

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Appellant,

vs.

BRITTNEY MILLER, an individual
engaging in dual employment with the
Nevada State Assembly and Clark County
School District; DINA NEAL, an individual
engaging in dual employment with the
Nevada State Senate and Nevada State
College and College of Southern Nevada;
JAMES OHRENSCHALL, an individual
engaging in dual employment with the
Nevada State Senate and Clark County
Public Defender; SELENA TORRES, and
individual engaging in dual employment
with the Nevada State Assembly and a Clark
County Public Charter School; and
LEGISLATURE OF THE STATE OF
NEVADA,

Respondents.

Supreme Court Case No.: 85935

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[District Court Case No. A-20-817757-C]
Elizabeth A. Brown
Clerk of Supreme Court

**APPELLANT’S OPPOSITION
TO RESPONDENTS’
COUNTERMOTIONS FOR
LEGISLATIVE CONTINUANCE
AND REPLY IN SUPPORT OF
MOTION TO SUSPEND RULES**

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION AND REPLY¹

I. INTRODUCTION.

NPRI underscores this Court’s own words. In denying NPRI’s request to

¹ The arguments made by NPRI in response to Respondents’ counter-motion overlap with those in support of its original motion to the degree that NPRI voluntarily limits itself to one response not to exceed 10 pages. NRAP 27(d)(2).

suspend the rules and except the matter from legislative continuance based on NRS 1.310 in the original appeal, the Court found that “a determination in district court regarding the constitutionality of respondent Legislators’ dual employment in the Legislature and the executive branch....is not before the court in the instant appeal,” and “[t]hus....appellant has failed to carry the burden placed upon it by NRS 1.310.” *See* Order dated March 10, 2021 (Case No. 82341) at p. 3.

The district court has now made its separation-of-powers determination. And, as this Court noted when remanding the matter previously upon its reversal of the district court’s original dismissal determination, the separation-of-powers question concerning Respondents’ dual service remaining unresolved “could result in serious public injury – either by the continued allegedly unlawful service of the above-named officials, or by the refusal of qualified persons to run for office for fear of acting unconstitutionally – because this unsettled issue continues to arise.” *See Nev. Policy Research Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28 at *10 (2022) (emphasis added). The Court itself has thus recognized that NPRI can now carry its burden under NRS 1.310, and this matter should proceed expeditiously.

II. ARGUMENT

A. The Parties Agree Suspension of the Rules and an Exception to NRS 1.310 Are Available.

The parties to this appeal do not dispute that the district court’s decision reached the merits of the separation-of-powers issue concerning Respondent-

Legislators’ dual service and that it did so without consideration of the majority of the parties’ arguments. *See, e.g.*, Respondent-Legislators’ Joint Opposition at p. 2; *see also* Respondent Legislature’s Opposition at pp. 5, 7 and 9. Further, Respondents, further do not dispute in such instance the availability of NRAP 2 or the exception to a legislative continuance, where there is “a substantial existing right or interest that will be defeated or abridged” and appellant will “suffer substantial and immediate irreparable harm” if the continuance is granted. NRS 1.310(3). *Id.*, Respondent-Legislators’ Joint Opposition at pp. 3 and 8; Respondent Legislature’s Opposition at p. 10. The only issue, then, is whether NPRI meets its burden for the relief it seeks. It does, and, respectfully, Respondents have failed to make any relevant argument to the contrary.

B. This Case Is Ripe to Proceed.

“Don’t worry, I won’t forget my local government roots.” – Sabra Smith Newby, Vice President of Government and Community Affairs at UNLV, upon her recent appointment to the Nevada Assembly. *See Las Vegas Review Journal*, “Smith Newby appointed to state Assembly District 10,” January 17, 2023 (Ricardo Torres-Cortez), a true and correct copy of which is attached hereto as

Exhibit A.

“D’Silva said easing the stress that educators endure should be a part of the solution as well and that he not only wants to increase teacher pay, but all wages for all public employees, with at least a 4 percent raise each year.” – Remarks

attributed to Rancho High School Teacher and incoming freshman Assemblyperson, Reuben D'Silva. See *The Nevada Independent*, "Freshmen Orientation: Assemblyman Reuben D'Silva," January 12, 2023 (Naoka Foreman) a true and correct copy of which is attached hereto as **Exhibit B**.

The fact that these newly elected and appointed Legislators are not present in the instant appeal is not an impediment to proceeding, as Respondents suggest, but this is the latest example of the serious public injury, or the perception thereof, that the Court recognized may arise from the continued dual service of Legislators also employed in the executive branch, where the issue remains unsettled. *Cannizzaro*, 138 Nev. Adv. Op. 28 at *10. Rather than address the obvious issue at hand, however, the opposition briefing seeks only to distract with inapposite arguments concerning the possible scope of the appeal. Indeed, neither the Respondent-Legislators nor the Respondent Legislature in their respective Joint Opposition, Opposition, and Countermotions attempt to assert in any way that the Legislators who are involved in the case cannot adequately represent through their counsel the interests of all those similarly situated, or that they could not possibly expend the minimal time necessary during the upcoming Legislative Session to review their counsels' briefings, if they are even inclined to do so. Such arguments are obviously untenable on their face.

1. Joinder of Other Parties Is a Non-Issue.

NPRI filed suit against all Legislators known to be engaging in dual service

as employees of the executive branch when it filed the instant action on July 9, 2020. And, as noted in the opposition briefing, it sought leave to amend its pleading following the 2022 General Election to add or remove individuals as necessary to ensure the case proceeded as to all those who would be continuing in the dual service. *See* Respondent Legislature’s Opposition at p. 4. The district court was aware of NPRI’s motion for leave to amend but proceeded to make a ruling on the merits regardless. *See id.*, at pp. 5 and 7. The district court was entitled to do so, too, where dismissal could not be a remedy based on the purported failure to join additional parties, such as members of the judiciary also employed in the executive branch.

It is only if a party is deemed necessary and joinder of that party is not feasible that a court must determine, in equity and good conscience, whether the action may proceed or should be dismissed. *Humphries v. Eighth Jud. Dist. Ct.*, 129 Nev. 788, 792, 312 P.2d 484, 490 (citing NRCP 19(b)). Joinder of members of the judiciary or others engaging in dual service, albeit entirely unnecessary, would have been feasible in the instant case, and this undisputed fact alone precluded the remedy of dismissal sought by Respondents below. Additionally, while members of the judiciary and others were capable of being joined, it was not necessary to do so, where complete relief is available among the parties already present in the litigation. *Rose, LLC v. Treasure Island, LLC*, 135 Nev. 145, 150, 445 P.3d 860, 865 (Ct. App. 2019) (holding whether a party is necessary does not

depend on upon broad labels or general classifications).

2. **The District Court Had Subject Matter Jurisdiction.**

The issue of the purportedly unresolved jurisdictional issue raised by Respondents is also a non-starter. See Respondent Legislature’s Opposition at pp. 8-9. The district court actually addressed the issue in its dismissal order, denying application of the provisions of NRS Chapter 41 based on its finding, among other things, that the case is one of equity and not tort. See *id.*, at p. 9. This holding is supported by the case law, cited by Respondents below, holding that for the NRS Chapter 41 requirements to “invoke the conditional waiver of sovereign immunity,” a lawsuit is required where the State is the party actually facing liability based on the actions of its employees. See, e.g., *Hagblom v. State Dir. Mtr. Vehs.*, 93 Nev. 599, 601-04 (1977) (“The legislature has exposed the State of Nevada to liability by conditionally waiving in certain instances governmental immunity from suit.”); *Clark Cnty. Sch. Dist. v. Richardson Constr.*, 123 Nev. 382, 389-90 (2007) (“Under the doctrine of sovereign immunity, generally, Nevada and its political subdivisions enjoy blanket immunity from tort liability).

As recognized by the district court, the instant action is one seeking declaratory and injunctive relief only, for which the Supreme Court already established this Court’s subject matter jurisdiction. *Cannizzaro*, 138 Nev. Adv. Op. 28 at *3-4. NPRI’s lawsuit, therefore, has no potential to impose liability on the State or any department, commission, board or other agency of the State, and

compliance with NRS Chapter 41, including the naming of Defendants’ State employers as parties, is not required.

C. The Expedited Scheduling Requested by NRPI Is Warranted.

This Court made clear over a decade ago in *Secretary of State (Heller) v. Nevada State Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), that, “[t]he dual service issue may be raised as a separation-of-powers challenge to legislators working in the executive branch, as the qualifications of legislators employed in the executive branch are not constitutionally reserved to that branch.” *Id.*, 120 Nev. at 472, 93 P.3d at 757 (citation omitted). The Court went on to opine that, “[s]uch a challenge might be well suited for *quo warranto* or a declaratory relief action filed in the district court.” *Id.* Declaratory and injunctive relief is what NPRI sought below, and it is what the district court denied on substantive grounds and now subject to the Court’s *de novo* review. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) (holding questions of statutory construction, including the meaning and scope of a statute, are questions of law reviewed *de novo*).

Instead of basing her decision on the specific arguments of the parties, the district court made a *sua sponte* merits determination based upon a legal conclusion that Nevada has no specific constitutional or statutory prohibition against dual public employment, finding instead that the analysis required the evaluation of three (3) factors: (1) the common law doctrine of “incompatible

offices;” (2) whether the executive branch employment is with a state entity or local political subdivision; and, (3) if the employment is with a state entity, whether the position is that of an employee or an officer. *See* Order dismissing the district court litigation in its entirety, entered January 4, 2023 (“Order of Dismissal”), at 8:1 – 12. Then based on its analysis of the factors it identified, the district court held that: (1) no officer or employee of a state or local government may also serve as a state legislator if the roles are not compatible, and it is the purview of the court to determine compatibility; (2) those employed by local government entities are not a part of the state executive branch and therefore may serve in the legislative branch providing the roles are compatible; and (3) public officers of the state executive branch may not serve in the legislature; however, those who are public employees may, providing the roles are compatible. *See* Order of Dismissal at 27:12 – 18.

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

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

Neither NPRI nor Respondents argued or briefed these matters before the district court, so some effort will be necessary to do so before this Court. However, as far as focusing on the actual separation-of-powers clause in the Nevada Constitution and all relevant binding or persuasive guidance for its interpretation, or any of the issues Respondents may seek to argue independently to support the district court’s ruling, everything has been fully briefed below and simply needs to be repurposed here. There is simply no reason to delay the progress of this appeal for yet another 120+ days because of a Legislative Session in which the 4 remaining Respondent-Legislators and the Legislature itself will have no problem participating as their attorneys prepare briefings and oral arguments.

For proof of this, the Court need look no further than the last Legislative Session, when Respondent Legislature actively pursued reversal of a district court’s ruling in a case involving then-District Attorney and former party herein, Melanie Scheible, which found a separation-of-powers violation warranted dismissal of a criminal action, by specifically seeking amicus curiae standing in

the matter of *State v. District Court* (Plumlee/Molen), Supreme Court Consolidated Case No. 82236. See Nevada Legislature’s Amicus Curiae Brief Supporting Reversal of the District Court’s Interpretation and Application of the Separation-of-Powers Provision in Article 3, Section 1 of the Nevada Constitution dated March 19, 2021 (Case No. 82236), and related briefing filed between February 8, 2021 and March 19, 2021. In other words, there is no problem proceeding when Respondents are the ones seeking reversal. And there is, in fact, no problem period. In the end, this appeal will be a purely academic exercise carried out by counsel for NPRI and Respondents, and there is no reason offered herein to stay or otherwise further delay review of this matter. The public deserves expeditious resolution of this long-standing issue.

III. CONCLUSION

Based on the foregoing, NPRI respectfully asks this Court to suspend the Rules, pursuant to NRAP 2, and regardless of the upcoming 120-day period of the 82nd Session (2023) of the Nevada Legislature, issue an expedited schedule for

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briefing and oral argument to allow *de novo* review of the district court's final judgment on the merits of this separation-of-powers case.

Dated this 25th day of January 2023.

FOX ROTHSCHILD LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January 2023 I caused the foregoing
**APPELLANT’S OPPOSITION TO RESPONDENTS’ COUNTERMOTIONS
FOR LEGISLATIVE CONTINUANCE AND REPLY IN SUPPORT OF
MOTION TO SUSPEND RULES** to be served on all parties via the Court’s e-
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EXHIBIT “A”

Smith Newby appointed to state Assembly District 10



Nevada State Legislature Building in Carson City. (Benjamin Hager/Las Vegas Review-Journal) @benjaminhphoto

By [Ricardo Torres-Cortez](#) Las Vegas Review-Journal



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The Clark County Commission on Tuesday appointed Sabra Smith Newby, a Las Vegas Democrat, to the Nevada Assembly.

Smith Newby replaces state Sen. Rochelle Nguyen, who recently vacated her Assembly District 10 seat.

"I'm very excited for this appointment," Smith Newby told the commission shortly before a unanimous vote. "I'm looking forward to service."

"Don't worry, I won't forget my local government roots," Smith Newby later added.

Smith Newby is currently the vice president of government and community affairs at UNLV, but previously served as Reno's city manager and assistant county manager and chief administrative officer for Clark County.

Commissioners are tasked with appointing people to vacancies in the Assembly and Senate from Clark County. The appointee must be of the same political party as the former occupant of the seat.

The 2023 session starts on Feb. 6 in Carson City.

Smith Newby was [nominated](#) last week by the Nevada Assembly Democratic Caucus.

“We work best as Nevadans when we all work together and recognize that we have some of the same constituents, and our purpose is to serve them and to make our state better for everyone,” Smith Newby said.

Smith Newby’s seat became open in December when Nguyen was chosen to replace former state Sen. Chris Brooks in Senate District 3. The former senator resigned and took an executive job at a renewable energy company.

Smith Newby graduated from Wellesley College with a bachelor of arts in political science and economics in 1999.

“Thank you for your willingness to serve,” Commissioner Jim Gibson told her.

The appointment of Smith Newby, a government employee, comes despite an ongoing lawsuit that contends public workers are ineligible to serve in the Legislature based on the state constitution’s separation of powers doctrine.

But a Clark County District Court judge [ruled this month that certain public employees can serve in the Legislature](#), notwithstanding the constitutional language. The plaintiff in the case, the conservative think tank Nevada Policy Research Institute, [is appealing that ruling](#).

Contact Ricardo Torres-Cortez at rtorres@reviewjournal.com. Follow him on Twitter [@rickytwrites](#).

EXHIBIT “B”

Freshmen Orientation: Assemblyman Reuben D'Silva



Assemblyman Reuben D'Silva speaks with a reporter at Rancho High School in Las Vegas on Thursday, Dec. 15, 2022. (Daniel Clark/The Nevada Independent)

- Freshman Democrat born in Mumbai, India who succeeds Democratic Assemblyman Edgar Flores, who is now a Nevada state senator representing District 2.
- He is the first Indian-American assemblyman to serve in the Legislature.
- Represents Las Vegas area District 28, which includes Sunrise Manor and neighborhoods between Bonanza Road and parts of Cheyenne Avenue from Pecos Road to parts of North Hollywood Boulevard
- District 28 is heavily Democratic (43 percent Democratic, 13 percent Republican and 36 percent nonpartisan in the 2022 election).
- D'Silva defeated three other candidates in the 2022 Democratic primary, winning 64.4 percent of the vote.
- He then defeated Republican Clint Brown in the general election, carrying 66 percent of the vote.
- He sits on the Education, Government Affairs and Legislative Operations and Elections committees.

Family and education

D'Silva was born in Mumbai, India and his family moved to the United States in the late 1980s seeking opportunities to improve their lives.

He grew up in northeast Las Vegas from the age of 6 with his mother, who was undocumented, his father, who passed away in 2016 and had temporary legal status, and three siblings, who had mixed immigration statuses. D'Silva said at one point, his mother received a letter about being deported.

“It was one of those desperate moments in our family’s history,” he said.

D'Silva said it seemed as if no one wanted to help. But then-U.S. Sen. Richard Bryan, who later became governor, stepped in to assist, and his mother was not deported.

Had she been sent back to India, D'Silva and one of his brothers would have returned with her, as they were both undocumented at the time. His younger siblings would have stayed with his father because they were both born in America.

“This story is very common with a lot of immigrant families,” he said.

He and his family members later gained citizenship.

Before graduating from Rancho High School in 2003, D'Silva attended the private St. Christopher Catholic School in North Las Vegas for middle school and said the experience was “life-changing.”

“There’s nothing wrong with private school,” he said. “I’m a product of private schools ... I was around a lot of folks who were making a lot of bad decisions ... and I think Catholic school may have saved my life.”

He later attended the College of Southern Nevada but left during his first year to join the U.S. Marine Corps during the Iraq War. He was shot through the forearm during an attack in 2007, and was able to return fire to ward off the assailant, ensuring other troops’ safety.

He received the Purple Heart award from President George W. Bush.

D'Silva returned to Nevada after a year of recovery, earned citizenship through the military and pursued a bachelor’s degree in history at UNLV. He later received a master’s degree in global studies from the University of Pennsylvania and a second master’s degree from Yale University in comparative religion and politics. In those programs, he said he learned about the intersection of religion and lawmaking and how it shapes war and conflict, international affairs and national politics.

“[Religious doctrine] is everywhere,” he said. “Even in our domestic policies, the issues around the death penalty ... Should we be more about forgiving and rehabilitating people? Or should we be about an eye for an eye?”

D'Silva, a practicing Catholic, said his graduate school experience was fundamental to his personal growth, and that he learned from studying many faiths that "[different religious believers] have a lot more in common than what divides [them]."

Career

D'Silva has been a history teacher at his alma mater, Rancho High School, since 2013. He works with more than 200 students daily.

He was appointed by the late Sen. Harry Reid to the Nevada's Military Academy Selection Committee and later to the North Las Vegas Library District Board of Trustees by North Las Vegas City Councilman Isaac Barron.

Political career

D'Silva first ran for office in an attempt to unseat Democratic Rep. Dina Titus in Las Vegas' Congressional District 1 during the 2016 primary election. He lost by a wide margin but managed to pick up 21 percent of the vote.

After years of maintaining a high profile, and cultivating a following from curating student forums about various topics at UNLV as a member of Phi Beta Sigma Fraternity, Inc., it was no surprise to those who knew him to learn D'Silva would make another run for office, this time for the Assembly.

"I didn't want to run against any incumbent. That's what I did last time," he said. "And ... I saw that this was the right place for me to be."

D'Silva said the opportunity appeared promising after he had gained the "support, trust and faith" from residents in the area and current and former elected officials.

In the primary election, he beat his Democratic opponents by earning more than 60 percent of the vote and went on to secure the seat in the general election, beating his Republican opponent Clint Brown by 33 percent.

"Mr. D'Silva, now I really wish you would have lost your race," D'Silva said one of his students told him. "'You're going to be leaving us, and we don't want you to leave.'"

He said about 20 students helped him knock on doors in the neighborhoods surrounding Rancho High School during his campaign.

D'Silva said he is optimistic about his first legislative session and thinks Gov. Joe Lombardo wants to get things done. Democrats hold a majority in both the state Senate and Assembly, and he said he's not worried about seeing vetoes from the Republican governor.

"The [legislative] leadership is very much results-focused," D'Silva said. "The governor, too."

He said during training for new legislators in November, his new role set in as he entered the chambers in the legislative building in Carson City. D'Silva said he was able to forge relationships with his colleagues on both sides of the aisle.

On the issues

Education

D'Silva said five bills that he's proposing are based on strengthening education in Nevada. He said his No. 1 priority is incrementally increasing the yearly education budget by at least \$2 billion within the next 10 years, to match the national average per pupil dollars.

“It won't happen overnight,” he said. “It's just about how we go about it — session by session — working towards that goal.”

According to the U.S. Census Bureau, the national average per-student government spending is \$15,000 a year. Nevada ranks in the bottom three states, spending roughly \$10,000 per pupil, compared to states with a similar or lower cost of living such as Nebraska which exceeds the national average at nearly \$16,000 per student, or Michigan's \$14,000 per student.

D'Silva said easing the stress that educators endure should be a part of the solution as well and that he not only wants to increase teacher pay, but all wages for all public employees, with at least a 4 percent raise each year.

“We got some big fish to fry and some big battles to fight,” he said.

D'Silva wants to make teaching a more attractive and sustainable career by reducing class sizes, hiring thousands of educators and increasing instructional times by limiting non-instructional duties carried out by teachers, such as organizing students for school pictures, monitoring kids at recess or in hallways and attending school assemblies.

He said he is working on defining what instructional time “really means” in the K-12 system.

“From the vantage point of a teacher, there's all kinds of duties put on us, all kinds of stresses,” D'Silva said.

When it comes to school choice, D'Silva said he will not support the strategy until leaders “stop the bleeding.”

He said there is a place for school vouchers but that it is imperative to first fully fund the public education system because it has the “apparatus” to serve the whole community.

“There's no data that shows... we even have the actual structure within the private school sector to serve every at-risk child. The school district does,” D'Silva said. “They have the mechanisms and we need to support those first and foremost, if you're going to create an equitable solution to education long term.”

He said school vouchers do not directly fund the Clark County School District and he fears the money will be taken away from a struggling public school system that has “big problems,” if those dollars follow students to private schools.

In the 2022-2023 school budget created by CCSD, the financial officer projected a \$33 million loss in revenue “as a result of projected enrollment loss.”

D’Silva also wants to expand post-secondary educational benefits to the children of combat-wounded veterans with tuition waivers.

Health care

D’Silva is also interested in supporting bills that would allocate more money toward building an emergency center in the northeast valley after learning from residents that it was a concern. He said the desire to support a new “triage center” grew when he lost a former student, in September, to blood loss after he was stabbed in an altercation.

“Minutes matter,” he said.

D’Silva said the student was a reformed gang member who graduated high school and wanted more out of life. But last fall during a fight, he was stabbed and bled to death as loved ones drove him from a neighborhood near Nellis Air Force Base to North Vista hospital, more than nine miles away.

Public safety

D’Silva said he would like to see more boots on the ground, literally, with police foot patrols in northeast communities. As it relates to public safety, he believes trust and respect between residents and police officers is a pressing issue.

“It's not necessarily putting more police officers out there ... just getting them out in the community where people can see them and feel safe,” he said. “People can see you... and personalize you as a human being, and not as some [threatening police] vehicle about to roll up and possibly cause some issues.”

He credited the idea to policing strategies he said he witnessed in the Downtown Summerlin shopping complex, where he said officers get out of their vehicles to interact with individuals. D’Silva said he would like to see the same efforts in his district.

This story was updated at 3 p.m. on 1/12/23 to reflect that D'Silva said he returned fire in the 2007 attack, but did not kill the assailant.