s request is made in good faith, and both outcomes are justified under
20 the applicable legal standard and will not result in prejudice to any party.
21

22 Dated this 15th day of December, 2022.

23 **FOX ROTHSCHILD LLP**

24 By: /s/ Deanna L. Forbush

25 DEANNA L. FORBUSH (#6646)
26 COLLEEN E. MCCARTY (#13186)
27 1980 Festival Plaza Drive, Suite 700
28 Las Vegas, Nevada 89135
Attorneys for Plaintiff
Nevada Policy Research Institute

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 15th day of December, 2022, the foregoing document entitled **PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND TO AMEND CAPTION IN CONFORMITY THEREWITH** was caused to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
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Attorney for Defendant Dina Neal

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Attorney for Defendant James Ohrenschall

Bradley Schrager, Esq.
Royi Moas, Esq.
Daniel Bravo, Esq.
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*Attorneys for Defendants Brittney Miller and
Selena Torres*

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Legislative Counsel Bureau, Legal Division
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Email: kpowers@lcb.state.nv.us
Attorney for Nevada Legislature

/s/ Jineen DeAngelis
An Employee of Fox Rothschild LLP

EXHIBIT 1

SACOM

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Nevada Bar No. 6646

dforbush@foxrothschild.com

COLLEEN E. MCCARTY, ESQ.

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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.

NATHA C. ANDERSON, an individual engaging in
dual employment with the Nevada State Assembly
and Washoe County School District; REUBEN
D'SILVA, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County School District; CECELIA
GONZÁLEZ, an individual engaging in dual
employment with the Nevada State Assembly and
University of Nevada, Las Vegas; LISA
KRASNER, an individual engaging in dual
employment with the Nevada State Senate and
Truckee Meadows Community College; SELENA
LA RUE HATCH, an individual engaging in dual
employment with the Nevada State Assembly and
Washoe County School District; 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.: VIII

**SECOND AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

[Exemption from Arbitration Based on
Equitable Relief Requested]

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; DAVID ORENTLICHER, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Las Vegas; SHONDRA SUMMERS-ARMSTRONG, an individual engaging in dual employment with the Nevada State Assembly and Regional Transportation Commission; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and a Clark County Public Charter School,

Defendants,

and Legislature of the State of Nevada,

Intervenor-Defendant.

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 NATHA C. ANDERSON, REUBEN D’SILVA, CECELIA GONZÁLES, LISA KRASNER, SELENA LA RUE HATCH, BRITTNEY MILLER, DINA NEAL, JAMES OHRENSCHALL, DAVID ORENTLICHER, SHONDRA SUMMERS-ARMSTRONG, and SELENA 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 Natha C. Anderson has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Teacher with the Washoe County School District.

8. At all relevant times, Defendant Reuben D'Silva has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Teacher with the Clark County School District.

1 9. At all relevant times, Defendant Cecelia González has simultaneously held the elected
2 office of Nevada State Assemblyperson and the paid government position of Part-Time Instructor
3 with the University of Nevada, Las Vegas.

4 10. At all relevant times, Defendant Lisa Krasner has simultaneously held the elected
5 office of Nevada State Assemblyperson and the paid government position of Adjunct Professor with
6 the Truckee Meadows Community College.

7 11. At all relevant times, Defendant Selena La Rue Hatch has simultaneously held the
8 elected office of Nevada State Assemblyperson and the paid government position of Teacher with
9 the Washoe County School District.

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

13 13. At all relevant times, Defendant Dina Neal has simultaneously held the elected office
14 of Nevada State Senator and the paid government position of Adjunct Professor with the Nevada
15 State College and the College of Southern Nevada.

16 14. At all relevant times, Defendant James Ohrenschall has simultaneously held the
17 elected office of Nevada State Senator and the paid government position of Deputy Public Defender
18 with the Clark County Public Defender's Office.

19 15. At all relevant times, Defendant David Orentlicher has simultaneously held the
20 elected office of Nevada State Assemblyperson and the paid government position of Professor with
21 the William S. Boyd School of Law at the University of Nevada, Las Vegas.

22 16. At all relevant times, Defendant Shondra Summers-Armstrong has simultaneously
23 held the elected office of Nevada State Senator and the paid government position of Management
24 Analyst with the Regional Transportation Commission.

25 17. At all relevant times, Defendant Selena Torres has simultaneously held the elected
26 office of Nevada State Assemblyperson and the paid government position of Teacher with a Clark
27 County Public Charter School.

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19. 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.

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

22. 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.

140824705.1

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

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

25. 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.

26. 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.

27. 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.

28. 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.*

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

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

2. For an injunction against Defendants prohibiting each and every one of them from continuing to simultaneously hold elected offices in the Nevada State Legislature and paid positions

1 with Nevada State or local governments in violation of the Separation of Powers requirement of
2 Nevada Const. Art. 3, §1, ¶1;

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

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

5 Dated this 15th day of December, 2022.

6 **FOX ROTHSCHILD LLP**

7
8 By: /s/ Deanna L. Forbush

9 DEANNA L. FORBUSH, ESQ.

10 Nevada Bar No. 6646

11 COLLEEN E. MCCARTY, ESQ.

12 Nevada Bar No. 13186

13 1980 Festival Plaza Dr., Suite 700

14 Las Vegas, Nevada 89135

15 Telephone: (702) 262-6899

16 Attorneys for Plaintiff

17 Nevada Policy Research Institute

EXHIBIT 3

EXHIBIT 3

1 **DECL**
2 BRADLEY SCHRAGER, ESQ. (SBN 10217)
3 ROYI MOAS, ESQ. (SBN 10686)
4 DANIEL BRAVO, ESQ. (SBN 13078)
5 **WOLF, RIFKIN, SHAPIRO,**
6 **SCHULMAN & RABKIN, LLP**
7 3773 Howard Hughes Parkway, Suite 590 South
8 Las Vegas, NV 89169
9 (702) 341-5200/Fax: (702) 341-5300

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

9
10 NEVADA POLICY RESEARCH
11 INSTITUTE,

11 Plaintiff,

12 vs.

13
14 NICOLE J. CANNIZZARO, ET AL.,

15 Defendants.

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

**ASSEMBLYWOMAN SHONDRA
SUMMERS-ARMSTRONG'S
DECLARATION RE: EMPLOYMENT**

16
17 **DECLARATION OF SHONDRA SUMMERS-ARMSTRONG**

18 I, Shondra Summers-Armstrong, being duly sworn under penalty of perjury, state that the
19 following facts are true of my own knowledge unless stated to be on information and belief in
20 which case I believe them to be true, and I am competent to testify accordingly if called:

21 1. This Declaration is made with reference to my inclusion as a potential defendant in
22 the above-entitled action, by virtue of Plaintiff NPRI's pending motion to amend its Amended
23 Complaint.

24 2. I currently serve as a member of the Nevada Assembly, representing District 6.

25 3. Between January 16, 1996 and February 10, 2022, I was employed with the
26 Regional Transportation Commission of Southern Nevada (RTCSNV).

27 4. Regardless of whether the RTCSNV, as an independent regional entity created by
28 statute, would be considered a part of the executive branch of the State of Nevada, which is itself

1 a questionable proposition, I retired from my position with the RTCSNV on February 10, 2022.

2 5. I do not currently hold an employment position with any government agency, apart
3 from my role as a state legislator.

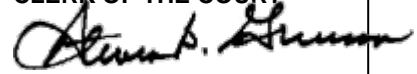
4 I declare under penalty of perjury in accordance with the law of the State of Nevada and
5 the United States that the foregoing is true and correct.

6 DATED this 28th day of December, 2022.

7
8 /s/ Sondra Summers-Armstrong
9 SHONDRA SUMMERS-ARMSTRONG
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EXHIBIT 4

EXHIBIT 4



OPPC
KEVIN C. POWERS, General Counsel
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Attorneys for the Legislature of the State of Nevada

**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 Senate 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.

**Case No. A-20-817757-C
Dept. No. 8**

**NEVADA LEGISLATURE'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT
AND COUNTERMOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Date of Hearing: January 17, 2023
Time of Hearing: 10:00 a.m.

OPPOSITION AND COUNTERMOTION

The Legislature of the State of Nevada ("Legislature"), by and through its counsel the Legal Division of the Legislative Counsel Bureau ("LCB Legal") under NRS 218F.720, hereby files its Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint and its Countermotion to Dismiss Plaintiff's First Amended Complaint. The Legislature's opposition and countermotion are made under NRCP 12 and EDCR 2.20 and are based upon the attached Memorandum of Points and

1 Authorities, all pleadings, documents and exhibits on file in this case and any oral arguments the Court
2 may allow at the hearing on these matters.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. Introduction.**

5 In its first amended complaint, Plaintiff Nevada Policy Research Institute (“NPRI”) alleged that
6 the individual Defendants are persons simultaneously holding elected offices in the Legislature and paid
7 positions as public employees with the state executive branch or with local governments in violation of
8 the separation-of-powers clause in Article 3, Section 1 of the Nevada Constitution.

9 On July 1, 2022, the Legislature filed a motion to dismiss NPRI’s first amended complaint. In its
10 motion to dismiss, the Legislature argued that NPRI’s claims must be dismissed for: (1) lack of subject-
11 matter jurisdiction because NPRI failed to comply with the statutory requirements under NRS
12 Chapter 41 to invoke the government’s conditional waiver of sovereign immunity as necessary to bring
13 this action; and (2) failure to join all necessary party-defendants who are needed for a just adjudication
14 of this action as required by the Due Process Clause, NRCP 19, and the Uniform Declaratory Judgments
15 Act in NRS Chapter 30. With regard to the lack of subject-matter jurisdiction, the Legislature contended
16 that the first amended complaint must be dismissed for lack of subject-matter jurisdiction because, in
17 violation of NRS Chapter 41, NPRI failed to bring this lawsuit in the name of: (1) the state on relation of
18 each particular department or other agency that employs the individual Defendants who are state
19 employees; and (2) each political subdivision that employs the individual Defendants who are local
20 employees. With regard to the failure to join all necessary party-defendants, the Legislature contended
21 that NPRI failed to meet its burden to join: (1) all members of the judicial branch and the legislative
22 branch who currently serve in dual roles; and (2) all their respective state executive branch employers
23 and local government employers because they are necessary party-defendants to this action.

1 On August 4, 2022, the Court held a hearing on the Legislature’s motion to dismiss the first
2 amended complaint and other related motions filed by the parties. At the conclusion of the hearing, the
3 Court directed the parties to submit proposed findings of fact and conclusions of law, and the Court
4 indicated that it would issue a written decision resolving all the pending motions. Therefore, based on
5 the Legislature’s pending motion to dismiss, the following issues are presently pending before the Court:
6 (1) whether NPRI should be required to join members of the judicial branch and additional members of
7 the legislative branch who currently serve in dual roles as necessary party-defendants to this action; and
8 (2) whether NPRI should be required to join all their respective state executive branch employers and
9 local government employers as necessary party-defendants to this action.

10 Despite the fact that these issues are presently pending before the Court, NPRI filed its motion for
11 leave to file a second amended complaint on December 15, 2022, asking the Court for permission to join
12 additional members of the legislative branch whom NPRI believes are currently serving in dual roles.¹
13 However, in its motion, NPRI does not ask the Court for permission to join: (1) any members of the
14 judicial branch who currently serve in dual roles; or (2) any state executive branch employers or local
15 government employers that employ members of the judicial branch and the legislative branch who
16 currently serve in dual roles.

17 The Legislature opposes NPRI’s motion for leave to file a second amended complaint because
18 NPRI’s proposed second amended complaint suffers from the same jurisdictional and legal deficiencies
19 as its first amended complaint. Specifically, NPRI’s proposed second amended complaint is
20 jurisdictionally deficient because, in violation of NRS Chapter 41, the proposed second amended

21
22 ¹ One of the additional members of the legislative branch whom NPRI wants to join is Assemblywoman
23 Shondra Summers-Armstrong because NPRI believes she is currently employed by the Regional
24 Transportation Commission of Southern Nevada in the position of Management Analyst. (Proposed
Second Am. Compl. ¶ 16.) On December 28, 2022, Assemblywoman Summers-Armstrong submitted
a declaration to NPRI in which she declared, under penalty of perjury, that she does not “currently
hold an employment position with any government agency, apart from my role as a state legislator.”

1 complaint does not bring this lawsuit in the name of: (1) the state on relation of each particular
2 department or other agency that employs the individual Defendants who are state employees; and
3 (2) each political subdivision that employs the individual Defendants who are local employees.
4 Additionally, NPRI's proposed second amended complaint is legally deficient because it fails to join:
5 (1) all members of the judicial branch and the legislative branch who currently serve in dual roles and
6 who are necessary party-defendants to this action; and (2) all their respective state executive branch
7 employers and local government employers that are necessary party-defendants to this action. For those
8 same reasons, the Legislature filed its countermotion to dismiss NPRI's first amended complaint.

9 **II. Background.**

10 In prior proceedings in this case, the district court (former District Court Judge Jim Crockett
11 presiding) dismissed NPRI's first amended complaint based on its lack of standing. However, NPRI
12 appealed, and the Nevada Supreme Court reversed and remanded this case to the district court in a
13 published opinion. Nev. Policy Research Inst. v. Cannizzaro, 138 Nev. Adv. Op. 28, 507 P.3d 1203
14 (2022) ("NPRI"). The Supreme Court held that NPRI has standing to bring its claims under the public-
15 importance exception to traditional standing because NPRI is an appropriate party that "seeks to enforce
16 a public official's compliance with a public duty pursuant to the separation-of-powers clause." NPRI,
17 507 P.3d at 1208. Additionally, the Supreme Court held that: (1) NPRI failed to demonstrate that the
18 district court abused its discretion in denying NPRI's motion to disqualify the official attorneys for the
19 Nevada System of Higher Education ("NSHE") from representing its public employees in this litigation;
20 and (2) NPRI waived its rights on appeal to challenge the district court's order granting permissive
21 intervention to the Legislature. NPRI, 507 P.3d at 1211 n.5.

22 Because the prior proceedings in the district court and the Supreme Court are important to
23 understanding the current status of this case, it is necessary to provide a thorough review of those prior
24 proceedings. On July 9, 2020, NPRI filed its original complaint against several individuals who, at the

1 time, were members of the Legislature and held paid positions as public employees with the state
2 executive branch or with local governments. However, NPRI did not serve the summons and original
3 complaint on any of the individual Defendants named in the original complaint.

4 On July 28, 2020, NPRI filed its first amended complaint against several individuals who, at the
5 time, were members of the Legislature and held paid positions as public employees with the state
6 executive branch or with local governments. The individual Defendants named in the first amended
7 complaint were: Nicole J. Cannizzaro, Kasina Douglass-Boone, Jason Frierson, Osvaldo Fumo, Heidi
8 Seevers Gansert, Glen Leavitt, Brittney Miller, Dina Neal, James Ohrenschall, Melanie Scheible, Teresa
9 Benitez-Thompson, Jill Tolles and Selena Torres. (First Am. Compl. ¶¶ 7-19.) During the course of
10 this litigation in the district court and in the Supreme Court, the following individual Defendants were
11 dismissed, without prejudice, because they no longer are members of the Legislature or they no longer
12 hold paid positions as public employees with the state executive branch or with local governments, or
13 because of both such circumstances: Nicole J. Cannizzaro, Kasina Douglass-Boone, Jason Frierson,
14 Osvaldo Fumo, Heidi Seevers Gansert, Melanie Scheible and Teresa Benitez-Thompson. In addition,
15 Glen Leavitt and Jill Tolles were dismissed, without prejudice, because their legislative terms end on the
16 day after the 2022 general election and they are not seeking reelection to their legislative offices.

17 As a result, the current individual Defendants are: (1) Brittney Miller who is a member of the
18 Nevada State Assembly and holds a paid position with a local governmental employer in Clark County
19 as a teacher; (2) Selena Torres who is a member of the Nevada State Assembly and holds a paid position
20 with a local governmental employer in Clark County as a teacher; (3) Dina Neal who is a member of the
21 Nevada State Senate and holds a paid position with the state executive branch as an adjunct professor at
22 Nevada State College within NSHE; and (4) James Ohrenschall who is a member of the Nevada State
23 Senate and holds a paid position with a local governmental employer in Clark County as a deputy public
24 defender employed under NRS 260.040.

1 In this case, Defendants Miller and Torres are represented by Bradley Schrager, Esq., Royi Moas,
2 Esq., and Daniel Bravo, Esq., of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP. On Sept. 18, 2020,
3 Defendant Miller filed her prior motion to dismiss the first amended complaint, which was joined by
4 Defendant Torres on Oct. 6, 2020.² In the prior motion to dismiss, it was argued that: (1) NPRI lacked
5 standing to bring its claims; and (2) NPRI lacked subject-matter jurisdiction to bring its claims because
6 it failed to name each Defendant's respective state or local governmental employer as required by
7 NRS Chapter 41 in order to invoke the government's waiver of sovereign immunity. See Craig v.
8 Donnelly, 135 Nev. 37, 40 (Nev. Ct. App. 2019) (dismissing plaintiff's complaint for lack of subject-
9 matter jurisdiction under NRS Chapter 41 because plaintiff failed to name the State of Nevada as a
10 defendant in order to invoke the government's waiver of sovereign immunity). Because the district
11 court dismissed based on lack of standing in the prior proceedings, the district court did not address the
12 other arguments raised by Defendant Miller in the prior motion to dismiss.

13 In this case, Defendant Neal is represented by Berna L. Rhodes-Ford, General Counsel, Nevada
14 State College, within NSHE. On Sept. 24, 2020, Defendant Neal filed her prior motion to dismiss the
15 first amended complaint.³ In the prior motion to dismiss, it was argued that: (1) NPRI failed to state a
16 claim for violation of the separation-of-powers clause; (2) NPRI failed to state a claim for declaratory
17 relief; (3) NPRI failed to state a claim for injunctive relief; and (4) NPRI failed to join all necessary
18 party-defendants under NRCP 19 because NPRI failed to name those members of the judicial branch
19 who hold paid positions with the state executive branch as adjunct professors at universities and colleges
20 within NSHE, just like the members of the legislative branch who were named as party-defendants in
21 this case and who hold similar positions as adjunct professors at universities and colleges within NSHE.
22 Because the district court dismissed based on lack of standing in the prior proceedings, the district court

23 ² On Sept. 24, 2020, Defendant Neal joined in Defendant Miller's prior motion to dismiss, and
24 Defendant Neal also filed her prior motion to dismiss on that same date.

³ On Oct. 6, 2020, Defendants Miller and Torres joined in Defendant Neal's prior motion to dismiss.

1 did not address the other arguments raised by Defendant Neal in the prior motion to dismiss.

2 In this case, Defendant Ohrenschall is represented by Jonathan D. Blum, Esq., of Wiley Petersen.
3 In the prior proceedings, NPRI did not serve the summons and first amended complaint on Defendant
4 Ohrenschall by personal service, and Defendant Ohrenschall did not enter an appearance. Instead, on
5 Nov. 4, 2020, the district court entered: (1) an order granting NPRI's motion for enlargement of time to
6 serve the summons and first amended complaint on Defendant Ohrenschall; and (2) an order authorizing
7 service of Defendant Ohrenschall by publication. On Dec. 10, 2020, NPRI filed an affidavit of
8 publication regarding service of Defendant Ohrenschall by publication. After the Supreme Court's
9 remand, Defendant Ohrenschall entered an appearance as a party-defendant.

10 In this case, the Legislature is represented by Kevin C. Powers, General Counsel, LCB Legal. On
11 Dec. 8, 2020, the district court entered an order granting the Legislature's motion to intervene, and the
12 Legislature became entitled to all the rights of a party-defendant. Consequently, the Legislature became
13 entitled to file a motion to dismiss the first amended complaint under NRCP 12 in the same manner as if
14 the Legislature had been named as a party-defendant in the first amended complaint. However, before
15 the Legislature could file such a motion to dismiss in the prior proceedings, the district court dismissed
16 the first amended complaint based on lack of standing, and the dismissal rendered any response to the
17 first amended complaint by the Legislature moot at that time. Thereafter, NPRI filed a timely notice of
18 appeal, which divested the district court of jurisdiction over this case during the pendency of the appeal
19 until the Supreme Court issued its remittitur under NRAP 41 and remanded this case to the district court.
20 After the Supreme Court's remand, the Legislature filed its motion to dismiss the first amended
21 complaint.

22 In its motion to dismiss, the Legislature argued that NPRI's claims must be dismissed for: (1) lack
23 of subject-matter jurisdiction because NPRI failed to comply with the statutory requirements under NRS
24 Chapter 41 to invoke the government's conditional waiver of sovereign immunity as necessary to bring

1 this action; and (2) failure to join all necessary party-defendants who are needed for a just adjudication
2 of this action as required by the Due Process Clause, NRCP 19, and the Uniform Declaratory Judgments
3 Act in NRS Chapter 30. With regard to the lack of subject-matter jurisdiction, the Legislature contended
4 that the first amended complaint must be dismissed for lack of subject-matter jurisdiction because, in
5 violation of NRS Chapter 41, NPRI failed to bring this lawsuit in the name of: (1) the state on relation of
6 each particular department or other agency that employs the individual Defendants who are state
7 employees; and (2) each political subdivision that employs the individual Defendants who are local
8 employees. With regard to the failure to join all necessary party-defendants, the Legislature contended
9 that NPRI failed to meet its burden to join: (1) all members of the judicial branch and the legislative
10 branch who currently serve in dual roles; and (2) all their respective state executive branch employers
11 and local government employers because they are necessary party-defendants to this action.

12 On August 4, 2022, the Court held a hearing on the Legislature's motion to dismiss the first
13 amended complaint and other related motions filed by the parties. At the conclusion of the hearing, the
14 Court directed the parties to submit proposed findings of fact and conclusions of law, and the Court
15 indicated that it would issue a written decision resolving all the pending motions. Therefore, based on
16 the Legislature's pending motion to dismiss, the following issues are presently pending before the Court:
17 (1) whether NPRI should be required to join members of the judicial branch and additional members of
18 the legislative branch who currently serve in dual roles as necessary party-defendants to this action; and
19 (2) whether NPRI should be required to join all their respective state executive branch employers and
20 local government employers as necessary party-defendants to this action.

21 Despite the fact that these issues are presently pending before the Court, NPRI filed its motion for
22 leave to file a second amended complaint on December 15, 2022, asking the Court for permission to join
23 additional members of the legislative branch whom NPRI believes are currently serving in dual roles.
24 However, in its motion, NPRI does not ask the Court for permission to join: (1) any members of the

1 judicial branch who currently serve in dual roles; or (2) any state executive branch employers or local
2 government employers that employ members of the judicial branch and the legislative branch who
3 currently serve in dual roles.

4 **III. As an intervenor, the Legislature has all the rights of a party-defendant and is entitled**
5 **to file its countermotion to dismiss the first amended complaint under NRCP 12 because, based on**
6 **well-established rules of appellate practice, the Supreme Court’s remand for further proceedings**
7 **in this case returned the parties to the same position they were in prior to the district court’s order**
8 **dismissing the first amended complaint for lack of standing.**

9 In reviewing the rights of intervenors, the Supreme Court is guided by federal practice interpreting
10 the corresponding federal rules. See Hairr v. Dist. Ct., 132 Nev. 180, 186-88 (2016); Lawler v.
11 Ginochio, 94 Nev. 623, 626 (1978). Under federal practice, a proposed intervenor is not considered a
12 party until the district court enters an order granting the motion to intervene. See 7C Wright & Miller, et
13 al., Fed. Prac. & Proc. Civ. § 1920 (3d ed. & Westlaw Apr. 2022 update). However, after the district
14 court enters such an order, the intervenor has all the rights of a party, and “[t]he intervenor may move to
15 dismiss the proceeding and may challenge the subject-matter jurisdiction of the court.” Id. (footnotes
16 omitted); League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1304 (9th Cir. 1997) (“[A]s a
17 general rule, intervenors are permitted to litigate fully once admitted to a suit.”).

18 In this case, when the district court granted the Legislature’s motion to intervene on Dec. 8, 2020,
19 the Legislature became entitled to all the rights of a party-defendant. See NRS 218F.720(3) (“If the
20 Legislature intervenes in the action or proceeding, the Legislature has all the rights of a party.”).
21 Consequently, the Legislature became entitled to file a motion to dismiss the first amended complaint
22 under NRCP 12 in the same manner as if the Legislature had been named as a party-defendant in the
23 first amended complaint. See Bartlett v. Bishop of Nev., Corp., 59 Nev. 283, 298 (1939) (“The same
24 rules govern intervenor’s rights which govern those who originally sue or defend.”); Fed. Prac. & Proc.
Civ., supra, § 1920 (stating that after intervention, “the intervenor is treated as if the intervenor were an
original party and has equal standing with the original parties.”).

1 However, before the Legislature could file such a motion to dismiss in the prior proceedings, the
2 district court dismissed the first amended complaint based on lack of standing, and the dismissal
3 rendered any response to the first amended complaint by the Legislature moot at that time. Specifically,
4 after entry of the district court's omnibus order on Dec. 8, 2020, which dismissed NPRI's first amended
5 complaint based on lack of standing, the district court did not have any jurisdictional power to reach the
6 merits of any other defenses and objections because, in the absence of standing, the district court was
7 precluded from exercising subject-matter jurisdiction over the lawsuit. See Steel Co. v. Citizens for
8 Better Env't, 523 U.S. 83, 94-97 (1998); Righthaven LLC v. Hoehn, 716 F.3d 1166, 1172-73 (9th Cir.
9 2013). Under such circumstances, the U.S. Supreme Court has explained that "[w]ithout jurisdiction the
10 court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to
11 exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."
12 Steel Co., 523 U.S. at 94 (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

13 Thus, after the district court entered the omnibus order dismissing NPRI's first amended
14 complaint based on lack of standing, the only function remaining to the district court was to dismiss the
15 lawsuit as to all remaining defendants based on NPRI's lack of standing. Thereafter, NPRI filed a
16 timely notice of appeal, which divested the district court of jurisdiction over this case during the
17 pendency of the appeal until the Supreme Court issued its remittitur under NRAP 41 and remanded this
18 case to the district court. See Mack-Manley v. Manley, 122 Nev. 849, 855 (2006); Buffington v. State,
19 110 Nev. 124, 126 (1994) ("Jurisdiction in an appeal is vested solely in the supreme court until the
20 remittitur issues to the district court.").

21 In its published opinion, the Supreme Court reversed the district court's order dismissing the first
22 amended complaint for lack of standing and remanded for "further proceedings" on NPRI's claims.
23 NPRI, 507 P.3d at 1211. Based on well-established rules of appellate practice, "[u]pon remand from an
24 appellate court, the lower court is required to proceed from the point at which the error occurred."

1 Giancola v. Azem, 109 N.E.3d 1194, 1200 (Ohio 2018) (quoting State ex rel. Douglas v. Burlew, 833
2 N.E.2d 293, 295 (Ohio 2005)). Thus, because the Supreme Court reversed the district court's order
3 dismissing the first amended complaint for lack of standing and remanded for further proceedings, it
4 "returned the parties to the same position they were in prior to the error," and nothing precludes the
5 parties from raising their claims and defenses on remand, except for those which were expressly decided
6 in the published opinion and have become the law of the case. Giancola, 109 N.E.3d at 1200 ("Only
7 those legal questions resolved by a reviewing court are the law of that case."). As explained by the
8 Oklahoma Supreme Court:

9 Where, on the judgment's reversal, a cause is remanded, it returns to the trial court as if it
10 had never been decided, save only for the "settled law" of the case. **The parties are**
11 **relegated to their prejudgment status and are free to re-plead or re-press their claims**
12 **as well as defenses.** It is the settled-law-of-the-case doctrine that operates to bar relitigation
13 of (a) issues in a case which are finally settled by an appellate opinion or of (b) those the
14 aggrieved party failed to raise on appeal.

15 Smedsrud v. Powell, 61 P.3d 891, 896 (Okla. 2002) (emphasis added and footnotes omitted).

16 In this case, the Supreme Court expressly decided and settled the following issues which have
17 become the law of the case: (1) NPRI has standing to bring its claims under the public-importance
18 exception to traditional standing; and (2) NPRI failed to demonstrate that the district court abused its
19 discretion in denying the motion to disqualify NSHE's official attorneys. NPRI, 507 P.3d at 1211 & n.5.
20 In addition, because the Supreme Court expressly decided and settled that NPRI waived its rights on
21 appeal to challenge the district court's order granting permissive intervention, the Legislature's
22 intervention as a party-defendant has become the law of the case. Id.

23 Accordingly, based on well-established rules of appellate practice, the Supreme Court's remand
24 for further proceedings in this case returned the parties to the same position they were in prior to the
25 district court's order dismissing the first amended complaint for lack of standing, and nothing precludes
26 the parties from raising their claims and defenses on remand, except for those which have become the

1 law of the case. Therefore, because the Legislature has all the rights of a party-defendant, it is entitled to
2 file its countermotion to dismiss the first amended complaint under NRCP 12 and raise its claims and
3 defenses on remand, except for those which have become the law of the case.

4 **IV. NPRI's first amended complaint must be dismissed and its motion for leave to file a**
5 **second amended complaint must be denied based on lack of subject-matter jurisdiction because**
6 **NPRI failed to comply with the statutory requirements under NRS Chapter 41 to invoke the**
7 **conditional waiver of sovereign immunity of the state and its state officers or employees and each**
8 **political subdivision and its local officers or employees.**

9 Under NRCP 12(b)(1), the Legislature is entitled to file its countermotion to dismiss the first
10 amended complaint based on "lack of subject-matter jurisdiction." Further, under NRCP 12(h)(3), "[i]f
11 the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the
12 action." Therefore, the lack of subject-matter jurisdiction may be raised at any stage of the litigation,
13 and the district court has an obligation to address such issues whenever they are raised by the parties or
14 are otherwise brought to the district court's attention, even if the district court must act *sua sponte* to
15 address such issues. See In re George J., 128 Nev. 345, 348 n.2 (2012) ("[R]egardless of whether the
16 State properly raised the issue, this court can *sua sponte* consider jurisdictional issues."); Landreth v.
17 Malik, 127 Nev. 175, 179 (2011) ("[W]hether a court lacks subject matter jurisdiction 'can be raised by
18 the parties at any time, or *sua sponte* by a court of review, and cannot be conferred by the parties.'" (quoting Swan v. Swan, 106 Nev. 464, 469 (1990))); Vaile v. Dist. Ct., 118 Nev. 262, 276 (2002)
19 ("[S]ubject matter jurisdiction cannot be waived and may be raised at any time, or *sua sponte* by a court
20 of review."), *overruled on other grounds by* Senjab v. Alhulaibi, 137 Nev. Adv. Op. 64, 497 P.3d 618
21 (2021). Accordingly, the district court must dismiss a complaint when the lack of subject-matter
22 jurisdiction is apparent on the face of the complaint. Craig, 135 Nev. at 39.

23 In this case, the Court must dismiss the first amended complaint and deny NPRI's motion for
24 leave to file a second amended complaint based on lack of subject-matter jurisdiction because NPRI
failed to comply with the statutory requirements under NRS Chapter 41 to invoke the conditional waiver

1 of sovereign immunity of: (1) the state and its state officers or employees; and (2) each political
2 subdivision and its local officers or employees. Specifically, in violation of NRS Chapter 41, NPRI
3 failed to bring this lawsuit in the name of: (1) the state on relation of each particular department or other
4 agency that employs the individual Defendants who are state employees; and (2) each political
5 subdivision that employs the individual Defendants who are local employees. Craig, 135 Nev. at 39-40;
6 NRS 41.031; NRS 41.0337; NRS 41.039.⁴

7 As part of our nation’s constitutional design, each state is an independent sovereign which enjoys
8 inherent sovereign immunity from lawsuits and liability for damages in its own state courts. Alden v.
9 Maine, 527 U.S. 706, 711-29 (1999); Echeverria v. State, 137 Nev. Adv. Op. 49, 495 P.3d 471, 475
10 (2021). Thus, “[t]he law is well settled that a state, which in the eye of the law is recognized as a
11 sovereign, cannot without its consent be sued by a citizen.” Hill v. Thomas, 70 Nev. 389, 401 (1954).
12 In other words, “the sovereign is immune from suit in the absence of a waiver of immunity.” Id.

13 Under the Nevada Constitution, sovereign immunity can be waived only by the Legislature
14 through the enactment of general laws. Nev. Const. art. 4, § 22 (“Provision may be made by general law
15 for bringing suit against the State as to all liabilities originating after the adoption of this Constitution.”);
16 Hardgrave v. State ex rel. Hwy. Dep’t, 80 Nev. 74, 76-78 (1964) (“We construe the words ‘general law’
17 as used in Section 22 to mean a general law passed by the legislature.”). Accordingly, “[i]t is the
18 legislature alone which has the power to waive immunity or to authorize such waiver.” Taylor v. State,
19 73 Nev. 151, 153 (1957). Consequently, “[i]t is not within the power of the courts . . . to strip the
20 sovereign of its armour.” Id.

21 When a legislative body waives sovereign immunity by statute, “the terms of its consent to be
22 sued in any court define that court’s **jurisdiction** to entertain the suit.” U.S. Dep’t of Treasury v. Hood,
23 101 Nev. 201, 204 (1985) (emphasis added). Thus, if a plaintiff files a lawsuit but fails to comply with

24 ⁴ NRS 41.031, NRS 41.0337 and NRS 41.039 are reproduced in the Addendum following the
Memorandum of Points and Authorities.

1 the statutory requirements to invoke the waiver of sovereign immunity, the court lacks subject-matter
2 jurisdiction to entertain the lawsuit. See Craig, 135 Nev. at 39-40; Wayment v. Holmes, 112 Nev. 232,
3 237-38 (1996).

4 In its first amended complaint and proposed second amended complaint, NPRI is seeking
5 declaratory relief against the individual Defendants under Nevada’s Uniform Declaratory Judgments Act
6 (“Uniform Act”) in NRS Chapter 30. (First Am. Compl. ¶ 24; Proposed Second Am. Compl. ¶ 22.) The
7 Uniform Act provides that it must be interpreted and construed in order to effectuate its purpose to make
8 the law uniform among the states which have enacted the Uniform Act. NRS 30.160; see also Lathigee
9 v. British Columbia Sec. Comm’n, 136 Nev. 670, 672 (2020) (“[W]e accept as persuasive authority the
10 official comments to the Uniform Act and the decisions of courts elsewhere interpreting it.”). In other
11 states that have enacted the Uniform Act, courts have held that the “Uniform Declaratory Judgments Act
12 does not waive the State’s sovereign immunity, and a plaintiff who seeks declaratory relief against the
13 State must find authorization for such remedy outside the confines of the Uniform Declaratory
14 Judgments Act.” JHK, Inc. v. Neb. Dep’t of Banking & Fin., 757 N.W.2d 515, 522 (Neb. Ct. App.
15 2008). Therefore, NPRI cannot bring this lawsuit against the individual Defendants under Nevada’s
16 Uniform Declaratory Judgments Act unless NPRI first complies with the statutory requirements under
17 NRS Chapter 41 to invoke the government’s conditional waiver of sovereign immunity.

18 In Nevada, by enacting NRS 41.0305 to 41.039, inclusive, the Legislature has provided for the
19 conditional waiver of sovereign immunity of: (1) the state and its state officers or employees; and
20 (2) each political subdivision and its local officers or employees. Hagblom v. State Dir. Mtr. Vehs., 93
21 Nev. 599, 601-04 (1977) (“The legislature has exposed the State of Nevada to liability by conditionally
22 waiving in certain instances governmental immunity from suit.”); Clark Cnty. Sch. Dist. v. Richardson
23 Constr., 123 Nev. 382, 389-90 (2007) (“Under the doctrine of sovereign immunity, generally, Nevada
24 and its political subdivisions enjoy blanket immunity from tort liability. The Legislature, however, has

1 waived this immunity on a limited basis.” (footnotes omitted)). The conditional waiver of sovereign
2 immunity applies to all causes of action, including tort actions and non-tort actions. Echeverria, 495
3 P.3d at 475-77. In order to invoke the conditional waiver of sovereign immunity, the plaintiff must
4 comply with the statutory requirements for bringing a lawsuit against: (1) the state and its state officers
5 or employees; or (2) a political subdivision and its local officers or employees. Craig, 135 Nev. at 39-
6 40; Wayment, 112 Nev. at 237-38.

7 In order to bring a lawsuit against the state or any of its state officers or employees for alleged
8 violations of the state constitution or state law, the plaintiff cannot bring the lawsuit solely against the
9 state officers or employees; instead, the plaintiff must also bring the lawsuit “in the name of the State of
10 Nevada on relation of the particular department, commission, board or other agency of the State whose
11 actions are the basis for the suit.” NRS 41.031; NRS 41.0337. The reason for this rule is that when the
12 plaintiff brings the lawsuit against the state officers or employees arising from the performance of public
13 duties in their official capacities, the lawsuit is effectively against the state itself, and the plaintiff must
14 comply with the statutory requirements to invoke the conditional waiver of sovereign immunity and
15 bring the lawsuit in the name of the state on relation of the particular department or other agency that
16 employs the state officers or employees. Craig, 135 Nev. at 39-40.

17 Similarly, in order to bring a lawsuit against a political subdivision or any of its local officers or
18 employees for alleged violations of the state constitution or state law, the plaintiff cannot bring the
19 lawsuit solely against the local officers or employees; instead, the plaintiff must also bring the lawsuit
20 against the political subdivision. NRS 41.031; NRS 41.0337; NRS 41.039. The reason for this rule is
21 that when the plaintiff brings the lawsuit against the local officers or employees arising from the
22 performance of public duties in their official capacities, the lawsuit is effectively against the political
23 subdivision itself, and the plaintiff must comply with the statutory requirements to invoke the
24 conditional waiver of sovereign immunity and bring the lawsuit against the political subdivision in

1 addition to the local officers or employees. See Craig, 135 Nev. at 39-40; Wayment, 112 Nev. at 237-
2 38.

3 In its published opinion in this litigation, the Supreme Court held—as the law of this case—that
4 NPRI has standing to bring its claims under the public-importance exception to traditional standing
5 because NPRI is an appropriate party that “seeks to enforce a public official’s compliance with a public
6 duty pursuant to the separation-of-powers clause.” NPRI, 507 P.3d at 1208. Therefore, it is the law of
7 this case that: (1) NPRI is bringing this lawsuit against the individual Defendants arising from the
8 performance of public duties in their official capacities; and (2) NPRI is seeking to enforce compliance
9 by the individual Defendants with the separation-of-powers clause based on alleged violations of that
10 clause in the performance of public duties in their official capacities.

11 Under such circumstances, the Court must dismiss the first amended complaint and deny NPRI’s
12 motion for leave to file a second amended complaint based on lack of subject-matter jurisdiction
13 because NPRI failed to comply with the statutory requirements under NRS Chapter 41 to invoke the
14 conditional waiver of sovereign immunity of: (1) the state and its state officers or employees; and
15 (2) each political subdivision and its local officers or employees. Specifically, in violation of NRS
16 Chapter 41, NPRI failed to bring this lawsuit in the name of: (1) the state on relation of each particular
17 department or other agency that employs the individual Defendants who are state employees; and
18 (2) each political subdivision that employs the individual Defendants who are local employees. Craig,
19 135 Nev. at 39-40; NRS 41.031; NRS 41.0337; NRS 41.039. Therefore, the Court must dismiss NPRI’s
20 first amended complaint and deny NPRI’s motion for leave to file a second amended complaint because
21 the lack of subject-matter jurisdiction is apparent on the face of those complaints.

22 //

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24 //

1 **V. NPRI's first amended complaint must be dismissed and its motion for leave to file a**
2 **second amended complaint must be denied because NPRI failed to join all necessary party-**
3 **defendants who are needed for a just adjudication of this action as required by the Due Process**
4 **Clause, NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30.**

5 Under NRCP 12(b)(6), the Legislature is entitled to file its countermotion to dismiss the first
6 amended complaint based on NPRI's failure to join all necessary party-defendants. In addition, issues
7 of failure to join all necessary party-defendants may be raised at any stage of the litigation, and the
8 district court has an obligation to address such issues whenever they are raised by the parties or are
9 otherwise brought to the district court's attention, even if the district court must act *sua sponte* to address
10 such issues. See Blaine Equip. Co. v. State Purchasing Div., 122 Nev. 860, 864-66 (2006) ("This court
11 has previously determined that a district court is obligated to, *sua sponte*, join a necessary party under
12 NRCP 19(a) if the litigants have not joined that party and the failure of a litigant to join a necessary
13 party does not constitute a waiver." (footnotes omitted)); Univ. of Nev. v. Tarkanian, 95 Nev. 389, 396
14 (1979); Johnson v. Johnson, 93 Nev. 655, 656 (1977). Therefore, the Court must address whether NPRI
15 failed to join all necessary party-defendants who are needed for a just adjudication of this action as
16 required by the Due Process Clause, NRCP 19 and the Uniform Declaratory Judgments Act in NRS
17 Chapter 30.

18 The Uniform Act requires that "[w]hen declaratory relief is sought, all persons shall be made
19 parties who have or claim any interest which would be affected by the declaration, and no declaration
20 shall prejudice the rights of persons not parties to the proceeding." NRS 30.130. Therefore, to comply
21 with the Uniform Act, a plaintiff must join all necessary party-defendants that are needed for a just
22 adjudication of the plaintiff's action for declaratory relief. In other states that have enacted the Uniform
23 Act, courts have held that "in an action for a declaratory judgment, all persons interested in the
24 declaration are necessary parties," and that "the failure to join parties, who have an interest which would
 be affected by the declaration, was fatal." Williams v. Moore, 137 A.2d 193, 196-97 (Md. 1957). One

1 of the primary reasons that the Uniform Act requires joinder of all necessary party-defendants is to
2 “make any decree rendered by the Court a final and complete determination of the subject matter in
3 dispute, and thereby prevent a multiplicity of suits.” Id. at 197. Consequently, “[a] declaratory
4 judgment serves a legitimate purpose only when all interested persons who might be affected by the
5 enforcement of rights and legal relations are parties, but not otherwise. A court may and ordinarily must
6 refuse to render a declaratory judgment in the absence of necessary parties.” J-T Assocs. v. Hudson
7 River-Black River Regulating Dist., 572 N.Y.S.2d 122, 124-25 (N.Y. App. Div. 1991).

8 In addition, to comply with the Due Process Clause and NRCP 19, a plaintiff must join all
9 necessary parties that are needed for a just adjudication. Olsen Family Trust v. Dist. Ct., 110 Nev. 548,
10 552-54 (1994); Tarkanian, 95 Nev. at 395-98. The requirement to join all necessary parties arises under
11 the Due Process Clause as part of the fundamental guarantee of fairness in litigation. Under the Due
12 Process Clause, a person may not be deprived of his legal rights in a judicial proceeding unless the
13 person has been made a party to that proceeding. Martin v. Wilks, 490 U.S. 755, 758-62 (1989). This
14 constitutional rule stems from the “deep-rooted historic tradition that everyone should have his own day
15 in court.” Id. at 762 (quoting 18 Wright & Miller, Fed. Prac. & Proc. Civ. § 4449 (1981)). Thus, due
16 process requires that all persons who have a material interest in the subject matter of the litigation be
17 joined as parties, so that those persons will have proper notice of the litigation and an opportunity to
18 protect their interests. Olsen Family Trust, 110 Nev. at 552-54; Tarkanian, 95 Nev. at 395-98.

19 The burden is on the plaintiff to join all necessary parties. Olsen Family Trust, 110 Nev. at 552-
20 54. The law does not impose any burden on a person to intervene voluntarily in an action when that
21 person has not been made a party to the action by service of process. Id. Thus, “[u]nless duly
22 summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment
23 recovered therein will not affect his legal rights.” Chase Nat’l Bank v. City of Norwalk, 291 U.S. 431,
24 441 (1934). Accordingly, due process is not satisfied by the fact that a person has knowledge of the

1 action and an opportunity to intervene. Martin, 490 U.S. at 762-65; Olsen Family Trust, 110 Nev. at
2 552-53. Instead, “[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to
3 intervene, is the method by which potential parties are subjected to the jurisdiction of the court and
4 bound by a judgment or decree.” Martin, 490 U.S. at 765; Olsen Family Trust, 110 Nev. at 553.

5 Because joinder of necessary parties is mandated by the Due Process Clause, courts have an
6 independent obligation to ensure that the relief requested by the plaintiff will not adversely affect the
7 interests of necessary parties that have not been joined. Tarkanian, 95 Nev. at 395-98; Blaine Equip.,
8 122 Nev. at 864-66. Accordingly, “a court must protect the interests of the parties not before it to avoid
9 possible prejudicial effect; failure of a court to protect those interests by joinder may amount to a
10 violation of due process.” R.J. Williams Co. v. Fort Belknap Hous. Auth., 92 F.R.D. 17, 21 (D. Mont.
11 1981). Moreover, if a court enters a judgment which substantially affects the rights of necessary parties
12 that have not been joined, such a judgment violates due process and is void. See Fletcher Aircraft Co. v.
13 Bond, 77 F.R.D. 47, 52 (C.D. Cal. 1977); Schwob v. Hemsath, 98 Nev. 293, 294-95 (1982); Johnson v.
14 Johnson, 93 Nev. 655, 658-59 (1977).

15 These fundamental principles of due process are reflected in NRCP 19, which requires the joinder
16 of all persons who qualify as necessary parties and who are needed for a just adjudication of the
17 litigation. Because NRCP 19 is modeled on the federal joinder rule in FRCP 19, the Supreme Court has
18 determined that federal cases interpreting the federal joinder rule are to be regarded as “persuasive
19 authority” when interpreting Nevada’s joinder rule in NRCP 19. Blaine Equip., 122 Nev. at 865
20 (quoting Nelson v. Heer, 121 Nev. 832, 834 (2005)).

21 Under NRCP 19(a)(1)(A), a person is considered a necessary party if “in that person’s absence,
22 the court cannot accord complete relief among existing parties.” In order for a court to provide complete
23 relief among the parties, the court must be able to enter a judgment that binds all persons who have a
24 material interest in the subject matter of the litigation. Blaine Equip., 122 Nev. at 865-66. But if there

1 are persons having such an interest who are not joined as parties, those persons would not be bound by
2 the court's judgment, leaving open the possibility of additional lawsuits, relitigation of the same issues
3 and inconsistent or conflicting decisions regarding the same controversy. Id. Thus, the purpose of
4 requiring joinder of all necessary parties under NRCP 19(a)(1)(A) is to ensure that the court can render a
5 final and complete determination of the controversy that binds all interested parties, avoids piecemeal
6 determination of the issues and prevents a multiplicity of lawsuits. Tarkanian, 95 Nev. at 397; Young
7 Inv. Co. v. Reno Club, Inc., 66 Nev. 216, 222 (1949).

8 In its published opinion in this litigation, the Supreme Court determined that NPRI has standing to
9 bring its claims under the public-importance exception to traditional standing because "it is represented
10 by counsel who have competently advocated NPRI's position and **named as defendants all of the**
11 **individuals who currently serve in dual roles.**" NPRI, 507 P.3d at 1210 (emphasis added).
12 Unfortunately, this statement is not accurate in this litigation because there are members of the judicial
13 branch and the legislative branch who currently serve in dual roles but who are not named as party-
14 defendants in this litigation.

15 In particular, there are members of the judicial branch who hold paid positions with the state
16 executive branch as adjunct professors at universities and colleges within NSHE, just like Defendant
17 Neal.⁵ However, NPRI has not joined these members of the judicial branch as necessary party-
18 defendants in this case. As required by the Due Process Clause, NRCP 19 and the Uniform Act, NPRI
19 has the burden to join these members of the judicial branch as necessary party-defendants. See Olsen
20 Family Trust, 110 Nev. at 552-54.

21
22 ⁵ Those members of the judicial branch are: (1) Honorable Jerome T. Tao, Nevada Court of Appeals
23 Judge and adjunct professor at William S. Boyd School of Law at the University of Nevada, Las
24 Vegas; (2) Honorable Frank P. Sullivan, Clark County Family Court Judge and adjunct professor at
William S. Boyd School of Law at the University of Nevada, Las Vegas; (3) Honorable Scott N.
Freeman, Second Judicial District Court Judge and instructor at the University of Nevada, Reno; and
(4) Honorable Dixie Grossman, Second Judicial District Court Judge and instructor at the University
of Nevada, Reno.

1 Additionally, NPRI has the burden to: (1) identify any other members of the judicial branch who
2 currently serve in dual roles with NSHE or with any other state executive branch employer or local
3 government employer; and (2) join these members of the judicial branch as necessary party-defendants.
4 Likewise, NPRI has the burden to: (1) identify any other members of the legislative branch who
5 currently serve in dual roles with NSHE or with any other state executive branch employer or local
6 government employer; and (2) join these members of the legislative branch as necessary party-
7 defendants. Finally, after NPRI meets its burden to identify all members of the judicial branch and the
8 legislative branch who currently serve in dual roles and join them as necessary party-defendants, NPRI
9 has the burden to join all the respective state executive branch employers and local government
10 employers because they are also necessary party-defendants to this action.

11 In order for a judgment in this case to provide complete and effective relief, the judgment would
12 have to be binding on all those members who currently serve in dual roles and all their respective state
13 executive branch employers and local government employers. However, under basic principles of due
14 process, a person cannot be bound by a judgment entered in an action unless the person has been made a
15 party to that action. See Martin, 490 U.S. at 758-62. Thus, unless all those members who currently
16 serve in dual roles and all their respective state executive branch employers and local government
17 employers are joined as necessary party-defendants to this action, there cannot be “a complete decree to
18 bind them all.” Olsen Family Trust, 110 Nev. at 553. Without such a decree, any judgment in this case
19 that does not include all such necessary party-defendants would clearly leave open the possibility of
20 additional lawsuits, relitigation of the same issues and inconsistent or conflicting decisions regarding the
21 same controversy. Therefore, by requiring NPRI to join all such necessary party-defendants to this case,
22 the Court would be taking steps that are necessary to avoid piecemeal determination of the issues and
23 prevent a multiplicity of lawsuits.

1 In addition, under NRCP 19(a)(1)(B), a person is considered a necessary party if “that person
2 claims an interest relating to the subject of the action and is so situated that disposing of the action in the
3 person’s absence may: (i) as a practical matter impair or impede the person’s ability to protect the
4 interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or
5 otherwise inconsistent obligations because of the interest.” Because the purpose of the rule is to protect
6 necessary parties from being deprived of their interests without notice and an opportunity to be heard,
7 the “interest” requirement in the rule is liberally construed and applied in a practical manner. Aguilar v.
8 L.A. Cnty., 751 F.2d 1089, 1093 (9th Cir. 1985); Lopez v. MLK, Jr. Hosp., 97 F.R.D. 24, 29 (C.D. Cal.
9 1983). Thus, the rule does not require that a necessary party have an interest in the litigation which
10 would be the equivalent of a constitutionally protected property right. Id. The rule only requires that a
11 necessary party have an interest which could be impaired by the litigation “as a practical matter.” Id.

12 If the Court were to grant the relief requested by NPRI, such relief would clearly impair “as a
13 practical matter” the employment interests of all members of the judicial branch and the legislative
14 branch who currently serve in dual roles, and such relief would also clearly impair “as a practical
15 matter” the interests of all their respective state executive branch employers and local government
16 employers which have devoted substantial time, effort and resources to developing and utilizing their
17 skills and expertise as employees. Under such circumstances, NPRI has the burden to join all members
18 of the judicial branch and the legislative branch who currently serve in dual roles and all their respective
19 state executive branch employers and local government employers because they are necessary party-
20 defendants to this action. Accordingly, NPRI’s first amended complaint must be dismissed and its
21 motion for leave to file a second amended complaint must be denied because NPRI failed to join all
22 necessary party-defendants who are needed for a just adjudication of this action as required by the Due
23 Process Clause, NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30.

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

Respectfully submitted,

By: /s/ Kevin C. Powers
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ADDENDUM

NRS 41.031 Waiver applies to State and its political subdivisions; naming State as defendant; service of process; State does not waive immunity conferred by Eleventh Amendment.

1. The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.010 or the limitations of NRS 41.032 to 41.036, inclusive. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.

2. An action may be brought under this section against the State of Nevada or any political subdivision of the State. In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit. An action against the State of Nevada must be filed in the county where the cause or some part thereof arose or in Carson City. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon:

(a) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and

(b) The person serving in the office of administrative head of the named agency.

3. The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.

NRS 41.0337 State or political subdivision to be named party defendant.

1. No tort action arising out of an act or omission within the scope of a person's public duties or employment may be brought against any present or former:

(a) Local judicial officer or state judicial officer;

(b) Officer or employee of the State or of any political subdivision;

(c) Immune contractor; or

(d) State Legislator,

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

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

(a) Local judicial officer or state judicial officer;

(b) Officer or employee of the State or of any political subdivision;

(c) Immune contractor; or

(d) State Legislator,

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

1 3. As used in this section:

2 (a) "Local judicial officer" has the meaning ascribed to it in NRS 41.03377.

3 (b) "State judicial officer" has the meaning ascribed to it in NRS 41.03385.

4 **NRS 41.039 Filing of valid claim against political subdivision condition precedent to**
5 **commencement of action against immune contractor, employee or officer.** An action which
6 is based on the conduct of any immune contractor, employee or appointed or elected officer of a
7 political subdivision of the State of Nevada while in the course of the person's employment or in
8 the performance of the person's official duties may not be filed against the immune contractor,
9 employee or officer unless, before the filing of the complaint in such an action, a valid claim has
10 been filed, pursuant to NRS 41.031 to 41.038, inclusive, against the political subdivision for which
11 the immune contractor, employee or officer was authorized to act.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 29th day of December, 2022, pursuant to NRCP 5(b) and NEFCR 9, I served a true and correct copy of the Nevada Legislature's Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint and Countermotion to Dismiss Plaintiff's First Amended Complaint, by means of the Eighth Judicial District Court's electronic filing system, directed to:

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EXHIBIT 5

EXHIBIT 5

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. 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
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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).
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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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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
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
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
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,
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 ///

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21 ///

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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
CLARK COUNTY, NEVADA

4
5
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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