

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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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 85935

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

**RESPONDENT LEGISLATURE'S REPLY IN SUPPORT OF
JOINDER IN RESPONDENT-LEGISLATORS' COUNTERMOTION
FOR LEGISLATIVE CONTINUANCE AS MATTER OF RIGHT
PURSUANT TO NRS 1.310**

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REPLY

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 reply in support of its joinder in Respondent-Legislators’ counter-motion for a legislative continuance as a matter of right pursuant to NRS 1.310.

I. Contrary to NPRI’s unsupported arguments being raised for the first time on appeal, this case cannot be treated as a pseudo-class action where the existing Respondent-Legislators can “adequately represent through their counsel the interests of all those similarly situated.”

In the district court, NPRI never argued that the existing Respondent-Legislators can “adequately represent through their counsel the interests of all those similarly situated” (*Opp’n & Reply at 4*), nor did NPRI move to certify this case as a class action under NRCP 23. To the contrary, by filing its motion for leave to file a second amended complaint to join additional defendants currently serving in dual roles, NPRI acknowledged that it had not named as defendants all the individuals currently serving in dual roles. Moreover, in its opposition and reply, NPRI acknowledges that “[j]oinder of members of the judiciary or others engaging in dual service . . . would have been feasible in the instant case” (*Opp’n & Reply at 5*), which means this case cannot be certified as a class action. NRCP 23(a)(1) (prohibiting class certification unless “the class is so numerous that joinder of all members is impracticable”). Yet, for the first time on appeal and

without citation to any authority, NPRI now argues that this case can be treated as a pseudo-class action where the existing Respondent-Legislators can “adequately represent through their counsel the interests of all those similarly situated.” (*Opp’n & Reply at 4*)

Without class certification, the existing Respondent-Legislators do not have and cannot exercise any authority to represent the interests of all other individual legislators and judges currently serving in dual roles. See Standard Fire Ins. Co. v. Knowles, 568 U.S. 588, 593 (2013) (explaining that, without class certification, a representative party of “a proposed class action cannot legally bind members of the proposed class”). Instead, to ensure that the interests of all other individual legislators and judges currently serving in dual roles are adequately represented, NPRI had the burden to join all those individual legislators and judges as necessary party-defendants who are needed for a just adjudication of this action as required by the Due Process Clause, NRC 19, and the Uniform Declaratory Judgments Act in NRS Chapter 30. See Martin v. Wilks, 490 U.S. 755, 765 (1989) (explaining that “[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.”).

Accordingly, despite NPRI’s attempts to characterize its failure to join all necessary party-defendants as a non-issue in this appeal, this Court cannot 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). Moreover, even assuming—as argued by NPRI—dismissal would not have been the appropriate remedy for the failure to join all necessary party-defendants, the district court still would not have been entitled to disregard such joinder and proceed to the merits because the appropriate course of action would have been for the district court to order such joinder. NRCP 19(a)(2). Otherwise, if the district court failed to order such joinder, 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, given that the existing Respondent-Legislators do not have and cannot exercise any authority to represent the interests of all other individual legislators and judges currently serving in dual roles, this Court must address, as a threshold matter in this appeal, whether the district court failed to order the joinder of all necessary party-defendants before this Court can review the merits of the dual-service issue.

II. Despite NPRI’s attempts to downplay the threshold issue of subject-matter jurisdiction, this Court must address that jurisdictional issue before it can review the merits of the dual-service issue.

In its opposition and reply, NPRI repeats the district court’s conclusion that NRS Chapter 41’s requirements apply only to tort actions (*Opp’n & Reply at 6*), even though this Court has held that those 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 finding that NPRI has public-importance standing, this Court recognized that NPRI brought this lawsuit against the individual Respondents arising from the performance of public duties in their official capacities as public employees with the state executive branch or with local governments, stating that NPRI “seeks to enforce a public official’s compliance with a public duty pursuant to the separation-of-powers clause.” Nev. Policy Research Inst. v. Cannizzaro, 138 Nev. Adv. Op. 28, 507 P.3d 1203, 1208 (2022). Because NPRI brought this lawsuit against the individual Respondents arising from the performance of public duties in their official capacities as public employees—and because they perform such public duties only on behalf of their state or local government employers—this lawsuit is effectively against those state or local government employers because it is an official-capacity lawsuit. Craig v. Donnelly, 135 Nev. 37, 39-40 (Nev. Ct. App. 2019). As such, NPRI was required to comply with NRS Chapter 41’s requirements to invoke the government’s waiver of sovereign immunity. Id.; Wayment v. Holmes, 112 Nev. 232, 237-38 (1996). Therefore, this Court must address, as a threshold matter in this appeal, whether the district court had the necessary subject-matter jurisdiction before this Court can review the merits of the dual-service issue.

III. NPRI has failed to meet its burden to warrant: (1) granting an exception to a legislative continuance as a matter of right under NRS 1.310; or (2) suspending any rules for expedited briefing and oral argument.

To warrant an exception to a legislative continuance as a matter of right, NPRI must prove that, as a direct result of emergency or extraordinary circumstances, it has a substantial existing right or interest that will be defeated or abridged, and it will suffer substantial and immediate irreparable harm if the continuance is granted. NRS 1.310(3). To meet its burden, NPRI argues that the public deserves expeditious resolution of the merits of the dual-service issue. However, as discussed previously, given the threshold issues of lack of subject-matter jurisdiction and failure to join all necessary party-defendants, it is unlikely that this Court can review the merits of the dual-service issue in this appeal. Moreover, given that public employees have been serving in the Legislature for over 100 years, NPRI has not proven emergency or extraordinary circumstances. Finally, NPRI alleges only general public harm if the continuance is granted. NPRI fails to prove how it has a substantial existing right or interest that will be defeated or abridged or how it will suffer substantial and immediate irreparable harm if the continuance is granted. To the contrary, after the legislative continuance ends, this Court can consider **all issues** in this appeal under its normal and ordinary appellate procedures without suspending any rules for expedited briefing and oral argument and without any irreparable harm to any existing rights or interests.

Therefore, this Court should deny NPRI's motion and grant Respondent-Legislators' countermotion.

DATED: This 1st day of February, 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 1st day of February, 2023, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Respondent Legislature's Reply in Support of its 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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