

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, an 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 Electronically Filed

Jun 12 2023 03:30 PM

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

Appeal from the Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Jessica K. Peterson

APPELLANT'S APPENDIX VOLUME 1 OF 3

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June 2023, I caused the foregoing **APPELLANT’S APPENDIX VOL. 1** to be served on all parties to this action via electronic mail to the following address(es):

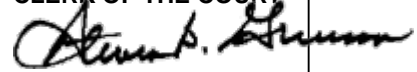
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/s/ Deborah L. Pressley
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Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: II

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

[Exemption from Arbitration Based on
Equitable Relief Requested]

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELINA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

NEVADA POLICY RESEARCH INSTITUTE (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby alleges and complains against NICOLE J. CANNIZZARO, KASINA DOUGLASS-BOONE, JASON FRIERSON, OSVALDO FUMO, HEIDI SEEVERS GANSERT, GLEN LEAVITT, BRITTNEY MILLER, DINA NEAL, JAMES OHRENSCHALL, MELANIE SCHEIBLE, TERESA BENITEZ-THOMPSON, JILL TOLLES, and SELINA TORRES (collectively herein “Defendants”), as follows:

FACTS COMMON TO ALL CLAIMS

1. NPRI files this Complaint for Declaratory and Injunctive Relief in the public interest to address the ongoing constitutional violations by Defendants, and each of them, for engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments.

2. The Nevada Constitution reads in relevant part:

The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislature, the Executive and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution. Nevada Const. Art. 3, §1, ¶1.

3. The rationale underlying the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 can be traced to the desires of the constitutional framers to encourage and preserve the independence and integrity of the actions and decisions of individual members of the Nevada State Legislature and to guard against conflicts of interest, concentration of powers, and dilution of the separation of powers.

4. Defendants' dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments expressly violates the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and undermines the ethics of their legislative service by creating conflicts, concentrating power, and diluting the separation of powers.

5. If allowed to proceed with the dual employment stated herein, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1. NPRI presents this action, pursuant to NRS 30.030, *et seq.*, and NRS 33.010, *et seq.*, respectively, and can and will fully advocate for: (1) the Court's declaration that it is unconstitutional for Defendants to engage in the dual employment stated herein, and (2) the Court's injunction to prevent Defendants from continuing to engage in the unconstitutional dual employment stated herein.

PARTIES

6. NPRI is a public interest nonprofit, nonpartisan corporation organized under the laws of the State of Nevada whose primary missions are to conduct public policy research and advocate for policies that promote transparency, accountability, and efficiency in government.

7. At all relevant times, Defendant Nicole J. Cannizzaro has simultaneously held the elected office of Nevada State Senator and the paid government position of Chief Deputy District Attorney for the County of Clark, State of Nevada.

8. At all relevant times, Defendant Kasina Douglass-Boone has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Social Worker Mental Health Specialist for the Clark County School District.

1 9. At all relevant times, Defendant Jason Frierson has simultaneously held the elected
2 office of Nevada State Assemblyperson and the paid government position of Assistant Public
3 Defender for the County of Clark, State of Nevada.

4 10. At all relevant times, Defendant Osvaldo Fumo has simultaneously held the elected
5 office of Nevada State Assemblyperson and the paid government position of Adjunct Instructor for
6 the University of Nevada, Las Vegas.

7 11. At all relevant times, Defendant Heidi Seevers Gansert has simultaneously held the
8 elected office of Nevada State Senator and the paid government position of Executive Director,
9 External Relations for the University of Nevada, Reno.

10 12. At all relevant times, Defendant Glen Leavitt has simultaneously held the elected
11 office of Nevada State Assemblyperson and the paid government position of Public Affairs Analyst
12 for the Regional Transportation Commission.

13 13. At all relevant times, Defendant Brittney Miller has simultaneously held the elected
14 office of Nevada State Assemblyperson and the paid government position of Teacher for the Clark
15 County School District.

16 14. At all relevant times, Defendant Dina Neal has simultaneously held the elected office
17 of Nevada State Assemblyperson and the paid government position of Adjunct Professor for the
18 Nevada State College.

19 15. At all relevant times, Defendant James Ohrenschall has simultaneously held the
20 elected office of Nevada State Senator and the paid government position of Deputy Public Defender
21 for the County of Clark, State of Nevada.

22 16. At all relevant times, Defendant Melanie Scheible has simultaneously held the elected
23 office of Nevada State Senator and the paid government position of Deputy District Attorney for the
24 County of Clark, State of Nevada.

25 17. At all relevant times, Defendant Teresa Benitez-Thompson has simultaneously held
26 the elected office of Nevada State Assemblyperson and the paid government position of Adjunct
27 Professor for the University of Nevada, Reno.
28

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

19. At all relevant times, Defendant Selena Torres has simultaneously held the elected office of Nevada State Assemblyperson and the paid government position of Teacher for the Clark County School District.

JURISDICTION AND VENUE

20. The Court has jurisdiction over all parties, where Plaintiff conducts business in the County of Clark, State of Nevada, and all Defendants either reside in or carry out the duties of their elected offices throughout the State of Nevada, including in the County of Clark.

21. Venue is appropriate because the events giving rise to Plaintiff's causes of action have occurred, and continue to occur, in the County of Clark, State of Nevada.

FIRST CAUSE OF ACTION

Violation of Separation of Powers (Declaratory Relief)

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

23. There is an actual controversy between Plaintiff, acting in the public interest, and the Defendants and each of them, as to the meaning of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and its application to Defendants and their conduct. Plaintiff has taken the position that Defendants are persons simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments in violation of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1. Upon information and belief, Defendants disagree with Plaintiff's position stated above.

24. Plaintiff seeks relief pursuant to NRS 30.010, *et seq.*, in the form of a declaration that Defendants simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments violates the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1. A declaration resolving the actual controversy between Plaintiff and

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

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

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

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

27. Defendants are persons simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments in violation of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1.

28. Without this Court's intervention, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, §1, ¶1, and irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada Constitution.

29. There exists no adequate remedy at law to prevent the constitutional violation caused by Defendants simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments in violation of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1.

30. Plaintiff, acting in the public interest, is entitled to injunctive relief to stop and prevent the Separation of Powers violations by Defendants stated herein. The Court has the power to grant such relief, pursuant to its inherent ability to grant equitable relief and the provisions of NRS 33.010, *et seq.*

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

///

///

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

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

6 2. For an injunction against Defendants prohibiting each and every one of them from
7 continuing to simultaneously hold elected offices in the Nevada State Legislature and paid positions
8 with Nevada State or local governments in violation of the Separation of Powers requirement of
9 Nevada Const. Art. 3, §1, ¶1;

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

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

12 Dated this 28th day of July, 2020.

13 **FOX ROTHSCHILD LLP**

14
15 By: /s/ Deanna L. Forbush

16 DEANNA L. FORBUSH, ESQ.

17 Nevada Bar No. 6646

18 COLLEEN E. MCCARTY, ESQ.

19 Nevada Bar No. 13186

20 1980 Festival Plaza Dr., Suite 700

21 Las Vegas, Nevada 89135

22 Telephone: (702) 262-6899

23 Attorneys for Plaintiff

24 Nevada Policy Research Institute

AFFIDAVIT OF SERVICE

DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
dual employment with the Nevada State Senate and
Clark County District Attorney; et al.,

Defendant(s)

Case No.:A-20-817757-C

DEANNA L. FORBUSH, ESQ., Bar No. 6646

FOX ROTHCHILD, LLP

1980 Festival Plaza Drive Suite 700

Las Vegas, NV 89135

(702) 262-6899

Attorneys for the Plaintiff(s)

Client File# 189864.00021

I, Judith Mae All, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That on 9/15/2020 at 5:10 PM at 3217 Brautigan Court, North Las Vegas, NV 89032 I served Dina Neal with the above-listed documents by personally delivering a true and correct copy of the documents by leaving with Tuwaski Simmons whose relationship is Son/Co-Resident, a person of suitable age and discretion residing at the defendants usual place of abode.

That the description of the person actually served is as follows:

Gender: Male, Race: African American, Age: 18+ yrs., Height: 5'10", Weight: 180 lbs., Hair: Black, Eyes:Brown/Glasses, Marks: Mustache/Goatee

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/17/2020

Judith Mae All

Judith Mae All
Registered Work Card# R-040570
State of Nevada

(No Notary Per NRS 53.045)

Service Provided for:

Nationwide Legal Nevada, LLC

626 S. 7th Street

Las Vegas, NV 89101

(702) 385-5444

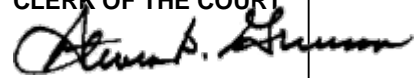
Nevada Lic # 1656



Control #:NV230882

Reference: 189864.00021

AA000008



1 **AOS**

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13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
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Defendants.

AFFIDAVIT OF SERVICE

DISTRICT COURT CLARK COUNTY
CLARK COUNTY, STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
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Plaintiff(s)

v.

NICOLE J. CANNIZZARO, an individual engaging in
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Defendant(s)

Case No.:A-20-817757-C

DEANNA L. FORBUSH, ESQ., Bar No. 6646

FOX ROTHCHILD, LLP

1980 Festival Plaza Drive Suite 700

Las Vegas, NV 89135

(702) 262-6899

Attorneys for the Plaintiff(s)

Client File# 189864.00021

I, Judith Mae All, being sworn, states: That I am a licensed process server registered in Nevada. I received a copy of the Summons-Civil; Amended Complaint For Declaratory And Injunctive Relief, from FOX ROTHCHILD, LLP

That on 9/1/2020 at 1:48 PM at 2200 S. Ft. Apache Road, Unit 2127, Las Vegas, NV 89117 I served Brittney Miller with the above-listed documents by personally delivering a true and correct copy of the documents by leaving with Brittney Miller.

That the description of the person actually served is as follows:

Gender: Female, Race: Caucasian/Mix, Age: 30's, Height: 5'5", Weight: 140 lbs., Hair: Black, Eyes:Brown

I being duly sworn, states: that all times herein, Affiant was and is over 18 years of age, not a party to or interested in the proceedings in which this Affidavit is made. I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/3/2020

Judith Mae All
Registered Work Card# R-040570
State of Nevada

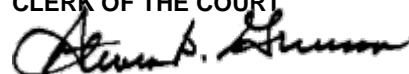
(No Notary Per NRS 53.045)

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626 S. 7th Street
Las Vegas, NV 89101
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Nevada Lic # 1656



Control #:NV230883
Reference: 189864.00021

AA000011



Affidavit of Publication

STATE OF NEVADA }
COUNTY OF CLARK } SS

I, Scott Sibley state:

That I am Publisher of the Nevada Legal News, a daily newspaper of general circulation, printed and published in Las Vegas, Clark County, Nevada; that the publication, a copy of which is attached hereto, was published in the said newspaper on the following dates:

Nov 12, 2020
Nov 19, 2020
Nov 25, 2020
Dec 03, 2020
Dec 10, 2020

That said newspaper was regularly issued and circulated on those dates. I declare under penalty of perjury that the foregoing is true and correct.

DATED: Dec 10, 2020



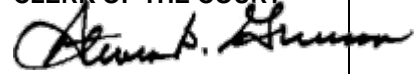
Scott Sibley

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DISTRICT COURT
CLARK COUNTY, NEVADA
Case No.: A-20-817757-C Dept. No.: II
NEVADA POLICY RESEARCH INSTITUTE, a Nevada domestic nonprofit corporation, Plaintiff,
vs. NICOLE J. CANNIZZARO, an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; KASINA DOUGLASS-BOONE, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; JASON FRIERSON, an individual engaging in dual employment with the Nevada State Assembly and Clark County Public Defender; OSVALDO FUMO, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Las Vegas; HEIDI SEEVERS GANSERT, an individual engaging in dual employment with the Nevada State Senate and University of Nevada Reno; GLEN LEAVITT, an individual engaging in dual employment with the Nevada State Assembly and Regional Transportation Commission; BRITTNEY MILLER, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; DINA NEAL, an individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District, Defendants.

SUMMONS - CIVIL
NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU FILE A RESPONSE WITH THE COURT WITHIN 21 DAYS. READ THE INFORMATION BELOW CAREFULLY. TO THE DEFENDANT: JAMES OHRENSCHALL A civil Complaint has been filed by the Plaintiff against you for the relief set forth in the Complaint. Object of Action: This is a Complaint for Declaratory and Injunctive Relief. 1. If you intend to defend this lawsuit, within 21 calendar days after this Summons is served on you, exclusive of the day of service, you must: a. File with the Clerk of the Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, and the appropriate filing fee. b. Serve a copy of your response upon the attorney whose name and address is shown below. 2. Unless you respond, your default will be entered upon application of the Plaintiff and failure to so respond will result in a judgment of default against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint. 3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time. 4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint. STEVEN D. GRIERSON, CLERK OF THE COURT, By: Demond Palmer, Deputy Clerk, Date 8/3/2020, Regional Justice Center, 200 Lewis Avenue, Las Vegas, NV 89155, Submitted by: FOX ROTHSCHILD LLP, By: DEANNA L. FORBUSH, ESQ., Nevada Bar No. 6646, dforbush@foxrothschild.com, COLLEEN E. MCCARTY, ESQ., Nevada Bar No. 13186, cmccarty@foxrothschild.com, 1980 Festival Plaza Drive, Suite 700, Las Vegas, Nevada 89135, Telephone: (702) 262-6899, Facsimile: (702) 597-5503, Attorneys for Plaintiff, Nevada Policy Research Institute
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Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

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

**NSHE DEFENDANT DINA NEAL'S
MOTION TO DISMISS
PURSUANT TO NRCP 12(b)(5)**

HEARING REQUESTED

1 **NSHE DEFENDANT DINA NEAL’S MOTION TO DISMISS**

2 Defendant Dina Neal (“Neal” also referred to as “NSHE Defendant”), sued herein as an
3 employee of Nevada State College, hereby moves to dismiss Plaintiff Nevada Policy Research
4 Institute’s (“NPRI”) Amended Complaint for Declaratory and Injunctive Relief on the basis that it fails
5 to state a claim upon which relief can be granted in favor of NPRI or against NSHE Defendant.

6 This motion is brought pursuant to NRCP 12(b)(5) and is based upon the following
7 memorandum of points and authorities, all of the pleadings and documents on file herein, and any
8 argument to be made at a hearing, if any.

9
10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. INTRODUCTION**

12
13 Even legislators have a right to earn a living. As a matter of law, NSHE Defendant Neal does
14 not exercise any powers of the executive branch by virtue of her employment as an adjunct professor at
15 Nevada State College. She does not engage in any functions that would trample on the Constitution
16 and, therefore, there is no violation of the separation of powers clause.

17 A person can only be in violation of the separation of powers clause if, while serving in one
18 branch, she exercises a sovereign function relating to another branch. The only person who can exercise
19 a sovereign function is a public officer. By law, the only individuals within the Nevada System of
20 Higher Education who are public officers are members of the Board of Regents. In addition, under the
21 Nevada Ethics in Government Law (“Ethics Law”) in NRS Chapter 281A, the presidents of the colleges
22 and universities are considered public officers only for the limited purpose of the Ethics Law. NEV.
23 REV. STAT. § 281A.182(1), (6). Neal is neither a regent nor a president, she cannot exercise sovereign
24 functions and, accordingly, her employment does not violate the separation of powers clause.

25 Therefore, this case should be dismissed because there is no viable claim for a violation of the
26 separation clause of the Nevada Constitution.

27 // //

28 // //

II. STATEMENT OF FACTS

The Amended Complaint asserts two causes of action, one for Declaratory Relief and one for Injunctive Relief, both premised on the claim that simultaneously holding positions in separate branches of the government violates the separation of powers doctrine. (*See* Am. Compl.)

The Amended Complaint alleges that Dina Neal is an Adjunct Professor for Nevada State College (*Id.* ¶ 14. Beyond describing Neal as an adjunct professor, however, the Amended Complaint contains no allegations as to her duties as an employee of an NSHE institution.

Nor does the Amended Complaint allege that the position held by NSHE Defendant is created by the Nevada Constitution or by statute, or that adjunct professor positions are “public officer” positions. Adjunct professors by their very titles are not “public officers” in that they are not members of the Board of Regents of NSHE (“Board of Regents”) and they are not college or university presidents who are considered public officers only for the limited purpose of the Ethics Law.

III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (NRCP 12(B)(5))

A. Legal Standard

Nevada Rule of Civil Procedure 12(b)(5) requires the Court to dismiss a complaint that fails to state a claim upon which relief can be granted. Dismissal is appropriate where Plaintiff “could prove no set of facts, which, if true, would entitle it to relief.” *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 226–227, 181 P.3d 670, 672 (2008).

When considering a Rule 12(b)(5) motion to dismiss, the Court will construe the pleading liberally and consider well-pled factual allegations as though they were true. *Buzz Stew*, 124 Nev. at 226–227, 181 P.3d at 672. But a plaintiff cannot survive a motion to dismiss when its “complaint is replete with generalizations and conclusory matter.” *Sproul Homes of Nev. v. State*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980).

A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). A court may properly take judicial notice of factual information “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

questioned.” NEV. REV. STAT. § 47.130; *see also Mack v. Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). Accordingly, it is appropriate to take judicial notice of information made publicly available on a governmental website. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-999 (9th Cir. 2010).

B. Analysis

1. Plaintiff cannot state a claim for violation of the separation clause of the Nevada Constitution

NPRI brings this suit under Article 3 of the Nevada Constitution, which provides:

The powers of the Government of the State of Nevada shall be divided into three separate departments, — the Legislative, — the Executive and the Judicial; and no persons 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.

NEV. CONST. art. III, §1, cl. 1. NPRI’s lawsuit is fatally flawed because this provision has been interpreted to prohibit *public officials or officers*, as opposed to mere *public employees*, from holding positions in separate branches of government.

Moreover, there is well-established case law to support the tenet that public employees do not generally exercise sovereign functions. *See State ex rel. Kendall v. Cole*, 38 Nev. 215, 229 (1915); *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21 (1953) (finding a public office distinguishable from other forms of employment in that its holder has, by the sovereign, been invested with some portion of the sovereign functions of government); *Eads v. City of Boulder City*, 94 Nev. 735, 737 (1978). Public officers are the only persons who exercise the sovereign functions of state government and, therefore, only public officers can be in violation of Article 3 and the separation of powers clause. *See* NEV. CONST. art. III, §1, cl. 1; *Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at 737.

a. NSHE Defendant is not public official or officer

For purposes of the Amended Complaint, the issue is whether the NSHE Defendant’s position is one of a public officer or one of public employment. *See Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at 737. The Amended Complaint merely alleges that Defendant Neal is an adjunct professor. It does not allege that the NSHE Defendant is a member of the NSHE Board of Regents or a college or university president who is considered a public officer only for the limited purpose of the Ethics Law. It does not allege that NSHE Defendant serves in a position created by law or that she exercises sovereign duties of the executive branch. The Amended Complaint contains no factual allegations from

1 which the Court could infer that NSHE Defendant holds a position that would cause her to fall under
2 the constitutional prohibition NPRI seeks to enforce.

3 The definition of public officer can be found in both case and statutory law. The case law
4 establishes two guiding principles in defining a public officer. First, a public officer must serve in a
5 position created by law. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117 Nev. 195, 200, 18 P.3d 1042,
6 1046 (2001) (citing *Mathews*, 70 Nev. at 120-121). Second, the duties of a public officer must be fixed
7 by law and must involve an exercise of the sovereign functions of the state. *DR Partners*, 117 Nev. at
8 200 (citing *Kendall*, 38 Nev. at 224). Both of these principles must be satisfied before a person is
9 deemed a public officer. *See Mullen v. Clark Cnty.*, 89 Nev. 308, 310-311 (1973).

10 Nevada Revised Statutes (“NRS”) 281.005(1) states that a public officer is a person elected or
11 appointed to a position which: (a) is established by the Constitution or a statute of this State, or by a
12 charter or ordinance of a political subdivision of this State; and (b) involves the continuous exercise, as
13 part of the regular and permanent administration of the government, of a public power, trust or duty.
14 NEV. REV. STAT. § 281.005(1). The case law and statute can be read in harmony because NRS
15 281.005(1)(a) encompasses the fundamental principle that a public officer is created by law, and NRS
16 281.005(1)(b) encompasses the fundamental principle that a public officer’s duties are fixed by law and
17 involve an exercise of the state’s sovereign power. *See DR Partners*, 117 Nev. at 201, 18 P.3d at 1047.

18 Plaintiff does not allege that the NSHE Defendant’s position is established by the Nevada
19 Constitution or by statute. This is because Plaintiff cannot make this allegation. In *DR Partners*, the
20 Supreme Court determined that only the Board of Regents hold positions established by the Constitution
21 or a statute of the state. *See DR Partners*, 117 Nev. at 205, 18 P.3d at 1048 (“the sovereign functions of
22 higher education repose in the Board of Regents, which has been constitutionally entrusted to control
23 and manage the University”). After *DR Partners* was decided, the legislature enacted NRS 281A.182
24 which provides that a president of a university, state college or community college within the NSHE
25 system is also considered a public officer only for the limited purpose of the Ethics Law.¹ NEV. REV.
26 STAT. § 281A.182(1), (6). Hence, only the members of the Board of Regents are public officers, and
college or university presidents are considered public officers only for the limited purpose of the Ethics
Law.

27 ¹ In designating college or university presidents as public officers only for the limited purpose of the Ethics Law,
28 NRS 281A.182 expressly provides that such a designation: (1) does not make the person a public officer for the purposes
of any other law or for any other purposes; and (2) must not be used, interpreted or applied in any manner to establish,
suggest or prove that the person is a public officer for the purposes of any other law or for any other purposes. NEV. REV.
STAT. § 281A.182(6).

1 Further, Plaintiff does not allege that NSHE Defendant is a member of the Board of Regents nor
2 has it alleged that Neal is a college or university president who is considered a public officer only for
3 the limited purpose of the Ethics Law. Again, this is because NPRI cannot make these allegations. The
4 Court can take judicial notice of the current elected members of the Board of Regents as posted on
5 NSHE's website (www.nshe.nevada.edu), and see that NSHE Defendant is not a current Board member.
6 See NEV. REV. STAT. § 47.130; NEV. REV. STAT. § 47.150; *FTC v. AMG Servs.*, No. 2:12-cv-00536-
7 GMN-VCF, 2014 U.S. Dist. LEXIS 10490, *45-46, n. 5 (D. Nev. Jan. 28, 2014) (allowing judicial
8 notice of information posted on government websites as it can be "accurately and readily determined
9 from sources whose accuracy cannot reasonably be questioned"); *Daniels-Hall v. Nat'l Educ. Ass'n*,
10 629 F.3d 992, 998-999 (9th Cir. 2010) ("It is appropriate to take judicial notice of this information, as it
11 was made publicly available by government entities."). Additionally, the Court can take judicial notice
12 of the current president of Nevada State College (www.nsc.edu) to demonstrate that Neal is not
13 president. *Id.* Hence, NPRI cannot meet the first tenet of establishing Neal's position is one of a public
14 officer because it cannot prove she is a member of the Board of Regents or a university or college
15 president who is considered a public officer only for the limited purpose of the Ethics Law.

16 The *Mathews* case further illustrates why the NSHE Defendant's position is not one of a public
17 officer. In *Mathews*, the government employee was the director of the Driver's License Division. The
18 Nevada Supreme Court determined that Mathews was not a public officer because his position was
19 created by administrative authority and not by statute, and the position was wholly subordinate and
20 responsible to the administrator of the department. *Mathews*, 70 Nev. at 122-123, 258 P.2d at 983.
21 The Nevada Supreme Court reasoned that if the position was wholly subordinate and responsible to the
22 administrator, the position was not created by law, the duties attached to the position had not been
23 prescribed by law and the person holding the position was not independent in exercising his or her duties.
24 *Mathews*, 70 Nev. at 123, 258 P.2d at 983. As such, the position had not been invested with any portion
25 of the sovereign functions of the government. *Id.*

26 All that can be inferred from the Amended Complaint is that Neal's position as adjunct faculty
27 is even more tenuous than the director in the *Mathews* case. There is no allegation that the adjunct
28 position was created by law or that the position has constitutional responsibilities. "Adjunct" implies
subordinate positions subject to modification or elimination. Nothing about the term suggests
permanency. Absent factual allegations to demonstrate that adjuncts are constitutional officers, the most
generous interpretation of the Amended Complaint is that Neal is a public employee, not a public officer.

1 **b. NSHE Defendant does not exercise sovereign functions**

2 NPRI also cannot establish that Neal's position is one of a public officer under the second tenet,
3 which states that duties of a public officer must be fixed by law and must involve an exercise of the
4 sovereign functions of the state. *DR Partners*, 117 Nev. at 201, 18 P.3d at 1047. NPRI did not allege
5 that NSHE Defendant's duties were fixed by law and that they involved the exercise of the sovereign
6 functions of the state. Even if NPRI had made these allegations, they would not save its claim as case
7 law and statutory law make it clear that the NSHE Defendant's position exercises no sovereign
8 functions. Sovereign functions can only be exercised by public officers, not public employees. *See*
9 *Kendall*, 38 Nev. at 229; *Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at 737. Only the members of
10 the Board of Regents are public officers for the NSHE System, and college or university presidents are
11 considered public officers only for the limited purpose of the Ethics Law. *DR Partners*, 117 Nev. at
12 201, 18 P.3d at 1047; NRS 281A.182.

13 The University of Nevada, Reno and Senator Heidi Gansert recently made this argument, and
14 the First Judicial District Court agreed. In *French v. Gansert*, the Court explained the distinction
15 between simply being a public employee and exercising powers such that one's employment would be
16 restricted by the separation of powers clause. In that case, Plaintiff Douglas E. French brought suit
17 against Nevada State Senator Heidi Gansert and University of Nevada, Reno advancing a virtually
18 identical argument by NPRI attorneys regarding the defendants' alleged violation of the Nevada
19 Constitution. *French v. Gansert*, First Amended Complaint, ¶13, attached hereto as Exhibit 1 and
20 incorporated by reference herein. Specifically, French alleged "Defendant Gansert's employment in a
21 Nevada State Executive Branch position expressly violates the Nevada Constitution and undermines the
22 public interest and liberty by diluting the separation of powers, concentrating power, creating conflicts
23 of interests and appearances thereof." Exhibit 1, ¶13. Plaintiff French sought declaratory relief on the
24 basis that Defendant Gansert held the Nevada executive branch position of Executive Director of
25 External Relations for the University of Nevada, Reno while concurrently serving as a Senator in the
26 Nevada Legislature, thus directly violating Art. 3. § 1. of the Nevada Constitution." Exhibit 1, ¶15.

27 Finding French's allegations untenable, the Court dismissed French's Complaint. A copy of the
28 full Order, dated August 3, 2017 is attached hereto as Exhibit 2 and incorporated herein by reference.
In the order of dismissal, Judge Russell analyzed the issue as follows:

 "By its own terms, Article 3, Section 1(1) does not prohibit all persons in one
branch from exercising any function related to another branch. The limitation on
exercising any function only applies to those persons who are charged with the

1 exercise of powers given to the departments or branches of government. These
2 departments are each charged by other parts of the Constitution with certain duties and
3 functions and it is to these constitutional duties and functions to which the prohibition
4 in Article 3, Section 1(1) refers. *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P.437 439
(Nev. 1893).

5 “Not every employee in a branch is charged with these constitutional powers, duties
6 and functions. Public employees, as distinguished from public officials or officers, do
7 not exercise functions or powers of the state. See, *State ex rel. Kendall v. Cole*, 38
8 Nev. 215, 9, 148 P. 551, 553 (1915); *State ex rel. Mathews v. Murray*, 70 Nev. 116,
9 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder City*, 94 Nev. 735, 737,
10 587 P.2d 39, 41 (1978). Public officers are the only persons who exercise the
11 sovereign functions of state government. *Mathews*, 70 Nev. at 120-21, 258 P.2d at
12 983. This is because public employees have not been invested by the State with some
13 portion of the powers, duties and functions of the government. *Mathews*, 70 Nev. at
14 120-21, 258 P.2d at 983; *Kendall*, 38 Nev. at 229, 148 P. at 553 (“To be an officer,
15 one must be charged by law with duties involving the exercise of some part of the
16 sovereign power of the state”).

17 “The case law describing public officials is consistent with the statutory law. NRS
18 281.005(1) states that a public officer is a person elected or appointed to a position
19 which: (a) Is established by the Constitution or a statute of this State, or by a charter
20 or ordinance of a political subdivision of this State; and (b) involves the continuous
21 exercise, as part of the regular and permanent administration of the government, of a
22 public power, trust or duty. NRS 281.005(1).

23 “Defendant [sic] French does not allege that Defendant Gansert’s position is
24 established by the Nevada Constitution, by statute or is a public officer position.
25 Defendant Gansert’s position as Executive Director, External Relations is not a public
26 office. **There are only two groups of people in NSHE that have been determined
27 to be public officers: members of the Board of Regents and presidents of the
28 universities, state colleges and community colleges.** *Univ. & Cmty. Coll. Sys. v. DR
Partners*, 117 Nev. 195, 205, 18 P.3d 1042, 1048 (2001) (“the sovereign functions of
higher education repose in the Board of Regents, which has been constitutionally
entrusted to control and manage the University”); NRS 281A.182 (a president of a
university, state college or community college within the NSHE system is a public
officer for purpose of Chapter 281A).” (emphasis added)

24 The same result is required here. The Amended Complaint in this matter merely alleges that
25 NSHE Defendant Neal is an adjunct professor. It does not allege that NSHE Defendant is an officer or
26 public official. It does not allege that she exercises constitutional or sovereign powers of the executive
27 branch of the state. Moreover, the Amended Complaint is completely devoid of any factual allegations
28 describing the job duties and responsibilities of NSHE Defendant such that there is no factual basis
from which to draw an inference that NSHE Defendant falls into the category of public officer to which

1 the constitutional prohibition stated in Article 3, §1, ¶1 would apply. And of course, NSHE Defendant
2 is neither a member of the Board of Regents nor the president of her institution who is considered a
3 public officer only for the limited purpose of the Ethics Law. Due to the absence of any allegations
4 that NSHE Defendant is a public official or that she exercises sovereign or constitutional powers, and
5 because there are no factual allegations from which such conclusions might reasonably be drawn, the
6 Amended Complaint is deficient and defective and must be dismissed for failure to state a claim.

7 **V. CONCLUSION**

8 NPRI's Amended Complaint must be dismissed as to NSHE Defendant Dina Neal. The
9 Amended Complaint is devoid of any allegations that NSHE Defendant Neal is a public officer to whom
10 the constitutional provision in question would apply. The law is clear that the separation of powers
11 doctrine applies only to public officials or officers, or those who are entrusted by law to exercise
12 sovereign powers. The Amended Complaint merely alleges that Defendant Neal is an adjunct professor
13 without any further factual allegation that would bring Defendant Neal within the purview of Article 3
14 of the Nevada Constitution. Absent such factual allegations, the Amended Complaint fails and must be
15 dismissed.

16
17 Respectfully submitted this 30th day of June, 2022.

18
19 /s/ Berna L. Rhodes-Ford
20 BERNAL RHODES-FORD
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*Attorney for Defendant
Dina Neal*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of General Counsel for Nevada State College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party to the within cause. Pursuant to NRCP 5, I further certify that on June 30, 2022, I caused the following document, **NSHE DEFENDANT DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)**, to be served as follows:



BY ELECTRONIC SERVICE Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail to the attorneys listed below at the address indicated below.

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BY MAIL I caused such envelope(s) with first class postage thereon fully prepaid to be placed in the U.S. Mail in Henderson, Nevada.

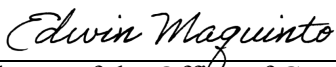

An employee of the Office of General Counsel
Nevada State College

EXHIBIT 1

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10 Attorney for Petitioner

11 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR CARSON CITY**

13 DOUGLAS E. FRENCH,

14 Plaintiff,

15 vs.

16 HEIDI GANSERT in her official capacity as Executive Director,
17 External Relations for the University of Nevada, Reno;
18 UNIVERSITY OF NEVADA, RENO; NEVADA SYSTEM OF
19 HIGHER EDUCATION; NEVADA BOARD OF REGENTS;
20 and the STATE OF NEVADA on Relation to The Nevada
21 System of Higher Education, The Nevada Board of Regents, and
22 the University of Nevada, Reno;

23 Defendants.

Case No.: 1700000231B

Dept. No. I

24 **FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE**
25 **RELIEF**

26 For his Complaint, Plaintiff alleges:

27 1. On or about February 6, 2017, Defendant, HEIDI GANSERT, began service in the
28 Nevada Legislature, as a Nevada State Senator, despite concurrently holding a position in the Executive
Branch of the State of Nevada, contrary to The Constitution of Nevada Art. 3, §1, ¶1.

///

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MAY 03 2017

University of Nevada, Reno
General Counsel

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SUSAN MERRIWETHER

J. HARKLEROD

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3. Venue lies in this Court pursuant to NRS 13.020 because the Defendant, STATE OF NEVADA in Relation to The Nevada System of Higher Education, The Nevada Board of Regents, and the University of Nevada, Reno (hereinafter “NEVADA”) resides in Carson City, Nevada.

4. Plaintiff (hereinafter “FRENCH”) is a resident of Las Vegas, Nevada, a citizen of the United States, a Nevada taxpayer and not a debtor in bankruptcy. He is duly qualified, holds the job requirements for and earnestly seeks the position of Executive Director, External Relations at the University of Nevada, Reno, currently held by Defendant HEIDI GANSERT.

6. Defendant UNIVERSITY OF NEVADA, RENO (hereinafter “UNR”) resides in Reno, Nevada and UNR, pursuant to NRS § 12.105, is named as a Defendant herein as a sub-unit of the Nevada System of Higher Education and as an employer of Defendant GANSERT, despite Defendant GANSERT’s concurrent service as a Senator in the Seventy-ninth Session of the Nevada State Legislature.

1 7. Defendant NEVADA SYSTEM OF HIGHER EDUCATION, (hereinafter "NSHE") is
2 named as a Defendant herein as a governing body of the University of Nevada, Reno, a sub-unit of the
3 Nevada System of Higher Education, and as an employer of Defendant GANSERT, despite Defendant
4 GANSERT's concurrent service as a Senator in the Seventy-ninth Session of the Nevada State
5 Legislature.
6

7 8. Defendant NEVADA BOARD OF REGENTS, (hereinafter "NBOR"), is named as a
8 Defendant herein as a governing body of the Nevada System of Higher Education and the University of
9 Nevada, Reno, a sub-unit of the Nevada System of Higher Education, and as an employer of Defendant
10 GANSERT, despite Defendant GANSERT's concurrent service as a Senator in the Seventy-ninth
11 Session of the Nevada State Legislature.
12

13 9. Defendant STATE OF NEVADA on relation to The Nevada System of Higher
14 Education, The Nevada Board of Regents, and the University of Nevada, Reno (hereinafter
15 "NEVADA") resides in Carson City, Nevada and, pursuant to NRS § 12.105, is named as a Defendant
16 herein as an employer of Defendant GANSERT, despite Defendant GANSERT's concurrent service as a
17 Senator in the Seventy-ninth Session of the Nevada State Legislature.
18

19 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

20 10. On or about February 6, 2017, Defendant GANSERT was sworn-in to the Seventy-ninth
21 Session of the Nevada Legislature, despite holding a position as an employee of the Nevada Executive
22 Branch.
23

24 11. The Nevada Constitution reads, in relevant part: "The powers of the Government of the
25 State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the
26 Judicial; and no persons charged with the exercise of powers properly belonging to one of these
27
28

1 departments shall exercise *any functions*, appertaining to either of the others. . .” Nevada Const. Art. 3,
2 §1, ¶1 (emphasis added).

3 12. The rationale underlying the Separation of Powers provision can be traced to the desire of
4 the constitutional framers to encourage and preserve independence and integrity of action and decision
5 on the part of individual members of the Nevada state government and to guard against conflicts of
6 interest, self-aggrandizement, concentration of power, and dilution of separation of powers.
7

8 13. Defendant GANSERT’s employment in a Nevada State Executive Branch position
9 expressly violates the Nevada Constitution and undermines the public interest and liberty by diluting the
10 separation of powers, concentrating power, creating conflicts of interests and appearances thereof.
11

12 **FIRST CLAIM FOR RELIEF**

13 (Declaratory and Injunctive Relief – Violation of Nevada Constitution, Art. 3, §1, ¶1)

14 14. Plaintiff hereby incorporates Paragraphs 1 through 13 as though fully set out herein.

15 15. Defendant GANSERT holds the Nevada executive branch position of Executive Director
16 of External Relations for the University of Nevada, Reno while concurrently serving as a Senator in the
17 Nevada Legislature, thus directly violating Art. 3, §1, ¶1 of the Nevada Constitution.
18

19 16. This constitutional violation by Defendants harms the public interest of all Nevadans
20 including Plaintiff FRENCH as well as Plaintiff FRENCH’s legally protectable interests both as he is
21 earnestly seeking and is qualified for the executive branch position currently held by Defendant
22 GANSERT and as a Nevada taxpayer whose taxes are being expended unconstitutionally.
23

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff prays that this Court:

26 1. Declare that Defendant GANSERT, by holding a Nevada executive branch position while
27 concurrently serving in the Seventy-ninth Session of the Nevada Legislature, and/or the UNIVERSITY
28

1 OF NEVADA, RENO; NEVADA SYSTEM OF HIGHER EDUCATION; NEVADA BOARD OF
2 REGENTS; and the STATE OF NEVADA on Relation to The Nevada System of Higher Education, The
3 Nevada Board of Regents, and/or the University of Nevada, Reno, by employing Defendant GANSERT
4 while she concurrently serves in the Nevada Legislature, violate the Nevada Constitution, Art. 3, §1, ¶1.

5
6 2. Enjoin Defendant GANSERT from continuing in her Nevada executive branch
7 employment position and from retaining any monetary or employment benefits derived from said
8 position from such time as she began serving in the Nevada Legislature and/or enjoin the UNIVERSITY
9 OF NEVADA, RENO; NEVADA SYSTEM OF HIGHER EDUCATION; NEVADA BOARD OF
10 REGENTS; and the STATE OF NEVADA on Relation to The Nevada System of Higher Education, The
11 Nevada Board of Regents, and the University of Nevada, Reno, from employing Defendant GANSERT
12 during such time she serves in another branch of the Nevada government.
13

14 3. Award Plaintiff his reasonable costs and attorney fees.

15 4. Grant such other relief as the Court deems appropriate and proper.

16 DATED this 1st day of May, 2017.

17
18 NPRI CENTER FOR JUSTICE
19 AND CONSTITUTIONAL LITIGATION

20 BY: 

21 JOSEPH F. BECKER, ESQ.

22 Nevada Bar No. 12178

23 NPRI CENTER FOR JUSTICE

24 AND CONSTITUTIONAL LITIGATION

25 75 Caliente Street

26 Reno, NV 89502

27 Telephone: (775) 636-7703

28 Fax: (775) 201-0225

Attorney for Plaintiff

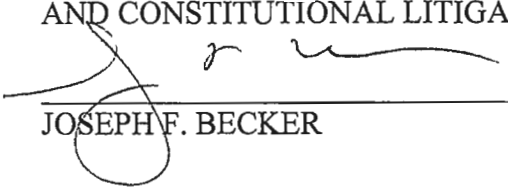
CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2017, I caused a true and correct copy of the foregoing First Amended Complaint for Declaratory Judgment and Injunctive Relief to be served via U.S. Mail, postage pre-paid addressed as follows:

Melissa Pagni Bernard
Assistant General Counsel
University of Nevada, Reno
1664 N. Virginia St. MS 0550
Reno, NV 89557-0550

Adam Laxalt
Attorney General
Nevada Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

NPRI CENTER FOR JUSTICE
AND CONSTITUTIONAL LITIGATION



JOSEPH F. BECKER

EXHIBIT 2

RECEIVED

AUG 04 2017

University of Nevada, Reno
General Counsel

REC'D & FILED

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SUSAN MERRIWETHER

CLERK
BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

DOUGLAS E. FRENCH,

Plaintiff,

vs.

Case No. 1700000231B

Dept. No. I

HEIDI GANSERT in her official capacity as
Executive Director, External Relations for
the University of Nevada, Reno;
UNIVERSITY OF NEVADA, RENO;
NEVADA SYSTEMS OF HIGHER
EDUCATION; NEVADA BOARD OF
REGENTS; and the STATE OF NEVADA on
Relation to The Nevada System of Higher
Education, The Nevada Board of Regents,
and the University of Nevada, Reno;

Defendants.

ORDER

This matter is before this Court on a Motion to Dismiss filed by Defendant Heidi Gansert and a Motion to Dismiss filed by Defendant Board of Regents of the Nevada System of Higher Education on behalf the University of Nevada, Reno ("NSHE Defendants"). Defendant Gansert's Motion to Dismiss the First Amended Complaint was filed pursuant to NRCP 12(b)(5) and NSHE Defendants' Motion to Dismiss the First Amended Complaint was filed pursuant to NRCP 12(b)(1), 12(b)(2) and 12(b)(5). Both Motions were filed on May 12, 2017. On May 26, 2017, Plaintiff Douglas E.

1 French filed one Opposition in response to both Motions. Defendant Gansert filed a
2 Reply to the Opposition on June 8, 2017 and the NSHE Defendants also filed a Reply
3 to the Opposition on June 8, 2017. A Request for Submission was filed in regards to
4 both Motions on June 8, 2017.

5 The First Amended Complaint filed in this matter asserts that because
6 Defendant Gansert holds the Nevada Executive Branch position of Executive
7 Director, External Relations at the University of Nevada, Reno while concurrently
8 serving as a State Senator in the Nevada Legislature, there is a violation of Article 3,
9 Section 1(1) of the Nevada Constitution.

10 The Motions to Dismiss assert that Article 3, Section 1(1) is not written as
11 broadly as Plaintiff French claims and that there are several conditions that must be
12 met before the restrictions of Article 3, Section 1(1) apply. Specifically, Article 3,
13 Section 1(1) applies only to those employees charged with Constitutional power for
14 their particular branch and only to those employees when they exercise a function
15 related to another branch. Defendant Gansert asserts that Plaintiff French failed to
16 allege that Defendant Gansert was charged with any Constitutional powers and also
17 failed to allege that she exercised any function related to another branch. The NSHE
18 Defendants assert that Plaintiff French also failed to bring any allegations against the
19 NSHE Defendants that state a cause of action or entitle him to any relief against
20 them. Finally, the NSHE Defendants also seek dismissal of the University of
21 Nevada, Reno on the basis that it is not a legal entity capable of being sued.

22 Nevada Rule of Civil Procedure 12(b)(5) requires the Court to dismiss a
23 complaint that fails to state a claim upon which relief can be granted. Dismissal is
24 appropriate where plaintiff "could prove no set of facts, which, if true, would entitle [him]
25 to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 226–227, 181
26 P.3d 670, 672 (2008); *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985)
27 (court must dismiss complaint which fails to "set forth allegations sufficient to make out
28 the elements of a right to relief.").

When considering a Rule 12(b)(5) motion to dismiss, the Court will construe the
pleading liberally and consider well-pled factual allegations as though they were true.
Buzz Stew, 124 Nev. at 226–227, 181 P.3d at 672. The Court need only accept the

1 nonmoving party's factual allegations as true. *Shoen v. SAC Holding Corp.*, 122 Nev.
2 621, 635, 137 P.3d 1171, 1180 (2006). Moreover, the Court is not required to "assume
3 the truth of legal conclusions merely because they are cast in the form of factual
4 allegations." See *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)
5 (interpreting substantively identical Fed. R. Civ. P. 12(b)(6)); see also *Sproul Homes of*
6 *Nev. v. State*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (plaintiff cannot survive a
7 motion to dismiss when its "complaint is replete with generalizations and conclusory
8 matter.").

8 **A. Necessary Parties**

9 NRCP 12(b)(6) authorizes dismissal for failure to join a necessary party. In order
10 to render a complete decree in any civil action, "all persons materially interested in the
11 subject matter of the suit [must] be made parties so that there is a complete decree to
12 bind them all." *Olsen Family Trust v. District Court*, 110 Nev. 548, 553, 874 P.2d 778,
13 781 (1994). Failure to join a necessary party to a case is "fatal to the district court's
14 judgment." *Olsen Family Trust*, 110 Nev. at 554, 874 P.2d at 782; see also *Univ. of Nev.*
15 *v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979). Thus, the trial court may
16 raise the issue *sua sponte*. *Tarkanian*, 95 Nev. at 396, 594 P.2d at 1163.

17 NRCP 19(a) requires joinder when an individual claims an interest in the subject
18 matter of the action and adjudication in the individual's absence may inhibit the ability to
19 protect that claimed interest or when an individual claims an interest in the subject
20 matter of the action and adjudication in the individual's absence potentially subjects an
21 existing party to "double, multiple, or otherwise inconsistent obligations." NRCP 19(a).
22 In applying NRCP 19(a), the Nevada Supreme Court has broadly indicated that a third
23 party must be joined if the third party's interest "may be affected or bound by the
24 decree," or if the third party "claims an interest in the subject matter of the action." *Olsen*
Family Trust, 110 Nev. at 553-54, 874 P.2d at 781-82.

25 Here, Plaintiff French is asking the Court to declare that employment in the
26 Executive Branch of Nevada while serving in the Nevada State Legislature violates
27 Article 3, Section 1(1) of the Nevada Constitution. Plaintiff French is also asking this
28 Court to enjoin Defendant Gansert from continuing employment in the Executive Branch
and also from retaining any money or benefits while she concurrently served in both

1 branches. If the Court were to grant Plaintiff French's requested declaratory relief, it
2 would affect additional State legislators who are also State employees. At the hearing
3 on the Motions to Dismiss, the parties indicated that there are as many as four other
4 additional legislators who are State employees. The Court finds that these other State
5 employees claim an interest relating to the subject of Plaintiff's First Amended
6 Complaint and are so situated that the disposition of the matter in their absence may as
7 a practical matter impair or impede their interests.

8 At the hearing on the Motions to Dismiss, Plaintiff French conceded that he had
9 no standing to bring an action against the other legislators who are State employees.
10 As such, the Court finds that these additional State legislators could not be made a
11 party to the action. Pursuant to NRCP 19(b), the Court has determined that the case
12 should be dismissed in the absence of these other State legislators since an adverse
13 judgment would be prejudicial to them because their employment with the State would
14 be impacted. The Court does not believe that it could make the broad declaration
15 requested by Plaintiff French and also shape relief that would lessen or avoid the
16 prejudice to these other State employees because the requested relief impacts their
17 employment and also their service in these two branches. As such, Plaintiff French's
18 First Amended Complaint is dismissed pursuant to NRCP 19(a) for failure to join
19 necessary parties.

18 **B. Defendant University of Nevada, Reno**

19 Defendant University of Nevada, Reno asserts that it is not a legal entity capable
20 of being sued because it does not legally exist for purposes of bringing or defending suits.
21 NRS § 396.020 provides that the legal and corporate name for the State
22 University is the University of Nevada and that it is administered by a Board of
23 Regents, collectively known as the Nevada System of Higher Education ("NSHE").
24 NSHE comprises all the various institutions and facilities that the Board of Regents
25 deems appropriate. NRS § 396.020. The University of Nevada, Reno is one of the
26 institutions or sub-units of NSHE, but it is not an independent legal or corporate entity
27 capable of being sued. See, *Robinson v. Nev. Sys. Of Higher Educ.*, 2016 U.S. Dist.
28 LEXIS 92221 (D. Nev. 2016). Accordingly, Defendant University of Nevada, Reno is
dismissed.

1 **C. Defendants NSHE and Board of Regents**

2 NSHE Defendants assert French has failed to set forth any allegations in his First
3 Amended Complaint against NSHE or the Board of Regents. There are no factual
4 allegations that reference or mention NSHE or the Board of Regents in the "Allegations
5 Common to All Claims for Relief" or the "First Claim for Relief" seeking declaratory and
6 injunctive relief. The only factual allegations in the body of the First Amended
7 Complaint related to NSHE and the Board of Regents are the allegations in the section
8 entitled "Parties" where Plaintiff French identifies NSHE and the Board of Regents as
9 Defendant Gansert's employer.

10 At the hearing on the Motions, Plaintiff French asserted that the First Amended
11 Complaint was amended to specifically make allegations against NSHE and the Board
12 of Regents and these allegations are found in the prayer for relief of the First Amended
13 Complaint. Allegations in a prayer for relief are not part of the cause of action.
14 *Kingsbury v. Copren*, 43 Nev. 448, 454-455, 187 P. 728, 729 (1920); *Keyes v. Nevada*
15 *Gas Co.*, 55 Nev. 431, 435-436, 38 P.2d 661, 663 (1943).

16 Dismissal is appropriate where plaintiff "could prove no set of facts, which, if true,
17 would entitle [him] to relief." *Buzz Stew*, 124 Nev. at 226–227, 181 P.3d at 672. Based
18 upon the lack of factual allegations against NSHE and the Board of Regents in the First
19 Amended Complaint and in the cause of action for declaratory and injunctive relief,
20 Plaintiff French failed to state a claim against NSHE and the Board of Regents.
21 Accordingly, the First Amended Complaint as against NSHE and the Board of Regents
22 is dismissed.

23 **D. Defendant Gansert**

24 Plaintiff French asserts that the Nevada Constitution, Article 3, Section 1(1)
25 states that no one may serve any function in one branch while serving in another
26 branch. Defendants assert that Article 3, Section 1(1) is not as broad as Plaintiff
27 claims and the limitation on exercising any function applies only to those persons
28 charged with powers under the Nevada Constitution.

Article 3, Section 1(1) states:

1 "The powers of the Government of the State of Nevada shall be divided
2 into three separate departments, the Legislative, the Executive and the
3 Judicial; and no persons charged with the exercise of powers properly
4 belonging to one of these departments shall exercise any functions,
appertaining to either of the others..."

5 By its own terms, Article 3, Section 1(1) does not prohibit all persons in one branch from
6 exercising any function related to another branch. The limitation on exercising any
7 function only applies to those persons who are charged with the exercise of powers
8 given to the departments or branches of government. These departments are each
9 charged by other parts of the Constitution with certain duties and functions, and it is to
10 these constitutional duties and functions to which the prohibition in Article 3, Section
11 1(1) refers. *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P. 437, 439 (Nev. 1893).

12 Not every employee in a branch is charged with these constitutional powers,
13 duties and functions. Public employees, as distinguished from public officials or
14 officers, do not exercise functions or powers of the state. See, *State ex rel. Kendall v.*
15 *Cole*, 38 Nev. 215, 9, 148 P. 551, 553 (1915); *State ex rel. Mathews v. Murray*, 70
16 Nev. 116, 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder City*, 94 Nev.
17 735, 737, 587 P.2d 39, 41 (1978). Public officers are the only persons who exercise
18 the sovereign functions of state government. *Mathews*, 70 Nev. at 120-21, 258 P.2d
19 at 983. This is because public employees have not been invested by the State with
20 some portion of the powers, duties and functions of the government. *Mathews*, 70 Nev.
21 at 120-21, 258 P.2d at 983; *Kendall*, 38 Nev. at 229, 148 P. at 553 ("To be an officer,
22 one must be charged by law with duties involving the exercise of some part of the
23 sovereign power of the state").

24 The case law describing public officials is consistent with the statutory law. NRS
25 281.005(1) states that a public officer is a person elected or appointed to a position
26 which: (a) Is established by the Constitution or a statute of this State, or by a charter or
27 ordinance of a political subdivision of this State; and (b) involves the continuous
28 exercise, as part of the regular and permanent administration of the government, of a
public power, trust or duty. NRS 281.005(1).

Defendant French does not allege that Defendant Gansert's position is
established by the Nevada Constitution, by statute or is a public officer position.

1 Defendant Gansert's position as Executive Director, External Relations is not a public
2 office. There are only two groups of people in NSHE that have been determined to be
3 public officers: members of the Board of Regents and presidents of the universities,
4 state colleges and community colleges. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117
5 Nev. 195, 205, 18 P.3d 1042, 1048 (2001) ("the sovereign functions of higher education
6 repose in the Board of Regents, which has been constitutionally entrusted to control and
7 manage the University"); NRS 281A.182 (a president of a university, state college or
8 community college within the NSHE system is a public officer for purpose of Chapter
281A).

9 The Court may take judicial notice of facts generally known or capable of
10 verification from a reliable source, whether it is requested to or not. NRS 47.150(1). The
11 Court may take judicial notice of facts that are "[c]apable of accurate and ready
12 determination by resort to sources whose accuracy cannot reasonably be questioned,
13 so that the fact is not subject to reasonable dispute." See NRS 47.130(2)(b). The Court
14 may take judicial notice of information posted on government websites as it can be
15 "accurately and readily determined from sources whose accuracy cannot reasonably be
16 questioned". *FTC v. AMG Servs.*, 2014 U.S. Dist. LEXIS 10490, *45-46, n. 5 (Nev.
17 2014); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-999 (9th Cir. 2010) ("It is
18 appropriate to take judicial notice of this information, as it was made publicly available
by government entities").


19 The Court takes judicial notice of the University of Nevada, Reno organizational
20 chart because it is a public record available on the University's website, capable of
21 verification from a reliable source and the facts are not subject to reasonable dispute.
22 The organizational chart demonstrates that Defendant Gansert is not the president of
23 the University. The Court takes judicial notice of the current elected members of the
24 Board of Regents as posted on NSHE's website to demonstrate that Defendant Gansert
25 is not a current member. Defendant Gansert's position of Executive Director, External
26 Relations is not one that is charged with constitutional powers as described in Article 3,
27 Section 1(1).
28

There are no allegations that Defendant Gansert is charged with any power belonging to NSHE and there are no allegations that she exercised any functions relating to the Legislative Branch. The Court finds that the specific criteria of Article 3, Section 1(1) have not been met and there has been no violation under that provision in this matter.

Therefore, good cause appearing,

IT IS HEREBY ORDERED that the NSHE Defendants Motion to Dismiss is granted and Defendant Gansert's Motion to Dismiss is granted. Plaintiff French's First Amended Complaint is dismissed with prejudice.

Dated this 3 day of August, 2017.

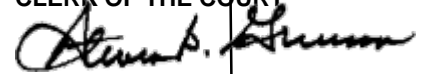

James T. Russell
District Judge

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1 **MDSM**

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6 *Attorney for Defendant,*
7 *James Ohrenschall*

DISTRICT COURT

CLARK COUNTY, NEVADA

10 NEVADA POLICY RESEARCH
11 INSTITUTE, a Nevada domestic nonprofit
corporation,

12 Plaintiff,

13 vs.

14 BRITTNEY MILLER, an individual engaging
15 in dual employment with the Nevada State
Assembly and Clark County School District;
16 DINA NEAL, an individual engaging in dual
employment with the Nevada State Senate and
17 Nevada State College; JAMES
18 OHRENSCHALL, an individual engaging in
dual employment with the Nevada State Senate
19 and Clark County Public Defender; SELENA
TORRES, an individual engaging in dual
20 employment with the Nevada State Assembly
and Clark County School District; and THE
21 LEGISLATURE OF THE STATE OF
NEVADA,

22
23 Defendants.
24

CASE NO: A-20-817757-C

DEPT. NO: VIII

**DEFENDANT JAMES
OHRENSCHALL'S MOTION TO
DISMISS**

[HEARING REQUESTED]

25 Defendant JAMES OHRENSCHALL (hereinafter "State Senator Ohrenschall") by and
26 through his counsel of record, WILEY PETERSEN, hereby moves this Court to dismiss the
27 Amended Complaint for Declaratory and Injunctive Relief, filed by Plaintiff Nevada Policy

28 ///

Research Institute ("NPRI"), pursuant to NRCP 12(b)(5) and NRCP 12(b)(6).

DATED this 30th day of June, 2022.

WILEY PETERSEN

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*Attorney for Defendant,
James Ohrenschall*

I. INTRODUCTION

James Ohrenschall is a Nevada State Senator, representing District 21 in Clark County. He also holds the position of Chief Deputy Public Defender for Clark County, Nevada. State Senator Ohrenschall has worked as a Deputy Public Defender since 2011, and in the Juvenile Office therein since 2012. This matter was remanded by the Nevada Supreme Court by Remittitur issued on May 16, 2022, and received by the District Court on May 17, 2022. With Plaintiff's standing confirmed, the case now returns for further proceedings in the District Court. State Senator Ohrenschall had not been served with the Summons and Complaint prior to the previous round of Motions to Dismiss. As such, he did not participate in the appeal, and this is his first appearance in this matter.

Plaintiff's most recent attempt to invoke the Separation of Powers doctrine of Article 3, Section 1 of the Nevada Constitution fails for at least three distinct reasons. As such, the Amended Complaint should be dismissed.

The issue presented in the Amended Complaint has been asserted in numerous lawsuits, both modern and historic, in Nevada and throughout the country. As set forth below, the law on this subject, at the very least as it applies to State Senator Ohrenschall, makes clear that this latest attempt to preclude the citizen legislature as it has historically operated should fail as well.

1 Plaintiff's position, taken to the logical conclusion, would preclude someone employed as a
2 maintenance worker in the Clark County School District from eligibility to serve in our citizen
3 legislature. While the concept of separation of powers is fundamental to the government of this
4 country and this state, such a result is not the intent of the provision, nor has it been interpreted
5 as such in the past.

6 State Senator Ohrenschall anticipates filing joinder(s) to other Defendants' Motions to
7 Dismiss, and hereby refers to and incorporates such joined motion(s) as though fully set forth
8 herein.

9 Plaintiff asserts two claims, and seeks two remedies:

- 10 1. For a declaration that Defendants simultaneously holding elected offices in the Nevada
11 State Legislature and paid positions with Nevada State or local governments violates the
Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1; and,
- 12 2. For an injunction against Defendants prohibiting each and every one of them from
13 continuing to simultaneously hold elected offices in the Nevada State Legislature and
14 paid positions with Nevada State or local governments in violation of the Separation of
Powers requirement of Nevada Const. Art. 3, §1, ¶1;
15 See Amended Complaint, p. 7.

16 If such relief is granted, State Senator Ohrenschall would have to decide whether he wants to
17 continue with his decade-long distinguished career of public service, serving in Juvenile Office
18 of the Clark County Public Defender's office, or continue to serve in the Nevada Senate. Under
19 the Nevada Constitution, and as set forth below, he should not face this decision.

20 II. LEGAL STANDARD

21 Pursuant to NRCP 12(b)(5), dismissal of a claim is appropriate if it appears with
22 certainty that a plaintiff can prove no set of facts which would entitle him or her to relief under
23 the claim. *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985). In making this
24 determination, all factual allegations pled must be accepted as true. *Capital Mortgage Holding*
25 *v. Hahn*, 101 Nev. 314, 705 P.2d 126 (1985). However, a "court may take into account matters
26 of public record, orders, items present in the record of the case, and any exhibits attached to the
27 complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can
28 be granted." *Brelian v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261

1 (1993). It is requisite that the court construe the pleading liberally and draw every fair inference
2 in favor of the non-moving party. *Squires v. Sierra Nev. Educ. Found.*, 107 Nev. 902, 905, 823
3 P.2d 256, 257 (1991). The sole issue presented before the court is whether a complaint states a
4 claim upon which relief may be granted. *Merluzzi v. Larson*, 96 Nev. 409, 411, 610 P.2d 739,
5 741 (1980), *overruled on other grounds by Smith v. Clough*, 106 Nev. 568, 796 P.2d 592
6 (1990).

7 The test for determining whether the allegations are sufficient to assert a claim for relief
8 is whether the allegations give fair notice of the nature and basis of a legally sufficient claim
9 and the relief requested. *See Riviera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408
10 (1984). Finally, with regard to the failure to join required parties, it can be raised by a motion
11 to dismiss under NRCP 12(b)(6), failure to join a party under Rule 19. *Rose, LLC u. Treasure*
12 *Island, LLC*, 135 Nev. 145, 155, 445 P.3d 860, 868 (Ct. App. 2019).

13 As will be demonstrated below, Plaintiff's Complaint fails as a matter of law as it fails
14 to state a claim upon which relief can be granted and thus requires dismissal under NRCP
15 12(b)(5) and 12(b)(6).

16 III. ARGUMENT

17 A. PLAINTIFF FAILED TO NAME NECESSARY PARTIES

18 Plaintiff failed to name the appropriate political subdivision(s) as required under NRS
19 41.0337. Plaintiff also failed to name other necessary party defendants pursuant to NRCP
20 19(a). State Senator Ohrenschall anticipates joining other Defendant(s)' Motion(s) to Dismiss
21 regarding this issue, and hereby refers to and incorporates such joined motion(s) as though fully
22 set forth herein.

23 B. THE NEVADA CONSTITUTION'S SEPARATION OF POWERS CLAUSE IS NOT 24 APPLICABLE TO LOCAL GOVERNMENT

25 NPRI's prior attempts to invoke the separation of powers doctrine against legislators is
26 well summarized in prior Motions to Dismiss¹. A great deal of litigation has ensued regarding
27

28 ¹ See Defendant Brittney Miller's Motion to Dismiss Complaint filed herein September 18, 2020, p. 4:8 – 5:9.

1 this matter over many years. There are several key points from such prior cases which support
2 dismissal.

3 1. Nevada's Separation of Powers Doctrine does not Apply to Local Government
4 Employees

5 The entire basis of the Amended Complaint rests on the following provision from the
6 Nevada Constitution:

7 Section 1. **Three separate departments; separation of powers;** legislative
8 review of administrative regulations.

9 1. The powers of the **Government of the State of Nevada** shall be divided
10 into **three separate departments**, — the Legislative, — the Executive and the
11 Judicial; and no persons charged with the exercise of **powers properly**
12 **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.

13 Nev. Const. Art. 3, §1. (emphasis added).

14 As discussed below, the Government of the State of Nevada is separate and distinct from the
15 government of Clark County, as well as any local government in the state. This language is
16 deliberate and important. By using “Government of the State of Nevada”, and not any of the
17 more inclusive terms it could have chosen, the Framers of the Constitution expressed a clear
18 intent that this provision applies only to the three departments of the state government it lists
19 thereafter. Neither Clark County, nor any of its departments, are part of these three departments

20 The Nevada Supreme Court recently stated, “[T]he language of the separation of powers
21 provision in the Constitution does not extend any protection to political subdivisions.” *City of*
22 *Fernley v. State*, 132 Nev. 32, 43 n.6, 366 P.3d 699, 707 (2016). Prior cases are consistent with
23 this finding. The Nevada Supreme Court in *DR Partners* states, “Neither state-owned
24 institutions, **nor state departments**, nor public corporations are synonymous with political
25 subdivisions of the state. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117 Nev. 195, 203-04
26 (2001) (emphasis added). As such, these distinct bodies must not be conflated. The Nevada
Supreme Court has expressed this on numerous occasions applied to various subdivisions.

27 [M]unicipal courts are primarily city, not state entities. Although municipal
28 courts are created by the legislature pursuant to authority vested in that body by
the Nevada Constitution, these courts are separate branches of their respective

1 city governments. ... the municipal courts of this state are separate branches of
2 their respective municipal governments. ... they are not state governmental
3 entities

Nunez v. City of N. Las Vegas, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000)

4 The same can be said of County governments and their respective departments. See also *City of*
5 *Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 362 n.5 (2013) ("While municipal courts are included
6 within the state constitutional judicial system, they are nonetheless primarily city entities, rather
7 than an extension of the state.").

8 As such, because political subdivisions are not part of one of the three departments of
9 state government, their local officers² generally are not considered to be state officers who are
10 subject to the separation-of-powers provision. See *State ex rel. Mason v. Bd. of Cnty. Comm'rs*,
11 7 Nev. 392, 396-97 (1872) (noting that the exercise of certain powers by a board of county
12 commissioners was not limited by the doctrine of separation of powers).

13 As discussed in more detail below in the context of Attorney General Opinion AGO
14 2004-03, it is not disputed that the Nevada Constitution was modeled on the original California
15 Constitution. *State ex rel. Harvey v. Second Judicial Dist. Ct.*, 117 Nev. 754, 763, 32 P.3d 1263,
16 1269 (2001) ("[S]ince Nevada relied upon the California Constitution as a basis for developing
17 the Nevada Constitution, it is appropriate for us to look to the California Supreme Court's
18 interpretation of the [specific provision] in the California Constitution.") Because the
19 provisions of the Nevada Constitution were taken from the California Constitution of 1849,
20 those provisions "may be lawfully presumed to have been taken with the judicial interpretation
21 attached." *State ex rel. Mason v. Bd. of Cnty. Comm'rs*, 7 Nev. 392, 397 (1872).

22 Construing the separation of powers provision in the California Constitution of 1849,
23 the California Supreme Court held that **it did not apply to local governments and their**
24 **officers and employees.** *People ex rel. Att'y Gen. v. Provines*, 34 Cal. 520 (1868). In
25 *Provines*, the court stated,

26 We understand the Constitution to have been formed for the purpose of
27 establishing a State Government; and we here use the term 'State Government'
in contradistinction to local, or to county or municipal governments. *Id.* at 532.

28 ² As addressed below, a Deputy Public Defender is not a public officer.

1 After examining the history and purpose of the separation of powers provision, the court
2 concluded that "the Third Article of the Constitution means that **the powers of the State**
3 **Government, not the local governments** thereafter to be created by the Legislature, shall be
4 divided into three departments." *Id.* at 534 (emphasis added). Thus, the court held that the
5 separation of powers provision had no application to the functions performed by a person at the
6 local governmental level. *Id.* at 523-40.

7 In later cases, the California Supreme Court reaffirmed that under California law, "it is
8 settled that the separation of powers provision of the constitution; art. 3, § 1, **does not apply to**
9 **local governments** as distinguished from departments of the state government." *Mariposa*
10 *County v. Merced Irrig. Dist.*, 196 P.2d 920, 926 (Cal. 1948) (emphasis added). This
11 interpretation of the separation-of-powers doctrine is followed by a majority of other
12 jurisdictions. *See, e.g., Poynter v. Walling*, 177 A.2d 641, 645 (Del. Super. Ct. 1962); *La*
13 *Guardia v. Smith*, 41 N.E.2d 153, 156 (N.Y. 1942); 16 *C.J.S. Constitutional Law* § 112, at 377
14 (1984).

15 Consequently, it is well settled that "a local government unit, though established under
16 state law, funded by the state, and ultimately under state control, with jurisdiction over only a
17 limited area, is not a 'State.'" *United States ex rel. Norton Sound Health Corp. v. Bering Strait*
18 *Sch. Dist.*, 138 F.3d 1281, 1284 (9th Cir. 1998). Furthermore, "a local government with
19 authority over a limited area, is a different type of government unit than a state-wide agency that
20 is part of the organized government of the state itself." *Wash. State Dep't of Transp. v. Wash.*
21 *Natural Gas Co.*, 59 F.3d 793, 800 n.5 (9th Cir. 1995). Thus, "[w]hile local subdivisions and
22 boards created by the state may have some connection with one of the departments of the state
23 government as defined by the Constitution, they are not 'departments of state government'
24 within the intent and meaning of the [law]." *State v. Coulon*, 3 So. 2d 241,243 (La. 1941). In
25 turn, courts have consistently found that cities, counties, school districts and other local
26 governmental entities are not included within one of the three departments of state government.
27 *See, e.g., Dermott Special Sch. Dist. v. Johnson*, 32 S.W.3d 477, 480-81 (Ark. 2000); *Dunbar*
28

1 *Blee. Supply, Inc. v. Sch Bd.*, 690 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1997); *Stokes v.*
2 *Harrison*, 115 So. 2d 373, 377-79 (La. 1959); *Coulon*, 3 So. 2d at 243.

3 Federal courts interpreting Nevada law have consistently found that cities, counties,
4 school districts and other local governmental entities in this state are not included within one of
5 the three departments of state government and that these local political subdivisions are not
6 entitled to Nevada's sovereign immunity in federal court. *See, e.g., Lincoln County v. Luning*,
7 133 U.S. 529, 530 (1890); *Eason v. Clark Cnty. Sch. Dist.*, 303 F.3d 1137, 1144 (9th Cir. 2002);
8 *Herrera v. Russo*, 106 F. Supp. 2d 1057, 1062 (D. Nev. 2000). These federal cases are
9 important because when a federal court determines whether a political subdivision is part of
10 state government for the purposes of the Eleventh Amendment, the federal court makes its
11 determination based on state law. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429
12 U.S. 274, 280-81 (1977); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 678-79 (9th Cir. 1991).

13 Thus, because local political subdivisions in this state are not included within one
14 of the three departments of state government, their officers and employees also are not part of
15 one of the three departments of state government. Therefore, legislators, such as State Senator
16 Ohrenschall, who hold positions of public employment with local governments do not hold such
17 positions within one of the three departments of state government. Thus, the separation of
18 powers provision does not prohibit legislators from holding positions of public employment
19 with local governments because local governments, such as Clark County, are not part of one of
20 the three departments of state government. This ends the inquiry with regard to State Senator
21 Ohrenschall and warrants dismissal.

22 **a. The Nevada Attorney General Opined that Nevada's Separation of Powers**
23 **Doctrine does not Apply to Local Government Employees**

24 While not binding on this Court, it is notable that on March 1, 2004, Attorney General
25 Brian Sandoval issued AGO 2004-03.³ That Opinion, which spans 27 pages, states in relevant
26 part:

27
28 ³ Attorney General Opinions are not binding legal authority.

1 In light of the absence of Nevada authority on the subject of the applicability of
2 the separation of powers to local governments and Nevada's adoption of the
3 California separation of powers provision into the Nevada Constitution, the
4 findings in *Provines* provide strong support for the contention that Article 3,
5 Section 1 of the Nevada Constitution **does not apply to local governments.**

6 Based upon the foregoing legal precedent, historical practice of this state,
7 and the relevant Nevada Attorney General opinions, this office concludes that
8 the constitutional requirement of separation of powers **does not prohibit a local
9 government employee from also serving in the Nevada Legislature.**
10 (emphasis added).

11 The Attorney General reaches such conclusion after reviewing numerous prior AG opinions and
12 case law, including but not limited to *Provines*, and after noting that the Nevada constitution
13 was modeled after California's constitution, and that the provisions in question were identical.⁴

14 The Attorney General goes on to state,

15 Simply put, the court found that the framers of the California Constitution did
16 not contemplate that the state government executive branch included local
17 government. Therefore, California's separation of powers doctrine did not apply
18 to local governments or its employees.
19 *Id.* at 35.

20 The conclusion of the Attorney General, based on the cited law and historical precedent,
21 reiterate the conclusion noted above, and should be the conclusion of this Court as well.

22 C. A DEPUTY PUBLIC DEFENDER IS NOT A PUBLIC OFFICIAL OR OFFICER
23 UNDER NEVADA LAW

24 Even assuming the Separation of Powers doctrine applies to local governments, only
25 public officers, as opposed to public employees, are potentially implicated under the separation
26 of powers provision.⁵ Public officers are the only persons who exercise the sovereign functions
27 of state government and, therefore, only public officers can be in violation of Article 3 and the
28 separation of powers clause. See NEV. CONST. art. III, §1, cl. 1; *State ex rel. Mathews v.*

⁴ "As previously noted, this California distinction is critical to the instant analysis because it is well settled that the framers of the Nevada Constitution modeled the Nevada Constitution after the California Constitution. *Aftercare of Clark County v. Justice Court of Clark County*, 120 Nev. ___, 82 P.3d 931 935 (Adv. Op. 2 at 5, January 23, 2004)." *Id.* at 35-36.

⁵ Nothing stated in this section negates Senator Ohrenschall's position that local government as a whole is not implicated, as set forth above.

1 *Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder City*, 94 Nev.
2 735, 737, 587 P.2d 39,41.

3 1. Nevada Statutes Regarding County Appointment of Public Defenders, and Lack
4 of Policymaking Authority for Deputy Public Defenders

5 The provisions of NRS 260.010(5-6) govern the creation of the office of public defender
6 and the appointment of the public defender as an officer of the county:

7 5. The office of public defender when created must be filled by appointment by
8 the board of county commissioners.⁶

9 6. The public defender serves at the pleasure of the board of county
10 commissioners.

11 State Senator Ohrenschall is not the appointed Public Defender for Clark County. Rather, the
12 Clark County Public Defender is currently Darin Imlay, Esq.⁷ Rather, State Senator
13 Ohrenschall is merely a Deputy Public Defender⁸, with less authority than his immediate
14 supervisors, and significantly less authority than his ultimate boss, Mr. Imlay.⁹ This is not
15 merely a matter of hierarchy, but the structure pursuant to statute.

16 NRS 260.040 Compensation; deputies and employees; private practice of
17 law limited; expenses; deputies in certain counties governed by merit
18 personnel system.

19 2. The public defender may appoint **as many deputies or assistant attorneys,**
20 **clerks, investigators, stenographers and other employees as the public defender**
21 **considers necessary to enable him or her to carry out his or her**
22 **responsibilities,** with the approval of the board of county commissioners. An
23 assistant attorney must be a qualified attorney licensed to practice in this State
24 and may be placed on a part-time or full-time basis. **The appointment of a**
25 **deputy,** assistant attorney or other employee pursuant to this subsection **must**
26 **not be construed to confer upon that deputy, assistant attorney or other**
27 **employee policymaking authority for the office of the public defender or the**

28 ⁶ Pursuant to Clark County Code of Ordinances 2.40.100, the Public Defender is appointed by the County Manager
with ratification by the Board of County Commissioners.

⁷ https://www.clarkcountynv.gov/government/departments/public_defender/firm_profile.php

⁸ Pursuant to Clark County Code of Ordinances 2.16.040(b), "The public defender shall, in accordance with the
county's merit personnel system, appoint any and all assistant or deputy public defenders necessary for the proper
operation of the office...."

⁹ Senator Ohrenschall's direct supervisor is the Team Chief of a group in the Juvenile Division who is in turn under
the Team Chief of the entire Juvenile Division, who in turn is under one of two Assistant Public Defenders. Those
Assistant Public Defenders are under the Public Defender Mr. Imlay. Under this hierarchy, State Senator
Ohrenschall is at least three levels below the Public Defender.

1 county or counties by which the deputy, assistant attorney or other
2 employee is employed.

(emphasis added).

3 Thus, this statute makes clear that: (1) deputy public defenders are merely appointed as public
4 employees serving at the whim of the Public Defender, who is in turn appointed by the County
5 Manager; and (2) such deputies have no policymaking authority.

6 So, even assuming the separation of powers doctrine applies to local governments, it is
7 clear that Deputy Public Defenders such as State Senator Ohrenschall are statutorily distinct
8 from the appointed Public Defender himself or herself, as State Senator Ohrenschall has no
9 policymaking authority as a mere unelected public employee. This is important in connection
10 with the interpreting case law, analyzed below.

11 2. State Senator Ohrenschall Has no Sovereign Duties as a Deputy Public Defender

12 The Amended Complaint is completely devoid of any factual allegations describing the
13 job duties and responsibilities of the individual defendants. Therefore, even assuming that State
14 Senator Ohrenschall's position as a public employee of local government, as opposed to state
15 government, is not dispositive, this lack of factual allegations is fatal, because, as set forth
16 below, the separation of powers provision application hinges on whether the individual
17 defendant exercises sovereign functions. However, permitting amendment in order to add such
18 allegations in this case would be futile since State Senator Ohrenschall has no such duties or
19 responsibilities, not only as a matter of fact, but also pursuant to statute. *See* NRS 260.040.

20 As a Deputy Public Defender, State Senator Ohrenschall is an employee of Clark
21 County. Mr. Imlay, in turn, is appointed by the County Manager. State Senator Ohrenschall is
22 subject to termination by the Public Defender. He is not elected. Rather, his job description
23 and duties are entirely within the authority and control of the Public Defender. In short, State
24 Senator Ohrenschall is a public employee; an employee of local government, and not a public
25 officer.¹⁰

26
27 ¹⁰ It is also worth noting the sacrifices made by Senator Ohrenschall to serve in the citizen legislature.
28 Pursuant to Clark County policy, during Nevada's legislative sessions, Senator Ohrenschall is put on
leave without pay. Not only does he not receive pay, but all of his benefits are frozen, including health

1 3. Public Employees and Public Officials are Different Under Nevada Law; State
2 Senator Ohrenschall is a Public Employee, Does not Exercise Sovereign
3 Functions, and is therefore not Subject to the Separation of Powers Doctrine

4 In evaluating a claim challenging the right of the defendant to hold the position of
5 director of the drivers' license division of the public service commission of Nevada at the time
6 he was serving as a state senator, the Nevada Supreme Court established the distinction between
7 a public office and mere employment.

8 The nature of a public office as distinguished from mere employment is the
9 subject of a considerable body of authority, and many criteria of determination
10 are suggested by the courts. Upon one point at least the authorities uniformly
11 appear to concur. A public office is distinguishable from other forms of
12 employment in that its holder has by the sovereign been invested with some
13 portion of the sovereign functions of government.

14 *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953)
15 (internal citations omitted).

16 First, the Court notes, "All public offices must originally have been created by the sovereign as
17 the foundation of government." *State ex rel. Mathews v. Murray*, 70 Nev. 116, 121 (Nev. June
18 15, 1953), citation omitted. It goes on to state,

19 [T]his court, in **definition of a public office**, quoted Wyman on Public Offices,
20 sec. 44, as follows: 'The right, authority and duty conferred by law by which, for
21 a given period, either fixed by law or through the pleasure of the creating power
22 of government, an individual **is invested with some portion of the sovereign**
23 **functions of the government**, to be exercised by him for the benefit of the
24 public. The warrant to exercise powers is conferred, not by contract, but by law.
25 *Id.* (emphasis added).

26 Here, with respect to the position of the Deputy Public Defender, there is no investment of
27 sovereign function of government, as explicitly stated in NRS 260.040. Further, while the
28 position itself is contemplated by statute under Title 20 of the Nevada Revised Statutes, entitled
29 Counties and Townships: Formation, Government and Officers, the duties and "warrant to
30 exercise powers" in the case of State Senator Ohrenschall, are entirely within the authority and
31 control of the Public Defender. Said another way, his day-to-day duties are determined by what

32 insurance and retirement benefits. He is not permitted to use vacation or sick leave during sessions. For
33 all intents and purposes, he is not employed during the legislative sessions.

1 his boss, Public Defender Imlay, tells him are his duties. Further, the fact that his employment is
2 at the will or pleasure of another cannot be disputed.

3 The fact that a public employment is held at the will or pleasure of another, as a
4 **deputy** or servant, who holds at the will of his principal, **is held to distinguish a**
5 **mere employment from a public office; for in such cases no part of the**
6 **state's sovereignty is delegated to such employees.'**

7 *Murray* at 121-22 (emphasis added, citations omitted).

8 The situation in *Murray* with regard to the defendant's subordinate position is analogous to
9 State Senator Ohrenschall's subordinate position.

10 Nowhere are duties imposed or authority granted save to the department and to
11 its administrator. It appears clear that the position of director was created not by
12 the act but by the administrator and may as easily by him be discontinued or
13 destroyed. It appears clear that the duties of the position are fixed not by law but
14 by the administrator and may as easily by him be modified from time to time. No
15 tenure attaches to the position save as may be fixed from time to time by the
16 administrator. The director, then, is wholly subordinate and responsible to the
17 administrator. It cannot, then, be said that that position has been created by law;
18 or that the duties which attach to it have been prescribed by law; or that, subject
19 only to the provisions of law the holder of such position is independent in his
20 exercise of such duties. **It cannot, then, be said that he has been invested with**
21 **any portion of the sovereign functions of the government.**

22 *Id.* at 123.

23 As noted in NRS 260.040(2), the decision to appoint deputy public defender(s), along with
24 "clerks, investigators, stenographers and other employees", and how many of each, is based on
25 the whim and needs of the Public Defender. By this logic and reasoning, the Nevada Supreme
26 Court makes clear that a Deputy Public Defender is not a public officer and is therefore not
27 subject to the separation of powers doctrine.¹¹ *See also, Univ. & Cmty. Coll. Sys. v. DR Ptnrs,*
28

24 ¹¹ Notably, this decision was reached at the motion to dismiss stage. The Court commented on the lack
25 of factual evidence regarding the defendant's duties but noted that such inquiry was not necessary. "The
26 state asserts that since the record now before this court does not contain any showing as to the nature of
27 the duties which now attach to the position, we cannot at this stage of the proceedings determine that the
28 position is not an office. For the reasons discussed, however, **it is apparent that the specific character**
of those duties cannot affect our decision. Regardless of the extent of responsibility which at any
given time might be delegated by the administrator to the defendant, the functions of sovereignty
which are involved continue to repose in the administrator to whom they have been assigned by
sovereign act." *Id.* at 123-124 (emphasis added).

1 117 Nev. 195, 200, 18 P.3d 1042, 1045-46 (2001). For this reason, too, the claims against State
2 Senator Ohrenschall fail.

3 **IV. CONCLUSION**

4 Based on the foregoing, the Amended Complaint should be dismissed.

5 DATED this 30th day of June, 2022.

6 **WILEY PETERSEN**

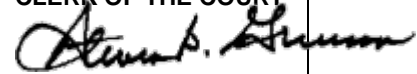
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*Attorney for Defendant,
James Ohrenschall*

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(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

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JMOT

BRADLEY SCHRAGER, ESQ. (SBN 10217)

ROYI MOAS, ESQ. (SBN 10686)

DANIEL BRAVO, ESQ. (SBN 13078)

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*Attorneys for Defendants,
Brittney Miller and Selena Torres*

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,

vs.

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

Defendants.

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

**DEFENDANTS BRITTNEY MILLER
AND SELENA TORRES'S JOINDER TO
DEFENDANT DINA NEAL'S MOTION
TO DISMISS**

**HEARING DATE: TBA
HEARING TIME: TBA**

///

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DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S JOINDER TO
DEFENDANT DINA NEAL'S MOTION TO DISMISS

1 Defendants Britney Miller and Selena Torres hereby join in Defendant Dina Neal's
2 Motion to Dismiss (the "Neal Motion") filed herein on June 30, 2022, and adopt by reference and
3 incorporate herein Defendants' Motion, Memorandum of Points and Authorities and Exhibits as
4 if set forth in full at this point.

5 Specifically, Ms. Miller and Ms. Torres are both alleged in the Amended Complaint to be
6 employed in a "paid government position of Teacher for the Clark County School District," Am.
7 Comp. ¶¶ 13 and 19, but, similar to the defendant in the Neal Motion, who states:

8 The Amended Complaint in this matter merely alleges that NSHE Defendant
9 Neal is an adjunct professor. It does not allege that NSHE Defendant is an
10 officer or public official. It does not allege that she exercises constitutional or
11 sovereign powers of the executive branch of the state. Moreover, the Amended
12 Complaint is completely devoid of any factual allegations describing the job
duties and responsibilities of NSHE Defendant such that there is no factual basis
from which to draw an inference that NSHE Defendant falls into the category
of public officer to which the constitutional prohibition stated in Article 3, §1,
¶1 would apply.

13 Neal Motion, at 8-9.

14 Each of these apply equally to the allegations—or their lack—against Defendants
15 Miller and Torres, and they therefore join the Neal Motion in all pertinent respects.

16 DATED this 30th day of June, 2022.

17 **WOLF, RIFKIN, SHAPIRO,**
18 **SCHULMAN & RABKIN, LLP**

19 By: /s/ Bradley S. Schrager
20 BRADLEY SCHRAGER, ESQ. (SBN 10217)
21 ROYI MOAS, ESQ. (SBN 10686)
22 DANIEL BRAVO, ESQ. (SBN 13078)
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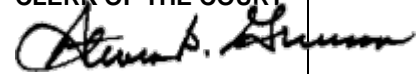
23 *Attorneys for Defendants,*
24 *Brittney Miller and Selena Torres*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 30th day of June, 2022, a true and correct copy of the
3 foregoing **DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S JOINDER**
4 **TO DEFENDANT DINA NEAL'S MOTION TO DISMISS** was served by electronically
5 filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with
6 an email address on record, pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

7 By: /s/ Dannielle Fresquez

8 Dannielle Fresquez, an Employee of
9 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
10 RABKIN, LLP
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JMOT

BRADLEY SCHRAGER, ESQ. (SBN 10217)

ROYI MOAS, ESQ. (SBN 10686)

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*Attorneys for Defendants,
Brittney Miller and Selena Torres*

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

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BRITTNEY MILLER, an individual engaging
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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.: VIII

**DEFENDANTS BRITTNEY MILLER
AND SELENA TORRES'S PARTIAL
JOINDER TO DEFENDANT JAMES
OHRENSCHALL'S MOTION TO
DISMISS**

**HEARING DATE: TBA
HEARING TIME: TBA**

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DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S PARTIAL JOINDER TO
DEFENDANT JAMES OHRENSCHALL'S MOTION TO DISMISS

1 Defendants Britney Miller and Selena Torres hereby join in Defendant James
2 Ohrenschall's Motion to Dismiss ("the Ohrenschall motion") filed herein on June 30, 2022, and
3 adopt by reference and incorporate herein Defendants' Motion, Memorandum of Points and
4 Authorities and Exhibits as if set forth in full at this point, subject to the limitations set forth
5 below..

6 Specifically, Ms. Miller and Ms. Torres, both alleged in the Amended Complaint to be
7 employed in a "paid government position of Teacher for the Clark County School District," Am.
8 Comp. ¶¶ 13 and 19, join the Ohrenschall Motion's Sections I and II, IIIA as concerns the
9 argument regarding N.R.S. 41.0337's requirement of the joinder of political subdivision
10 employers, and Section IIIB. The Court's substantive ruling on the underlying questions in the
11 Ohrenschall Motion should apply in full to Defendants Miller and Torres.

12 DATED this 30th day of June, 2022.

13 **WOLF, RIFKIN, SHAPIRO,**
14 **SCHULMAN & RABKIN, LLP**

15 By: /s/ Bradley Schrager
16 BRADLEY SCHRAGER, ESQ. (SBN 10217)
17 ROYI MOAS, ESQ. (SBN 10686)
18 DANIEL BRAVO, ESQ. (SBN 13078)
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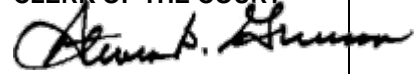
22 *Attorneys for Defendants,*
23 *Brittney Miller and Selena Torres*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 30th day of June, 2022, a true and correct copy of the
3 foregoing **DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S PARTIAL**
4 **JOINDER TO DEFENDANT JAMES OHRENSCHALL'S MOTION TO DISMISS** was
5 served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system
6 and serving all parties with an email address on record, pursuant to Administrative Order 1402
7 and Rule 9 of the N.E.F.C.R.

8 By: /s/ Dannielle Fresquez

9 Dannielle Fresquez, an Employee of
10 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
11 RABKIN, LLP
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JMOT

Berna L. Rhodes-Ford
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*Attorney for Defendant
Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

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

**NSHE DEFENDANT DINA NEAL'S
JOINDER TO DEFENDANT JAMES
OHRENSCHALL'S MOTION TO
DISMISS**

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Respectfully submitted this 30th day of June, 2022.

/s/ Berna L. Rhodes-Ford

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*Attorney for Defendant
Dina Neal*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State
3 College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party
4 to the within cause. Pursuant to NRCP 5, I further certify that on June 30, 2022, I caused the following
5 document, **NSHE DEFENDANT DINA NEAL'S JOINDER TO DEFENDANT JAMES**
6 **OHRENSCHALL'S MOTION TO DISMISS**, to be served as follows:

7 ☒

8 **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to
9 be electronically served through the Eighth Judicial District Court's electronic filing system,
10 with the date and time of the electronic service substituted for the date and place of deposit in the
11 mail to the attorneys listed below at the address indicated below.

12 Deanna L. Forbush, Esq.
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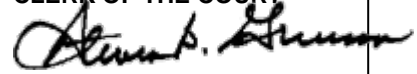
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LEGISLATIVE COUNSEL BUREAU,
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Legislature of the State of Nevada

24 ☐

25 **BY MAIL** I caused such envelope(s) with first class postage thereon fully prepaid to be
26 placed in the U.S. Mail in Henderson, Nevada.

27 *Edwin Maguinto*

28 An employee of the Office of General Counsel
Nevada State College



MDSM
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

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 Schragar, 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**

General Counsel

Nevada Bar No. 6781

12 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

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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:

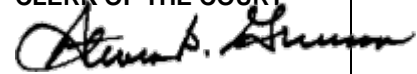
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/s/ Kevin C. Powers
An Employee of the Legislative Counsel Bureau



JMOT

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*Attorney for Defendant
Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

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

**NSHE DEFENDANT DINA NEAL'S
JOINDER TO LEGISLATIVE
COUNSEL BUREAU'S NEVADA
LEGISLATURE'S MOTION TO
DISMISS AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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Respectfully submitted this 1st day of July, 2022.

*Attorney for Defendant
Dina Neal*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State
3 College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party
4 to the within cause. Pursuant to NRCP 5, I further certify that on July 1, 2022, I caused the following
5 document, **NSHE DEFENDANT DINA NEAL'S JOINDER TO LEGISLATIVE COUNSEL**
6 **BUREAU'S NEVADA LEGISLATURE'S MOTION TO DISMISS AMENDED COMPLAINT**
7 **FOR DECLARATORY AND INJUNCTIVE RELIEF**, to be served as follows:

8 ☒

9 **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to
10 be electronically served through the Eighth Judicial District Court's electronic filing system,
11 with the date and time of the electronic service substituted for the date and place of deposit in the
12 mail to the attorneys listed below at the address indicated below.

13 Deanna L. Forbush, Esq.
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20 *and Selena Torres*

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Attorney for Defendant James Ohrenschall

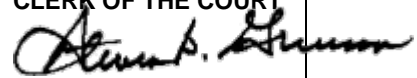
Kevin C. Powers, Esq.
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Attorney for Intervenor-Defendant
Legislature of the State of Nevada

24 ☐

25 **BY MAIL** I caused such envelope(s) with first class postage thereon fully prepaid to be
26 placed in the U.S. Mail in Henderson, Nevada.
27

28 *Edwin Maguinto*

An employee of the Office of General Counsel
Nevada State College



JMOT

BRADLEY SCHRAGER, ESQ. (SBN 10217)

ROYI MOAS, ESQ. (SBN 10686)

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*Attorneys for Defendants,
Brittney Miller and Selena Torres*

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,

vs.

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

Defendants.

Case No.: A-20-817757-C

Dept. No.: VIII

**DEFENDANTS BRITTNEY MILLER
AND SELENA TORRES'S PARTIAL
JOINDER TO NEVADA
LEGISLATURE'S MOTION TO DISMISS**

**HEARING DATE: TBA
HEARING TIME: TBA**

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1 Defendants Britney Miller and Selena Torres hereby join in Nevada Legislature's Motion
2 to Dismiss ("the Legislature Motion") filed herein on July 1, 2022, and adopt by reference and
3 incorporate herein Defendants' Motion, Memorandum of Points and Authorities and Exhibits as
4 if set forth in full at this point, subject to the limitations set forth below.

5 Specifically, Ms. Miller and Ms. Torres, both alleged in the Amended Complaint to be
6 employed in a "paid government position of Teacher for the Clark County School District," Am.
7 Comp. ¶¶ 13 and 19, join the Legislature Motion's Section III and Section IV as concerns the
8 argument regarding N.R.S. 41.0337's requirement of the joinder of political subdivision
9 employers.

10 DATED this 1st day of July, 2022.

11 **WOLF, RIFKIN, SHAPIRO,**
12 **SCHULMAN & RABKIN, LLP**

13 By: /s/ Daniel Bravo

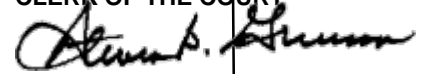
14 BRADLEY SCHRAGER, ESQ. (SBN 10217)
15 ROYI MOAS, ESQ. (SBN 10686)
16 DANIEL BRAVO, ESQ. (SBN 13078)
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17 *Attorneys for Defendants,*
18 *Brittney Miller and Selena Torres*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 1st day of July, 2022, a true and correct copy of the foregoing
3 **DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S PARTIAL JOINDER**
4 **TO NEVADA LEGISLATURE'S MOTION TO DISMISS** was served by electronically filing
5 with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an
6 email address on record, pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

7
8 By: /s/ Dannielle Fresquez
9 Dannielle Fresquez, an Employee of
10 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
11 RABKIN, LLP
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JOIN

JONATHAN D. BLUM, ESQ.

Nevada Bar No. 09515

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Attorneys for Defendant, James Orenschall

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: 24

**DEFENDANT JAMES
ORENSCHALL'S JOINDER TO NSHE
DEFENDANT DINA NEAL'S MOTION
TO DISMISS PURSUANT TO NRCP
12(B)(5)**

HEARING DATE: AUGUST 16, 2022

HEARING TIME: 10:00 AM

Defendant, JAMES ORENSCHALL (hereinafter "Defendant" or "Orenschall") by and
through his counsel of record, WILEY PETERSEN, hereby joins, incorporates, and adopts the
factual allegations and authorities asserted in the NSHE Defendant Dina Neal's Motion to

///

///

///

1 Dismiss Pursuant to NRCP 12(b)(5), filed on June 30, 2022.

2 DATED this 7 day of July, 2022.

3 **WILEY PETERSEN**

4
5 
6 JONATHAN D. BLUM, ESQ.
7 Nevada Bar No. 09515
8 1050 Indigo Dr., Suite 200B
9 Las Vegas, Nevada 89145
10 Telephone: (702) 910-3329
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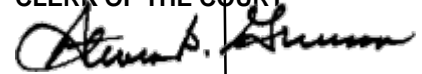
13 *Attorneys for Defendant, James*
14 *Orenschall*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of WILEY PETERSEN. On the 1 day of July, 2022, I caused to be served a true and correct copy of foregoing **DEFENDANT JAMES ORENSCHALL'S JOINDER TO NSHE DEFENDANT DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.


An Employee of WILEY PETERSEN



JOIN

JONATHAN D. BLUM, ESQ.

Nevada Bar No. 09515

WILEY PETERSEN

1050 Indigo Drive, Suite 200B

Las Vegas, Nevada 89145

Telephone: (702) 910-3329

Facsimile: (702) 553-3467

E-Mail: jblum@wileypetersenlaw.com

Attorneys for Defendant, James Orenschall

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: 24

**DEFENDANT JAMES
ORENSCHALL'S JOINDER, IN PART,
TO LEGISLATURE OF THE STATE
OF NEVADA'S MOTION TO DISMISS
COMPLAINT**

HEARING DATE: AUGUST 16, 2022

HEARING TIME: 10:00 A.M.

Defendant, JAMES ORENSCHALL (hereinafter "Defendant" or "Orenschall") by and
through his counsel of record, WILEY PETERSEN, hereby joins, incorporates, and adopts the
factual allegations and authorities asserted in the Legislature of the State of Nevada's Motion to

///

///

1 Dismiss Complaint, filed on June 30, 2022, regarding with necessary joinder of employers in this
2 action (Section III, p. 8-12), only.

3 DATED this 7 day of July, 2022.

4 **WILEY PETERSEN**

5
6 
7 JONATHAN D. BLUM, ESQ.
8 Nevada Bar No. 09515
9 1050 Indigo Dr., Suite 200B
10 Las Vegas, Nevada 89145
11 Telephone: (702) 910-3329
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14 *Attorneys for Defendant, James*
15 *Orenschall*

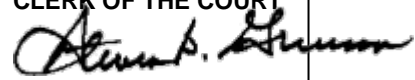
1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of WILEY PETERSEN. On the 7 day of July,
3 2022, I caused to be served a true and correct copy of foregoing **DEFENDANT JAMES**
4 **ORENSCHALL'S JOINDER, IN PART, TO LEGISLATURE OF THE STATE OF**
5 **NEVADA'S MOTION TO DISMISS COMPLAINT** in the following manner:

6 (ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the referenced
7 document was electronically filed on the date hereof and served through the Notice of Electronic
8 Filing automatically generated by the Court's facilities to those parties listed on the Court's
9 Master Service List.

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11 

12 _____
13 An Employee of WILEY PETERSEN
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MSTR

DEANNA L. FORBUSH, 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.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: VIII

HEARING REQUESTED

PLAINTIFF'S MOTION TO STRIKE:

**(1) NSHE DEFENDANT DINA NEAL'S
MOTION TO DISMISS PURSUANT
TO NRCP 12(B)(5),**

**(2) NEVADA LEGISLATURE'S
MOTION TO DISMISS AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF, AND**

(3) ALL JOINDERS THERETO

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants,

and Legislature of the State of Nevada,

Intervenor-Defendant.

Pursuant to NRCP 12(g)(2), 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 submits its Motion to Strike the successive motion to dismiss and joinders filed by NSHE Defendant, Dina Neal [Docs. 135, 140 and 144]; the successive motion to dismiss filed by Intervenor-Defendant, Legislature of the State of Nevada (“Nevada Legislature”) [Docs. 143]; the successive joinders filed by Defendant, Brittney Miller and Selena Torres [Docs. 138, 139 and 145]; and, in the event the underlying matters are stricken, the then-improper joinders filed by Defendant, James Ohrenschall [Docs. 152, 153¹ and 154].

NRCP 12(g)(2), titled “Limitation on Further Motions,” mandates that a party who previously moved for dismissal under the rule “must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.” (Emphasis added.) The record in the instant case is clear that the only party who did not previously move for

¹ Doc. 153, Defendant James Ohrenschall’s Joinder to NSHE Defendant Dina Neal’s Motion to Dismiss Pursuant to NRCP 12(b)(5), appears to be a duplicate filing of Doc. 152.

1 dismissal in the instant case is Defendant, James Ohrenschall, and his motion to dismiss is not
2 subject to the instant Motion to Strike. The remaining motions to dismiss and their joinders
3 including those of Defendant Ohrenschall, however, are not properly before this Court and must be
4 stricken.

5 The instant Motion to Strike is made and based on the following Memorandum of Points and
6 Authorities; the Declaration of Colleen E. McCarty, Esq. included therein; all pleadings and papers
7 already on file; and any oral argument the Court may permit at a hearing of this matter.

8 Dated this 13th day of July, 2022.

9
10 **FOX ROTHSCHILD LLP**

11 By: /s/ Colleen E. McCarty

12 DEANNA L. FORBUSH

13 Nevada Bar No. 6646

14 COLLEEN E. MCCARTY

15 Nevada Bar No. 13186

16 1980 Festival Plaza Drive, Suite 700

17 Las Vegas, Nevada 89135

18 Telephone: (702) 262-6899

19 Attorneys for Plaintiff

20 Nevada Policy Research Institute

21 **DECLARATION OF COLLEEN E. MCCARTY, ESQ. IN SUPPORT OF**
22 **MOTION TO STRIKE**

23 I, Colleen E. McCarty, hereby declare as follows:

24 1. I am an attorney licensed to practice law in the State of Nevada, and I am an
25 Associate with Fox Rothschild LLP, attorneys for Plaintiff, Nevada Policy Research Institute.

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

28 3. In the instant litigation, Defendant Dina Neal filed, fully briefed and initially
prevailed on her motion to dismiss pursuant to NRCP 12(b). See Docs. 47, 77 and 106, on file
herein. Intervenor-Defendant, the Legislature of the State of Nevada ("Nevada Legislature"), filed
and fully briefed its motion to intervene in which it made substantive dismissal arguments, and it

1 ultimately authored a joint opposition to NPRI's motion for clarification of the then-assigned Court's
2 order of dismissal, which included a countermotion for dismissal of all remaining parties. *See* Docs.
3 54, 90, and 104, on file herein. And, finally, Defendants Brittney Miller and Selena Torres, who
4 have joined the successive motions to dismiss filed by Defendant Neal and Intervenor-Defendant
5 Nevada Legislature, themselves filed and/or joined fully briefed prior motions to dismiss. *See* Docs.
6 35, 65, 66, 67 and 100.

7 4. The only party who did not participate in the voluminous, three-month-long NRCP 12
8 dismissal process that preceded the Supreme Court's remand of this matter is Defendant, James
9 Ohrenschall, and only because he evaded service long enough that he did not have to participate.
10 That said, to the extent Mr. Ohrenschall seeks dismissal by motion for the first time in the instant
11 case, NPRI recognizes the need to timely oppose that motion. But to the extent that all other
12 Defendants have sought to pursue and/or join a second round of motion practice to obtain relief
13 pursuant to NRCP 12 for matters available to them but omitted from their prior motions,
14 countermotions and joinders, and which motions are not properly subject to and exception, NPRI
15 respectfully requests the Court strike these improper pleadings at the first available opportunity in
16 the interest of both judicial and part economy.

17 I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045)² that
18 the foregoing is true and correct.

19 Dated this 13th day of July, 2022.

20
21 /s/ Colleen E. McCarty
COLLEEN E. MCCARTY

22 ///

23 ///

24 ///

25 ///

26
27 ² NRS 53.045. Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence
28 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 As discussed during the further proceedings the Court conducted on June 9, 2022, following
5 the Supreme Court's reversal and remand of Judge Crockett's dismissal order, this matter will
6 inevitably return to the Supreme Court for a final determination of whether Defendants' dual
7 employment in the Executive Branch while serving as an elected member of the Legislature violates
8 the separation of powers clause of the Nevada Constitution. Whether this Court ultimately decides
9 that all dual employment service is precluded, or it makes a distinction between the types of service
10 or for whom the service is provided, someone will appeal to obtain the certainty on the issue the
11 Supreme Court specifically recognized is sorely lacking.

12 For this reason, NPRI has sought stipulation to the facts pertaining to each remaining
13 Defendant's dual service and to submit either joint or simultaneous motions for the Court's
14 consideration, to minimize the time this matter remains in the district court and to expedite its return
15 for appellate review. Regrettably, all such suggestions by NPRI have been roundly rejected. And it
16 now appears from the numerous motions to dismiss and joinders filed since the Supreme Court's
17 remand, nine (9) total as of the date of this filing, that Defendants hope to drag this matter out before
18 this Court to the greatest extent possible to again attempt to avail themselves of NRS 1.310, which
19 allows a Legislator who is a party to a court action to request a continuance until after the legislative
20 session. NRCP 12(g)(2), however, precludes the delay tactics currently being employed by
21 Defendants because it plainly prohibits the filing of the successive motions submitted by Defendant,
22 Dina Neal, and Intervenor-Defendant, Nevada Legislature, and all joinders filed thereto. The only
23 party eligible to bring a motion to dismiss pursuant to NRCP 12 at this time is Defendant, James
24 Ohrenschall, and it is only his motion that the Court should hear on August 4, 2022. All other
25 motions to dismiss and their respective joinders, including those made by Mr. Ohrenschall, should
26 be stricken and no further time and expense of the Court or the parties spent on them.

27 ///

28 ///

1 II.

2 **STATEMENT OF FACTS**

3 The facts relevant to the instant Motion to Strike are contained within the Declaration of
4 Colleen E. McCarty, *supra*, and are incorporated by reference herein.

5 III.

6 **ARGUMENT**

7 **A. Defendants' Dismissal Motions and Joinders Violate NRCP 12(g)(2) and Should**
8 **Be Stricken.**

9 The plain language of NRCP 12(g)(2) reads as follows: “**Limitation on Further Motions.**
10 Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not
11 make another motion under this rule raising a defense or objection that was available to the party but
12 omitted from its earlier motion.” (Emphasis in original.) Further, as discussed in greater detail
13 below, the exceptions stated in NRCP 12(h)(2) and (3), which only permit certain matters to be
14 raised a second time by other means later in the case or where subject matter jurisdiction of the court
15 is legitimately truly in question, are simply not present here.

16 Indeed, this long-standing rule remained unchanged by the NRCP amendments of March,
17 2019, and it exists to preclude Defendants' successive motion practice in its entirety. First
18 Defendant Dina Neal, by both title and substance, admits she is once again seeking relief pursuant to
19 NRCP 12(b)(5), which NRCP 12(g)(2) specifically precludes. Even more egregious than her blatant
20 disregard for procedure, however, is the fact that she is knowingly raising arguments she knows to
21 be unsound and the subject of Defendants' prior motion practice. The entire premise of her motion
22 to dismiss is the unsupported and erroneous conclusion that the separation of powers clause found in
23 the Nevada Constitution “has been interpreted to prohibit *public officials or officers*, as opposed to
24 mere *public employees*, from holding positions in separate branches of government.” See NSHE
25 Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5) (“the Neal Motion”) [Doc.
26 135] at 4:10-12. This assertion, however, is completely contrary to the Supreme Court's remand
27 order, which unequivocally stated in relevant part:

28 / / /

1 Our refusal to grant standing [to NPRI] under these circumstances could
2 result in serious public injury – either by the continued allegedly unlawful
3 service of the above-named officials, or by the refusal of qualified persons
4 to run for office for fear of acting unconstitutionally – because the
5 unsettled issue continues to arise. (Citation omitted.) Indeed, this court
6 has previously been asked to decide a similar question regarding whether
7 state and local government employees could simultaneously serve as
8 members in the Legislature. (Citation omitted.) In *Heller*, the Nevada
9 Secretary of State asked this court to declare that dual service violates the
10 separation-of-powers clause and to order the Legislature to oust those
11 legislators who were also employed by the state executive branch and
12 local governments. This court declined to reach the issue....

13 *See Nev. Policy Research Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28 at *10 (2022) (emphasis
14 added), on file herein; *see also* at *11 (stating “future guidance is necessary because of the lack of
15 judicial interpretation of Nevada’s separation-of-powers clause,” and expressing in a footnote
16 concerning the prior non-binding opinions issued by the Nevada Attorney General and Nevada
17 Legislative Counsel Bureau that these opinions “serve to demonstrate the recurring and unresolved
18 nature of the dual service issue.”).

19 Additionally, the fact that Judge Crockett granted dismissal solely on NPRI’s purported lack
20 of standing does not mean that these arguments, which were previously made and/or joined by
21 Defendants, were not fully considered. Raising these arguments now in a successive NRCP 12(b)(5)
22 motion or joining in any other motion based on the same, is clearly procedurally improper.

23 Second, despite its claims to the contrary, the Nevada Legislature also fully engaged in the
24 prior dismissal process and is precluded from filing its own successive motion to dismiss at this
25 time. *See* Nevada Legislature’s Motion to Dismiss Amended Complaint for Declaratory and
26 Injunctive Relief (“Nevada Legislature’s Motion”) [Doc. 143.] Specifically, the Nevada Legislature
27 first argued substantive grounds for dismissal of the instant action in its prior Motion to Intervene as
28 Defendant [Doc. 54], on file herein, including but not limited to asserting that “the public policy in
this State protects the concept of the ‘citizen-legislator’ as the cornerstone of an effective, responsive
and qualified part-time legislative body.” *See id.* at 13:22-24. But even if the Court does not find
the arguments in support of intervention sufficient to warrant striking the Nevada Legislature’s
Motion pursuant to NRCP 12(g)(2), there can be no doubt that the countermotion to dismiss that the

1 Nevada Legislature brought on behalf of itself and all other then-remaining Defendants mandates the
2 rule's application.

3 Specifically, prior to the entry of Judge Crockett's final order, NPRI sought clarification on
4 the basis of his decision to dismiss the case in its entirety, as well as to grant the Nevada
5 Legislature's intervention request. The Legislative Counsel Bureau, on behalf of the Nevada
6 Legislature, not only authored the joint opposition to the motion for clarification, it also included
7 therewith what it styled as the "Countermotion to Dismiss All Remaining Defendants Based on
8 Plaintiff's Lack of Standing." See Doc. 104, on file herein. The countermotion relied squarely on
9 NRCP 12 and provided ample opportunity for the Nevada Legislature to raise all grounds
10 appertaining to its desired dismissal. NRCP 12(g)(2) precludes it from now seeking a second bite at
11 the apple for matters that were available but omitted from this earlier countermotion.

12 Finally, with regard to the substance of the Nevada Legislature's Motion, NPRI anticipates it
13 will seek to argue that one or both of the exceptions to the application of NRCP 12(g)(2) apply, but
14 they do not. First, the entire argument regarding the purported failure of NPRI to join required
15 parties is being made pursuant to NRCP 19(a). See Nevada Legislature's Motion at 14:4-17:2. But
16 the exception to the limitation of further motions found in NRCP 12(h)(2) pertains only to motions
17 brought to NRCP 19(b) where joinder of a party is not feasible, and not NRCP 19(a) where joinder is
18 required if feasible, the latter of which must clearly be filed in the first instance. Second, while the
19 exception found in NRCP 12(h)(3) references lack of subject-matter jurisdiction as a basis for
20 dismissal at any time, the matter of the Court's jurisdiction has already been settled by the Supreme
21 Court in the conclusion of its remand order. There, the Supreme Court succinctly stated:

22 We elect to apply the public-importance exception here and confer
23 standing on NPRI because it is an appropriate party and the issue in this
24 case implicates separation of powers under our state constitution, is likely
25 to recur, and is of such significant public importance as to require
26 resolution for further guidance. We therefore reverse the district court
order dismissing NPRI's complaint and remand for further proceedings on
its claims.

27 See *NPRI*, 138 Nev. Adv. Op. 28 at *14-15 (emphasis added), on file herein. The argument that
28 somehow this Court could still lacks subject-matter jurisdiction based on the application of the

provisions of NRS Chapter 41 is simply a red herring with no legitimate basis for consideration. NRS 41.031, NRS 41.0337 and NRS 039, by their plain language, are all statutes pertaining to causes of action wherein the liability of the State or one of its political subdivisions has been implicated by the actions of one of its officers, employees or immune contractors. The instant case in no way implicates liability for any party, let alone the State of Nevada, and there is no question of subject matter jurisdiction being challenged for the failure to meet any requirements of a wholly inapplicable chapter of the Nevada Revised Statutes.

Lastly, although not seeking motions to dismiss of their own, Defendants Brittney Miller and Selena Torres have filed their joinder to the motion to dismiss filed by Defendant Dina Neal [Doc. 138] and their partial joinders to the motions to dismiss filed by Intervenor-Defendant Nevada Legislature [Doc. 145], and newly-appearing Defendant James Ohrenschall [Doc. 139]. These joinders are, however, equally successive where they also filed and/or joined fully briefed prior motions to dismiss brought pursuant to NRCP 12. *See* Docs. 35, 65, 66, 67 and 100. Accordingly, for all of the same reasons argued above, the joinders of Brittney Miller and Selena Torres, too, should be dismissed as procedurally improper under NRCP 12(g)(2).

B. Should the Court Strike the Pending Motions to Dismiss, the Joinders Thereto Filed By Newly-Appearing Defendant James Ohrenschall Must Also Be Stricken.

To reiterate, NPRI recognizes Defendant Ohrenschall's ability to file a first motion to dismiss pursuant to NRCP 12 and will timely oppose the same. But the Court's local rules do not permit any consideration of a joinder to a motion otherwise stricken. Specifically, EDCR 2.20 only permits a joinder to become its own, stand-alone motion where the underlying motion "becomes moot or is withdrawn by the movant." EDCR 2.20(d). Should the Court exercise its broad discretion to preclude the other Defendants' improper motions to dismiss and strike them from the record, the arguments contained in the motions may not be otherwise considered by way of Defendant Ohrenschall's joinders, as they will have been neither rendered moot nor withdrawn.

All NPRI seeks by way of the instant Motion to Strike is for the Court to avoid any protracted delay resulting from the unnecessary and unwarranted revisiting of dismissal arguments that already were or could have been brought previously, and the Court's rules contemplate.

1 Defendant Ohrenschall's motion to dismiss is entitled to consideration; no other motions to dismiss
2 or any joinders are entitled to the same consideration, and the Court can significantly improve the
3 judicial and party economy of these proceedings by granting NPRI's Motion to Strike in its entirety.

4 **III.**

5 **CONCLUSION**

6 Defendants appear to want this matter to remain before this Court indefinitely. In seeking to
7 file and/or join successive motions to dismiss that are prohibited by NRCP 12(g)(2), however,
8 Defendants are violating the Court's rules, and with the exception of the motion to dismiss filed by
9 Defendant, James Ohrenschall [Doc. 136], all improperly filed motions to dismiss and their joinders
10 can and should be summarily stricken [i.e., Docs. 135, 138, 139, 140, 143, 144, 145, 152, 153 and
11 154].

12 NPRI seeks this necessary relief in the in the interest of both judicial and party economy, and
13 respectfully asks that, unlike its predecessor, this Court reach a substantive conclusion to this matter
14 at the earliest available opportunity.

15 Dated this 13th day of July, 2022.

16 **FOX ROTHSCCHILD LLP**

17 By: /s/ Colleen E. McCarty

18 DEANNA L. FORBUSH, ESQ.

19 Nevada Bar No. 6646

20 COLLEEN E. MCCARTY, ESQ.

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22 1980 Festival Plaza Dr., Suite 700

23 Las Vegas, Nevada 89135

24 Telephone: (702) 262-6899

25 Attorneys for Plaintiff

26 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 13th day of July, 2022, I caused the foregoing document entitled **PLAINTIFF'S MOTION TO STRIKE: (1) NSHE DEFENDANT DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5), (2) NEVADA LEGISLATURE'S MOTION TO DISMISS AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, AND (3) ALL JOINDERS THERETO** 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
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu
Attorney for Defendant Dina Neal

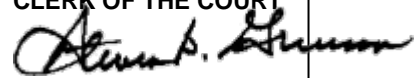
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/s/ Sherry Harper

An Employee of Fox Rothschild LLP



OMD

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Attorneys for Plaintiff
Nevada Policy Research Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
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and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

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

**PLAINTIFF'S OPPOSITION TO
DEFENDANT JAMES
OHRENSCHALL'S MOTION TO
DISMISS AND ALL JOINDERS
THERE TO**

Date of Hearing: August 4, 2022
Time of Hearing: 2:00 p.m.

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Opposition to the Motion to Dismiss filed on June 30, 2020 by Defendant James Ohrenschall (“Ohrenschall MTD”) [Doc. 136], as well as the Joinders incorporating the same arguments therein by reference filed by Defendants Brittney Miller and Selena Torres [Doc. 139] and NSHE Defendant Dina Neal [Doc. 140] (the “Joinder Defendants”), also filed on June 30, 2022.

NPRI draws the Court’s attention to the fact that Defendant Ohrenschall’s motion to dismiss contains all arguments that are identical – at times verbatim – to those already submitted to this Court’s predecessor by his then Deputy Public Defender colleague, Jason Frierson [Doc 60]. Importantly the bulk of those arguments are also wholly inconsistent with the Supreme Court’s opinion, which is officially the law of this case. Specifically, the assertions in Defendant Ohrenschall’s redundant motion to dismiss that Nevada’s separation of powers clause has been found to be inapplicable to local governments and to only prohibit public officials or officers, but not public employees, from holding positions in separate branches of government are entirely unsupported and erroneous, as discussed herein. *See* Ohrenschall MTD at Secs. III(B) and (C).

His redundancy notwithstanding, NPRI recognizes Defendant Ohrenschall, unlike his co-Defendants, has not previously made a dismissal motion and may now be heard and files its

1 Opposition based on the following Memorandum of Points and Authorities, the papers and pleadings
2 already on file, and any oral argument the Court may permit at the hearing of this matter.

3 Dated this 18th day of July, 2022.

4 **FOX ROTHSCHILD LLP**

5
6 By: /s/ Colleen E. McCarty

7 DEANNA L. FORBUSH

8 Nevada Bar No. 6646

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14 Attorneys for Plaintiff

15 Nevada Policy Research Institute

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I.**

18 **INTRODUCTION**

19 Similar to NSHE Defendant Dina Neal, Defendant Ohrenschall premises the majority of his
20 dismissal argument under NRCP 12(b)(5) on a legal conclusion for which there is no legal
21 precedent. In his motion to dismiss specifically, Defendant Ohrenschall, also asserted without any
22 legal support that the separation of powers of the Nevada Constitution does not apply to local
23 governments or public employees. *See* Ohrenschall MTD at Secs. III(B) and (C). These assertions,
24 however, run completely contrary to the Supreme Court's opinion on file herein, which
25 unequivocally states that application of the separation of powers clause remains unresolved. *See*
26 *Nev. Policy Research Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28 at *10-11 (2022) (stating, among
27 other things, that "future guidance is necessary because of the lack of judicial interpretation of
28 Nevada's separation-of-powers clause."), as well as the holding in *Secretary of State v. Nevada State*
Legislature ("Heller"), 120 Nev. 456, 93 P.3d 746 (2004), where the Nevada Supreme Court gave
clear instruction for challenging the dual employment of executive branch employees, separate and
apart from those employees invested with sovereign power.

1 Additionally, Defendant Ohrenschall's assertion that the separation of powers clause applies
2 only to employees of "the three departments of state government" and not to local government
3 employees is also belied by the *Heller* decision, where the right of legally interested persons to seek
4 declaratory and injunctive relief is stated without any distinction being made between state and local
5 government employees. *Heller*, 120 Nev. at 472, 93 P.3d at 757. Defendant Ohrenschall ignores
6 this holding, just like his co-Defendant Neal, but it remains binding on this Court. Further, the
7 motion conflates the prohibition against a political subdivision itself invoking separation of powers
8 with NPRI's challenge to legislators engaging in dual executive branch employment, which is
9 specifically authorized. *Id.*

10 Finally, Defendant Ohrenschall seeks to incorporate by reference the argument that dismissal
11 is necessary where NPRI purportedly failed to name other necessary party defendants pursuant to
12 NRCP 19(a). This issue is substantively raised in the current round of motions to dismiss only by
13 Intervenor-Defendant Nevada Legislature, and NPRI incorporates by reference the arguments in its
14 opposition thereto as though fully set forth herein. In summary, however, as is plain from the face of
15 the Amended Complaint, NPRI currently seeks to address the separation of powers violations of
16 legislators engaging in impermissible dual employment with the executive branch. There is no
17 requirement that NPRI sue anyone else at this stage, and more importantly, there is no legal basis to
18 request dismissal because it has limited its lawsuit in this way. On the contrary, dismissal would
19 only be available where joinder of an indispensable party was not feasible, which is addressed in
20 NRCP 19(b), and, even then, it is still well within a district court's discretion to proceed with the
21 lawsuit as filed regardless. *See, e.g., Humphries v. Eighth Jud. Dist. Ct.*, 129 Nev. 788, 792, 312
22 P.3d 484, 487 (2013) (citing NRCP 19(b)).

23 For all of the reasons stated herein, Defendant Ohrenschall's motion to dismiss and all
24 joinders thereto should be denied, and NPRI should be permitted to proceed with litigation in the
25 normal course.

26 ///

27 ///

28 ///

1 II.

2 **FACTUAL ALLEGATIONS**

3 The facts properly at issue with regard to the motion and joinders thereto are those set forth
4 in NPRI's Amended Complaint filed on July 28, 2020 [Doc. 12], a copy of which is on file herein.
5 In the interest of judicial and party economy, NPRI will not reattach the Amended Complaint here
6 and will only repeat those facts herein as necessary to support the arguments that follow.

7 III.

8 **STANDARDS OF REVIEW**

9 **A. NRCP 12(b)(5) Dismissal Requests Are Subject to Rigorous Review.**

10 A district court's decision to dismiss a complaint for failure to state a claim will be subject to
11 rigorous, de novo appellate review. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227,
12 181 P.3d 670, 672 (2008). Further, Nevada remains a notice-pleading jurisdiction, where all that is
13 required is that a pleading provide fair notice to the adverse party of the nature of the claims stated
14 therein, and the basis or grounds for such claims. *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d
15 216, 217 (1979); *see also Western States Constr. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220,
16 1223 (1992). In turn, "notice pleading" only requires a claimant to set forth a general recitation of
17 facts that support a cognizable legal theory. *See Liston v. Las Vegas Metropolitan Police Dept.*, 111
18 Nev. 1575, 1579, 908 P.2d 720, 723 (1995) (citing *Swartz v. Adams*, 93 Nev. 240, 245, 563 P.2d 74,
19 77 (1977)).

20 NPRI has clearly met the above pleading standard in the instant case as to Defendant
21 Ohrenschall.

22 **B. NRCP 12(b)(6) Dismissal Requests Also Require De Novo Review.**

23 To the extent Defendant Ohrenschall's intent to incorporate by reference arguments made in
24 the Nevada Legislature's motion to dismiss regarding NPRI's purported failure to join required
25 parties pursuant to NRCP 19(a) implicates the standard under NRCP 12(b)(6), NPRI asserts that the
26 Supreme Court will also review de novo a district court's interpretation of NRCP 19. *Humphries*,
27 129 Nev. at 792, 312 P.2d at 487 (citations omitted). "Whether a party is necessary does not depend
28 on upon broad labels or general classifications, but rather compromises a highly fact-specific

inquiry.” *Rose, LLC v. Treasure Island, LLC*, 135 Nev. 145, 150, 445 P.3d 860, 865 (Ct. App. 2019). Further, “[t]here is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a).” *Id.* (citation omitted). When the question of whether a nonparty must necessarily be joined is raised by another party already present in the action, rather than by the missing party itself, the court’s inquiry will primarily focus on whether complete relief is available among the parties already present. *Id.*, 135 Nev. at 158, 445 P.3d at 870. “[T]he court must decide if complete relief is possible among those already parties to the suit. This analysis is independent of the question whether relief is available to the absent party.” *Id.* (citing *Humphries*, 129 Nev. at 796, 312 P.3d at 490). Finally, even if a party is determined to be indispensable, only if joinder of that party is not feasible must the court determine, in equity and good conscience, whether the action should proceed or be dismissed. *Humphries*, 129, Nev. at 792, 312 P.2d at 487 (citing NRCP 19(b)).

IV.

ARGUMENT

A. The Entirety of Defendant Ohrenschall’s Motion to Dismiss Under NRCP 12(b)(5) Is Legally Unsupported and Must Fail.

The gravamen of the NRCP 12(b)(5) dismissal request made by Defendant Ohrenschall and the Joinder Defendants rests on the false premise that the Nevada Supreme Court has declared the separation of powers clause in the Nevada Constitution to be applicable only to executive branch employees working directly for the state, as opposed to a local government, and then only to those employees who also serve as public officials or officers. Simply put, the Nevada Supreme Court has not yet rendered a decision on these ultimate issues, let alone one that mandates dismissal in the instant case. If such a decision existed, NPRI would never have filed the instant litigation. Regardless of what Defendants believe to be NPRI’s agenda, the truth is that it is precisely for the purpose – and only for the purpose – of having the Supreme Court settle these matters that NPRI filed its Amended Complaint for both declaratory and injunctive relief in the district court seeking to exclude legislators from employment with the executive branch, which *Heller* expressly approved.

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1 1. *The Supreme Court Has Approved Using Actions for Declaratory and*
2 *Injunctive Relief to Bring Separation of Powers Challenges Against*
3 *Legislators Working as Executive Branch Employees.*

4 In *Heller*, then Secretary of State, Dean Heller, sought by writ of mandamus to challenge
5 state and local government employees' service in the Legislature as violating the Nevada
6 Constitution's separation of powers doctrine. In the end, the Supreme Court denied the requested
7 writ relief after determining, among other things, that the Secretary of State did not have a
8 discernable beneficial interest to confer standing to bring a writ of mandamus action and that he sued
9 the wrong party, i.e. the Legislature as a whole, to prevent service therein by executive branch
10 employees. *Id.*, 120 Nev. at 462-63, 93 P.3d at 750. But in so doing, the Supreme Court also
11 provided a clear path for a legally interested party to seek to exclude a legislator from executive
branch employment, which is exactly what NPRI is seeking to do in the instant case.

12 Specifically, the Court recognized two mechanisms for challenging what it deemed the "dual
13 service issue." *Heller*, 120 Nev. at 472, 93 P.3d at 756. It held that, "[t]he dual service issue may be
14 raised as a separation-of-powers challenge to legislators working in the executive branch, as the
15 qualifications of legislators employed in the executive branch are not constitutionally reserved to that
16 branch." *Id.*, 120 Nev. at 472, 93 P.3d at 757 (citation omitted). It went on to opine that, "[s]uch a
17 challenge might be well suited for quo warranto or a declaratory relief action filed in the district
18 court." *Id.* Most telling, and particularly relevant to the instant case, however, is the distinction the
19 Court draws between how each of the two types of actions might be employed, and by whom, stating
20 clearly that:

21 A quo warranto action could be used to challenge any executive branch
22 employees invested with sovereign power, who thereby occupy public
23 offices within quo warranto's exclusive reach. And, declaratory relief,
possibly coupled with injunctive relief, could be sought against other
executive branch employees.

24 The party with the clearest standing to bring the quo warranto action
25 would be the attorney general, and declaratory relief could be sought by
26 someone with a "legally protectable interest," such as a person seeking the
27 executive branch position held by the legislator. Individual legislators
would need to be named as either quo warranto respondents or declaratory
relief defendants.

28 *Id.*, 120 Nev. at 472-73, 93 P.3d at 757 (citations omitted) (emphasis added).

1 In sum, the Nevada Supreme Court in the *Heller* holding unequivocally endorses the
2 declaratory and injunctive relief actions alleged by NPRI against executive branch employees
3 without sovereign power, such as Defendant Ohrenschall and the Joinder Defendants named herein.
4 There are no restrictions stated by the Supreme Court for such a suit as between state or local
5 government employees, even though the Secretary of State clearly posed the question. And, there
6 are no restrictions for such a suit based on the functions engaged in by the executive branch
7 employees. In this regard, the decision squares completely with the Supreme Court's
8 acknowledgment of the ultimate importance of the separation of powers doctrine, as previously
9 stated in *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). The Supreme Court also
10 recognized in *Galloway* that it is precisely in the area of non-sovereign, ministerial functions that
11 separation of powers violations most frequently occur. *Galloway*, 83 Nev. at 22, 422 P.2d at 243.

12 Thus, the only condition precedent to NPRI bringing the instant action was claiming a legally
13 protectable interest, which the Supreme Court granted NPRI when it reversed this Court's
14 predecessor and conferred standing via an appropriate expansion of the public-importance standing
15 exception. *Cannizzaro*, 138 Nev. Adv. Op. 28 at *9, n. 2. As such, any argument that NPRI is not
16 properly before this court because it did not limit its lawsuit to state-level public officials and
17 officers fails in its entirety, and dismissal on that basis is improper.

18 2. **The Non-Binding Attorney General Opinion Relied on by Defendant**
19 **Ohrenschall Only Confirms the Lack of Existing Supreme Court Precedent.**

20 Save for two wholly inapposite cases, i.e. *City of Fernley v. State*, 132 Nev. 32, 366 P.3d 699
21 (2016) and *City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 302 P.3d 1118 (2013)¹, the case law
22 cited by Defendant Ohrenschall and the Joinder Defendants for the proposition that “the law on this
23 subject, at the very least as it applies to State Senator Ohrenschall, makes clear” that the separation
24 of powers clause does not apply to local government employees significantly predates the Attorney
25 General Opinion (“AGO”) 2004-03 on which they also rely. See Ohrenschall MTD at 2:26-28. This
26 is vitally important because, as admitted in the motion, the Attorney General undertook a thorough
27

28 ¹ Neither case brought by the named municipality discusses the issue of dual employment as a possible violation of the
separation of powers clause. Each merely addresses the legality of a limitation of authority imposed on the political
subdivision itself, which has no bearing on NPRI's claims in the instant litigation.

1 review of all prior cases before declaring, in the very first sentence of the introduction to his 2004
2 opinion, that “[t]he question of whether executive branch and local government employees can
3 dually serve as members of the Nevada State Legislature, in conformance with Article 3, Section 1
4 of the Nevada Constitution, has never been reviewed by the Nevada Supreme Court.” AGO 2004-03
5 at p. 18 (emphasis added); *see also* Ohrenschall MTD at 9:8-11.

6 It is also admitted in the motion that the AGO is not binding authority on this Court. *See*
7 Motion at 8:24-25, n. 3. This is another reason why the Court’s determination in this case is
8 imperative to secure the necessary appellate review. The AGO’s conclusion that the separation of
9 powers clause of the Nevada Constitution “bars any employee from serving in the executive branch
10 of government and simultaneously serving as a member of the Nevada State Legislature,” while
11 contemporaneously finding that “the constitutional requirement of separation of powers is not
12 applicable to local governments,” only perpetuates the concern that this matter remains unsettled.
13 The Supreme Court’s lack of review and clarification of these issues remains true as of the date of
14 this filing, 16 years after AGO 2004-03 and the decision in *Heller* were issued, and this Court has
15 the power through its substantive handling of this case to correct this error. *See also Cannizzaro*,
16 138 Nev. Adv. Op. 28 at *11, n. 4.

17 **B. Defendant Ohrenschall’s Dismissal Request under NRCP 12(b)(6) Is Equally**
18 **Unavailing Where NPRI Did Not Fail to Join a Necessary Party, and Dismissal**
19 **May Not Occur Regardless, Where Joinder of a Necessary Party Is Feasible.**

20 Defendant Ohrenschall and the Joinder Defendants additionally seek dismissal under NRCP
21 12(b)(6) by incorporating by reference the Nevada Legislature’s argument that NPRI failed to
22 include political subdivisions or other purportedly necessary party defendants in its lawsuit. *See*
23 Ohrenschall MTD at 4:17-22. To reach this conclusion, however, the Court must review the matter
24 under both NRCP 19(a) and NRCP 19(b), the latter provision of which the Nevada Legislature
25 neglected to address.

26 Indeed, the argument posed by the Nevada Legislature, and adopted by Defendant
27 Ohrenschall and the Joinder Defendants, focuses on whether political subdivisions or members of
28 another branch exercising executive branch functions are necessary parties and reaches the summary

1 conclusion that NRCP 19(a) requires their joinder because they may be interested in the outcome of
2 the litigation. This oversimplified analysis, however, is contrary to Nevada law, stated by the Court
3 of Appeals, which recently clarified that “NRCP 19 asks whether complete relief can be accorded to
4 all current parties without the absent party and/or whether the absent party claims an interest in the
5 action.” *Rose, LLC*, 135 Nev. 145, 157, 445 P.3d 860, 869 (Ct. App. 2019). Where, as here, the
6 party raising the issue is already in the litigation, and the absent party presumably knows about the
7 litigation but has made no effort to intervene, the lack of interest of the absent party suggests it does
8 not fear the impairment of its rights. *Id.* Completeness, however, is ultimately determined based on
9 those persons who are already parties, and not whether relief is also available to the absent party.
10 *Id.*, 135 Nev. at 158, 445 P.3d at 870.

11 Even if NPRI assumes for purposes of this argument only that there are political subdivisions
12 required to be named or judicial branch employees engaging in dual employment are necessary
13 parties to the instant case, their joinder is entirely feasible, and dismissal would be improper. *See*
14 NRCP 19(b). In other words, while NPRI did not join these parties and chose to focus this lawsuit
15 on only those legislators engaging in dual employment with the executive branches, there is no
16 actual impediment to their joinder here. And it is only if joinder of a necessary party is not feasible
17 that a court must determine, in equity and good conscience, whether the action may proceed or
18 should be dismissed. *Humphries*, 129, Nev. at 792, 312 P.2d at 487 (citing NRCP 19(b)).

19 Here, there is no legitimate dispute that complete relief may be accorded between NPRI and
20 legislators who are engaging in executive branch employment, so that the joinder of any political
21 subdivision or member of the judicial branch who may be similarly situated is neither required nor
22 necessary. *See* NRCP 19(a). Should the Court disagree, the rule only contemplates two options
23 where joinder is feasible but did not occur, i.e., joining the parties by court order or permitting the
24 matter to proceed without joining them. Dismissal would only be available where, unlike the instant
25 case, joinder is not feasible, and even in that inapplicable scenario, only if the court determines
26 equity and good conscience warrant dismissal. *See* NRCP 19(b); see also *Humphries*, 129, Nev. at
27 792, 312 P.2d at 487. The one outcome not available to the Court in the instant case, despite the

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arguments to the contrary of Defendant Ohrenschall and the Joinder Defendants, via the motion to dismiss of the Nevada Legislature, is their request for outright dismissal.

V.

CONCLUSION

Respectfully, there is no legitimate dispute that NPRI has more than adequately pled its claims for declaratory and injunctive relief, that Defendant Ohrenschall and the Joinder Defendants are on notice of the nature of these claims, and that NPRI should be permitted to proceed with its substantive action in the normal course.

For all of the reasons stated herein, NPRI respectfully requests that this Honorable Court deny Defendant Ohrenschall's Motion to Dismiss and all Joinders thereto, respectively, on each and every ground asserted therein.

Dated this 18th day of July, 2022.

FOX ROTHSCHILD LLP

By: /s/ Colleen E. McCarty

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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 18th day of July, 2022, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO DEFENDANT JAMES OHRENSCHALL'S MOTION TO DISMISS AND ALL JOINDERS THERETO** 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.

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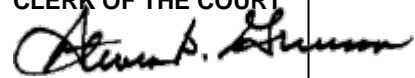
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DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

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

**PLAINTIFF'S OPPOSITION TO
NEVADA LEGISLATURE'S MOTION
TO DISMISS AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND ALL
JOINDERS THERETO**

Date of Hearing: August 4, 2022
Time of Hearing: 2:00 p.m.

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

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 Opposition to the Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief filed by Intervenor-Defendant, Legislature of the State of Nevada (“Nevada Legislature”) on July 1, 2022¹ (“Nevada Legislature MTD”) [Doc. 143], as well as the Partial Joinder filed by Defendants Brittney Miller and Selena Torres on July 1, 2022 [Doc. 145], and Defendant James Ohrenschall on July 7, 2022 [Doc.154], respectively (the “Joinder Defendants”).

In remanding this matter in its opinion styled *Nev. Policy Research Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28 (2022), the Nevada Supreme Court reversed the dismissal order of this Court’s predecessor and specifically stated it was remanding “for further proceedings on [NPRI’s] claims.” 138 Nev. Adv. Op. 28 at *15 (emphasis added). Contrary to the standard remand language that simply calls for “further proceedings,” the Supreme Court indicated it expects proceedings

¹ At the time set for further proceedings after the Supreme Court remand on June 9, 2022, the Court accepted the parties’ stipulation that all responsive pleadings must be filed on or before June 30, 2022. The Nevada Legislature had ample time to file its motion to dismiss within the agreed time frame, as all other Defendants did. Instead, the Nevada Legislature’s MTD did not come in until 9:30 a.m. on July 1, 2022 and, as such, it is untimely and may be denied on this basis alone. EDCR 7.60(b)(1), (5). Whatever technical difficulties the Legislative Counsel Bureau encountered in literally the 11th hour on the day required for filing, the late filing should not be excused.

1 specifically on NPRI's declaratory and injunctive relief claims. It is important to note that at the
2 time it issued its opinion, the Supreme Court had the district court's full record, as well as briefing
3 on all dismissal arguments. The Supreme Court's review was not limited solely to the issue of
4 NPRI's standing, and by the unanimous remand order, the Justices clearly did not contemplate a
5 duplicate round of dismissal requests by all existing parties. NPRI respectfully requests this Court
6 not countenance such obvious delay tactics.

7 Without waiving any of the arguments in its Motion to Strike filed July 13, 2022, then, NPRI
8 submits this Opposition based on the following Memorandum of Points and Authorities, the papers
9 and pleadings already on file, and any oral argument the Court may permit at the time of hearing.

10 Dated this 18th day of July, 2022.

11 **FOX ROTHSCHILD LLP**

12
13 By: /s/ Colleen E. McCarty

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22 Nevada Policy Research Institute

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I.**

25 **INTRODUCTION**

26 On July 13, 2022, NPRI filed its Motion to Strike [Doc. 157], which in relevant part seeks to
27 strike Nevada Legislature's current motion to dismiss as an impermissibly successive motion. The
28 Intervenor-Defendant filed and fully briefed not only its motion to intervene, in which it made
substantive dismissal arguments, but also its opposition to NPRI's motion for clarification of the
then-assigned Court's order of dismissal, which included its countermotion for dismissal of all
remaining parties, pursuant to NRCP 12. See Docs. 54, 90 and 104. This Court declined to set

1 NPRI's Motion to Strike on OST, choosing instead to hear all pending matters on August 4, 2022,
2 therefore NPRI incorporates its Motion to Strike by reference as though fully set forth herein and
3 does not waive any arguments therein by the filing of this Opposition.

4 Further, as demonstrated herein, the Nevada Legislature's attempt to evade substantive
5 review of the constitutionality of the dual employment of the remaining Defendants is entirely
6 unavailing. The relief it seeks under NRCP 19(a), based on its argument for joinder of Defendants'
7 employers as well as members of the judicial branch who may also serve in the executive branch,
8 i.e., outright dismissal, is simply not available. Only under NRCP 19(b), if required parties are
9 identified and joinder is not feasible, is dismissal a possible remedy, and even then, the Court may
10 still exercise its discretion to allow the matter to continue as filed regardless. *See, e.g., Humphries v.*
11 *Eighth Jud. Dist. Ct.*, 129 Nev. 788, 792, 312 P.3d 484, 487 (2013) (citing NRCP 19(b)).

12 For all of the reasons stated herein, there is no dispute that the Court must assume to be true
13 all facts alleged in NPRI's Amended Complaint if addressing the Nevada Legislature's current
14 motion to dismiss, that NPRI has met its burden to set forth cognizable legal theories based on those
15 facts, and that the Nevada Legislature has not provided any legal theory to warrant dismissal of the
16 Amended Complaint. For all of these reasons, Nevada Legislature's MTD and the joinders thereto
17 should be denied and the instant case should be allowed to proceed in the normal course.

18 II.

19 FACTUAL ALLEGATIONS

20 The facts properly at issue with regard to the motion and joinders thereto are those set forth
21 in NPRI's Amended Complaint filed on July 28, 2020 [Doc. 12], a copy of which is on file herein.
22 In the interest of judicial and party economy, NPRI will not reattach the Amended Complaint here
23 and will only repeat those facts herein as necessary to support the arguments that follow.

24 III.

25 STANDARD OF REVIEW

26 A. NRCP 12(b)(5) Dismissals Are Subject to Rigorous Review.

27 A district court's decision to dismiss a complaint for failure to state a claim will be subject to
28 a rigorous, de novo appellate review. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224,

227, 181 P.3d 670, 672 (2008). A motion brought pursuant to NRCP 12(b)(5) may, in fact, only be granted if the claimant would be entitled to no relief under the facts set forth in the pleading. *Morris v. Bank of America Nevada*, 110 Nev. 1274, 1277, 886 P.2d 454, 457 (1994) (citing *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)). Nevada remains a notice-pleading jurisdiction, where all that is required is for a pleading to provide fair notice to the adverse party of the nature of the claims stated therein and the basis or grounds for such claims. *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Western States Constr. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). “[N]otice pleading” simply requires a claimant to set forth a general recitation of facts that support a cognizable legal theory. *See Liston v. Las Vegas Metropolitan Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995) (citing *Swartz v. Adams*, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977)).

B. NRCP 12(b)(6) Dismissal Requests Also Require De Novo Review.

To the extent Nevada Legislature’s motion to dismiss regarding NPRI’s purported failure to join required parties pursuant to NRCP 19(a) implicates the standard under NRCP 12(b)(6), NPRI asserts that the Supreme Court will also review de novo a district court’s interpretation of NRCP 19. *Humphries*, 129 Nev. at 792, 312 P.2d at 487 (citations omitted). “Whether a party is necessary does not depend upon broad labels or general classifications, but rather compromises a highly fact-specific inquiry.” *Rose, LLC v. Treasure Island, LLC*, 135 Nev. 145, 150, 445 P.3d 860, 865 (Ct. App. 2019). Further, “[t]here is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a).” *Id.* (citation omitted). When the question of whether a nonparty must necessarily be joined is raised by another party already present in the action, rather than by the missing party itself, the court’s inquiry will primarily focus on whether complete relief is available among the parties already present. *Id.*, 135 Nev. at 158, 445 P.3d at 870. “[T]he court must decide if complete relief is possible among those already parties to the suit. This analysis is independent of the question whether relief is available to the absent party.” *Id.* (citing *Humphries*, 129 Nev. at 796, 312 P.3d at 490). Finally, even if a party is determined to be indispensable, only if joinder of that party is not feasible must the court determine, in equity and good conscience, whether the action should proceed or be dismissed. *Humphries*, 129, Nev. at 792, 312 P.2d at 487 (citing NRCP 19(b)).

1 C. **NRCP 12(b)(1) Dismissals Are Held to the Same High Standards as the Other**
2 **NRCP 12(b) Motions.**

3 Finally, contrary to the assertion in the Nevada Legislature MTD, its joinder arguments in no
4 way constitute a subject matter jurisdiction challenge under NRCP 12(b)(1) or NRCP 12(h)(3). The
5 question of NPRI's standing, which has already been decided by the Supreme Court, did properly
6 fall within NRCP 12(b)(1), but joinder challenges pursuant to NRCP 19 are clearly distinguished
7 under the rule. *See* NRCP 12(h)(2). However, to the extent the Court is curious whether the
8 standard of review is different under NRCP 12(b)(1), it is not. The Supreme Court reviews dismissal
9 of a complaint for lack of subject matter jurisdiction under the same rigorous, de novo standard as
10 dismissal for failure to state a claim upon which relief may be granted. *See, e.g., Citizens for Cold*
11 *Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009). Additionally, it is axiomatic
12 that, if a party has standing to assert its claims, which NPRI clearly does, the court has subject matter
13 jurisdiction to hear those claims. *See, e.g., Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155
14 N.C.App. 110, 113, 574 S.E.2d 48, 51 (2002) (holding defendants' standing argument implicates
15 Rule 12(b)(1) (citation omitted).

16 By any fair application of the legal standards stated above, the Nevada Legislature and
17 Joinder Defendants are not entitled to dismissal of NPRI's Amended Complaint, and their respective
18 motion to dismiss and joinders thereto should each be denied in their entirety.

19 IV.

20 **ARGUMENT**

21 A. **The Nevada Legislature Already Sought Dismissal of the Amended Complaint**
22 **and Is Precluded by NRCP 12(g)(2) From Filing the Instant Successive Motion.**

23 The Nevada Legislature first argues that it has all the rights of a party-defendant and that the
24 Supreme Court's remand returned the parties to the same position they were in prior to the dismissal
25 order entered by this Court's predecessor. *See* Nevada Legislature MTD at 6:1-3. NPRI agrees with
26 these general statements regarding the rights of intervenor-defendants. NPRI, however, vigorously
27 disputes that the Nevada Legislature did not have the opportunity to file a motion to dismiss
28 previously. *Id.* at 6:21-24. On the contrary, the Nevada Legislature authored and filed what it styled
as the "Countermotion to Dismiss All Remaining Defendants Based on Plaintiff's Lack of

1 Standing,” in conjunction with its substantive opposition to NPRI’s motion for clarification on the
2 basis for dismissal, which had been announced by minute order but not yet finalized. *See* Doc. 104.
3 The countermotion relied squarely on NRCP 12 and provided ample opportunity for the Nevada
4 Legislature to raise all grounds appertaining to its desired dismissal. Its strategy to forego seeking
5 dismissal on other bases does not preclude the application now of NRCP 12(g)(2), which prohibits
6 parties from subsequently pursuing dismissal arguments that were available but omitted from prior
7 dismissal motion practice.

8 Finally, to the extent the Nevada Legislature seeks to argue that one or both of the exceptions
9 to the application of NRCP 12(g)(2) apply, they do not. First, the entire argument regarding the
10 purported failure of NPRI to join required parties is being made pursuant to NRCP 19(a). *See*
11 Nevada Legislature MTD at 14:4-17:2. The exception to the limitation of further motions found in
12 NRCP 12(h)(2), however, pertains only to motions brought pursuant to NRCP 19(b), where joinder
13 of a party is not feasible, and not NRCP 19(a) where joinder is required if feasible, the latter of
14 which must clearly be filed in the first instance. Second, while the exception found in NRCP
15 12(h)(3) references lack of subject-matter jurisdiction as a basis for dismissal at any time, the matter
16 of the Court’s jurisdiction has already been settled by the Supreme Court in the conclusion of its
17 remand order. There, the Supreme Court succinctly stated:

18 We elect to apply the public-importance exception here and confer
19 standing on NPRI because it is an appropriate party and the issue in this
20 case implicates separation of powers under our state constitution, is likely
21 to recur, and is of such significant public importance as to require
22 resolution for further guidance. We therefore reverse the district court
order dismissing NPRI’s complaint and remand for further proceedings on
its claims.

23 *See Cannizzaro*, 138 Nev. Adv. Op. 28 at *14-15 (emphasis added).

24 Further, as discussed in greater detail below, the argument that somehow this Court could
25 still lack subject-matter jurisdiction based on the application of the provisions of NRS Chapter 41 is
26 simply a red herring with no legitimate basis for consideration. NRS 41.031, NRS 41.0337 and NRS
27 41.039, by their plain language, are all statutes pertaining to causes of action wherein the liability of
28 the State or one of its political subdivisions has been implicated by the actions of one of its officers,

employees or immune contractors. The instant case in no way implicates liability for any party, let alone the State of Nevada, and there is no question of subject matter jurisdiction lacking based on a purported failure to meet requirements of an inapplicable chapter of the Nevada Revised Statutes.

B. NPRI Did Not Fail to Name A Necessary Party, and Dismissal May Not Occur Where Joinder of Any Necessary Party Is Entirely Unnecessary But Still Feasible.

NPRI will take the Nevada Legislature’s arguments slightly out of order for ease of reference, where the gravamen of its motion to dismiss is truly the issue of whether dismissal is an appropriate remedy should the Court find NPRI failed to join one or more necessary parties. *See* Nevada Legislature MTD at Sec. IV. Remarkably, the Nevada Legislature in its joinder argument acknowledges the Supreme Court ruled in the instant case 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,**” but then immediately dismisses the statement out of hand as “not accurate.” *See* Nevada Legislature MTD at 14:15-21 (citing *Cannizzaro*, 138 Nev. Adv. Op. 28 at *13 (emphasis in original)). The focus of this argument then turns to four members of the judicial branch alleged to also be serving as adjunct professors with the Nevada System of Higher Education (“NSHE”). *See* Nevada Legislature MTD at 14:22-15:8.²

As noted in the motions to dismiss filed by other Defendants, it was also expected that the Nevada Legislature would argue the necessary joinder of the Defendants’ political subdivision employers. *See, e.g.,* Ohrenschall MTD [Doc. 136] at 4:17-22; *see also* Defendants Brittney Miller and Selena Torres’s Partial Joinder to James Ohrenschall’s Motion to Dismiss [Doc. 139] at 2:8-10. Instead, in an unavailing attempt to escape the application of NRCP 12(g)(2) to prohibit its successive motion practice, the Nevada Legislature attempts to couch that issue as one implicating subject matter jurisdiction, which it does not.

Returning to the argument regarding joinder under NRCP 19(a), however, the Nevada Legislature is simply asking for a remedy it cannot have. The artful, but fatally flawed argument

² During the further proceedings hearing on June 9, 2022, the Court asked whether the possible joinder of judges, if any that may be the Court’s colleagues could require a change of venue. Only one of the referenced judges, Frank Sullivan, presides in the Eighth Judicial District Court and his assignment to the Family Division hopefully allays any concerns the Court may have had in this regard.

continues for several paragraphs referencing only NRCP 19 without making the all-important distinction between the subparts of the NRCP, one of which contemplates dismissal and one which does not. The law is, in fact, well-settled that to reach the remedy of outright dismissal, the Court must review the matter under both NRCP 19(a) and NRCP 19(b), the latter provision of which the Nevada Legislature ignored in its entirety and for obvious reasons. Instead, it focused its argument solely on whether the four judicial branch members in question are necessary parties under NRCP 19(a), which subpart is finally acknowledged seven paragraphs into its argument, and incorrectly argues their joinder is required because they may be interested in the outcome of the litigation. *See* Nevada Legislature MTD at 14:4-14. This oversimplified analysis, however, is contrary to Nevada law and falls well short of requiring this Court's dismissal.

“NRCP 19 asks whether complete relief can be accorded to all current parties without the absent party and/or whether the absent party claims an interest in the action.” *Rose, LLC*, 135 Nev. at 157, 445 P.3d 869 (emphasis added.). But, as the appellate court stated in *Rose, LLC*, how the court analyzes the two inquiries depends on how the question of necessity came before the court, i.e., is the absent party seeking to intervene, or is a party other than the absent party raising the necessity of joinder. *Id.* Where, as here, the party raising the issue is already in the litigation, and the absent party presumably knows about the litigation but has made no effort to intervene, the lack of interest of the absent party suggests it does not fear the impairment of its rights. *Id.* There can be no doubt at this time, following the publication of its *Cannizzaro* opinion herein that all members of the judiciary are aware of the litigation and have, of course, made no effort to intervene. Completeness, however, is ultimately determined based on those persons who are already parties, and not whether relief is also available to the absent party. *Id.*, 135 Nev. at 158, 445 P.3d at 870.

That said, even if NPRI assumes for purposes of this argument only that the judicial branch employees engaging in dual employment with NSHE are necessary parties to the instant case, their joinder is entirely feasible and the remedies available under NRCP 19(a) are limited to the Court's order of joinder or the Court's determination to proceed without joinder; outright dismissal is not available. *See* NRCP 19(a)(1), (2). All of the Nevada Legislature's citations purportedly to the contrary deal with completely inapposite scenarios and are, again, unavailing. NPRI, as was its right

1 as the plaintiff, chose to focus its lawsuit on legislators engaging in dual employment in the
2 executive branch, and not on members of the judiciary. These parties are perfectly capable of being
3 joined, although it is entirely unnecessary to do so as complete relief is available among the parties
4 already present in the litigation. *Rose, LLC*, 135 Nev. at 157, 445 P.3d 869. Again, it is only if a
5 party is deemed necessary and joinder of that party is not feasible that a court must determine, in
6 equity and good conscience, whether the action may proceed or should be dismissed. *Humphries*,
7 129, Nev. at 792, 312 P.2d at 487 (citing NRCP 19(b)).

8 In the end, should the Court determine members of the judiciary to be necessary parties, it
9 may then exercise one of two options: it may join these judicial branch employees by court order, or
10 it may permit this matter to proceed without the joinder of these parties. *See* NRCP 19(a)(1), (2).
11 The one remedy not available to the Court under the circumstances of the instant case is the request
12 for outright dismissal made by the Nevada Legislature and Joinder Defendants. As such, their
13 respective motions should be denied on this basis in their entirety.

14 C. **The NRS Chapter 41 Arguments Made By the Nevada Legislature Are Wholly**
15 **Inapplicable and Should Be Summarily Disregarded.**

16 As a threshold matter, none of the NRS Chapter 41 provisions cited in the Nevada
17 Legislature’s MTD, i.e., NRS 41.031, NRS 41.0337 and NRS 41.039, speak to the dismissal remedy
18 sought by it and the Joinder Defendants. Instead, what each provision does, as the subtitle in NRS
19 Chapter 41 - LIABILITY OF AND ACTIONS AGAINST THIS STATE, ITS AGENCIES AND
20 POLITICAL SUBDIVISIONS – makes clear, is set forth the requirements when a party files a tort
21 action against the State of Nevada, either directly or through one of its agencies or political
22 subdivisions. Not only is this section of the NRS commonly referred to as the Nevada Tort Claims
23 Act, the plain language of NRS 41.0337 requiring the naming of the State or political subdivision as
24 a party and commences each subpart with the language “No tort action....,” and the Nevada
25 Administrative Code provisions interpreting the chapter is itself titled CHAPTER 41 - TORT
26 CLAIMS AGAINST THE STATE, ITS AGENCIES AND POLITICAL SUBDIVISIONS. NAC
27 41.100, *et seq.*

28 ///

1 The Nevada Legislature presumably being well aware of the purpose and nature of the NRS
2 Chapter 41 notwithstanding, the attack on this Court's subject matter jurisdiction based on
3 this chapter is simply another untenable straw man argument, similar to the argument posed by
4 NSHE Defendant Dina Neal. She attempts to obtain dismissal by starting with the false and legally
5 unsupported premise that the Supreme Court has previously ruled that the separation of powers
6 clause does not apply to public employees, when no such ruling has ever been made. All citations
7 that follow thereafter appear relevant but are, in fact, entirely inapposite. In the same fashion, the
8 Nevada Legislature seeks dismissal based on the false and legally unsupported premise that this
9 lawsuit is one that should have been made against the State pursuant to the provisions of NRS
10 Chapter 41. The instant action, of course, is one seeking declaratory and injunctive relief for which
11 this court has already established its subject matter jurisdiction. *Cannizzaro*, 138 Nev. Adv. Op. 28
12 at *7. And again, just as with Defendant Neal's fatally flawed argument, all citations that follow by
13 the Nevada Legislature speak to its false premise, i.e., the application of the NRS Chapter 41
14 provisions cited, but are entirely inapposite to the instant case.

15 In conclusion, NPRI posits to this Court that the Nevada Legislature knows it has filed an
16 impermissibly successive motion under NRCP 12(g)(2), which is why it attempts to make a subject
17 matter jurisdiction argument pursuant to the exception for subject matter jurisdiction challenges
18 found in NRCP 12(h)(3). NPRI further posits that it knows the cited provisions of NRS Chapter 41
19 do not apply to the instant case, but because there is general case law indicating the failure to invoke
20 a waiver of sovereign immunity is jurisdictional, the Nevada Legislature hopes the Court will be
21 persuaded to once again deny NPRI its rightful day in court on procedural grounds. NPRI trusts the
22 Court will see these arguments for what they truly are, unconscionable delay tactics, and disregard
23 them in their entirety.

24 ///

25 ///

26 ///

27 ///

28 ///

V.

CONCLUSION

Respectfully, there is no legitimate dispute that this Court has subject matter jurisdiction over the instant lawsuit, that NPRI has more than adequately pled its claims for declaratory and injunctive relief to survive any dismissal challenge, and that NPRI should be permitted to proceed with its substantive action in the normal course.

For all of the reasons stated herein, NPRI respectfully requests that this Honorable Court deny the Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief and all Joinders thereto, respectively, on each and every ground asserted therein.

Dated this 18th day of July, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 18th day of July, 2022, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO NEVADA LEGISLATURE'S MOTION TO DISMISS AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND ALL JOINDERS THERETO** 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.

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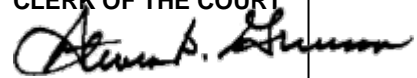
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DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

NICOLE J. CANNIZZARO, an individual engaging
in dual employment with the Nevada State Senate
and Clark County District Attorney; KASINA
DOUGLASS-BOONE, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; JASON
FRIERSON, an individual engaging in dual
employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

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

**PLAINTIFF'S OPPOSITION TO
NSHE DEFENDANT DINA NEAL'S
MOTION TO DISMISS PURSUANT
TO NRCP 12(B)(5) AND ALL
JOINDERS THERETO**

Date of Hearing: August 4, 2022
Time of Hearing: 2:00 p.m.

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

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 Opposition to the Motion to Dismiss Pursuant to NRCP 12(b)(5) filed by NSHE Defendant Dina Neal on June 30, 2022 (“Neal MTD”) [Doc. 135], as well as the Joinders incorporating the same arguments therein by reference filed by Defendants Brittney Miller and Selena Torres on June 30, 2022 [Doc. 138], and Defendant James Ohrenschall on July 7, 2022 [Doc.152], respectively (the “Joinder Defendants”).

In remanding this matter in its opinion styled *Nev. Policy Research Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28 (2022), the Nevada Supreme Court reversed the dismissal order of this Court’s predecessor and specifically stated it was remanding “for further proceedings on [NPRI’s] claims.” 138 Nev. Adv. Op. 28 at *15 (emphasis added). Contrary to the standard remand language that simply calls for “further proceedings,” the Supreme Court indicated it expects proceedings specifically on NPRI’s declaratory and injunctive relief claims. It is important to note that at the time it issued its opinion, the Supreme Court had the district court’s full record, as well as briefing on all dismissal arguments, including those stated in Defendant Neal’s current motion to dismiss. The Supreme Court’s review was not limited solely to the issue of NPRI’s standing, and by their own remand order, the Justices clearly did not contemplate or condone a duplicate round of

1 dismissal requests by all existing parties. NPRI respectfully requests this Court not countenance
2 such obvious delay tactics.

3 Without waiving any of the arguments in its Motion to Strike filed July 13, 2022, NPRI
4 submits this Opposition based on the following Memorandum of Points and Authorities, the papers
5 and pleadings already on file, and any oral argument the Court may permit at the time of hearing.

6 Dated this 18th day of July, 2022.

7 **FOX ROTHSCHILD LLP**

8
9 By: /s/ Colleen E. McCarty

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19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I.**

21 **INTRODUCTION**

22 On July 13, 2022, NPRI filed its Motion to Strike [Doc. 157], which in relevant part seeks to
23 strike Defendant Neal's current motion to dismiss as an impermissibly successive motion. She,
24 along with two of her colleagues who later ceased their dual employment positions with the Nevada
25 System of Higher Education ("NSHE") and were dismissed, filed and fully briefed a motion to
26 dismiss based on NRC 12(b) at the outset of the litigation in 2020. *See* Docs. 47, 77. This Court
27 declined to set NPRI's Motion to Strike on OST, choosing instead to hear it all pending matters on
28 August 4, 2022, therefore NPRI incorporates its Motion to Strike by reference as though fully set
forth herein and does not waive any arguments therein by the filing of its Opposition.

1 NPRI also draws the Court's attention to the fact that, while Defendant Neal's current motion to
2 dismiss does not contain all of her prior arguments, the arguments she does put forth are identical – at times
3 verbatim – to those already submitted to this Court's predecessor. Importantly the arguments are also wholly
4 inconsistent with the Supreme Court's opinion, which is officially the law of the case. Specifically, the
5 entire premise of the current motion to dismiss is the unsupported and erroneous conclusion that the
6 separation of powers clause found in the Nevada Constitution "has been interpreted to prohibit
7 *public officials or officers*, as opposed to mere *public employees*, from holding positions in separate
8 branches of government." See Neal MTD at 4:11-13. This assertion, however, is completely
9 contrary to the Supreme Court's remand order, which unequivocally states that the separation of
10 powers issue remains unresolved. See *Cannizzaro*, 138 Nev. Adv. Op. 28 at *10-11 (stating, among
11 other things, that "future guidance is necessary because of the lack of judicial interpretation of
12 Nevada's separation-of-powers clause.").

13 As demonstrated herein, Defendant Neal's attempt to evade substantive review of the
14 constitutionality of her dual employment is entirely unavailing. Again, the gravamen of her
15 dismissal request is the wholly unsupported and untenable distinction purportedly drawn between
16 public officials and public employees when it comes to dual service in separate branches of
17 government. There is no such case law provided by Defendant Neal in her motion because, in fact,
18 none exists. To the contrary, if anything the Nevada Supreme Court has for decades recognized that
19 the reach of the separation of powers clause may extend to all public employees. See, e.g., *Secretary*
20 *of State v. Nevada State Legislature*, 120 Nev. 456, 472, 93 P.3d 746, 757 (2004) (holding quo
21 warranto appropriate to challenge executive branch employees invested with sovereign power, who
22 thereby occupy public offices, "[a]nd declaratory relief, possibly coupled with a request for
23 injunctive relief, could be sought against other executive branch employees") (emphasis added); see
24 also *Galloway v. Truesdell*, 83 Nev. 13, 21-22, 422 P.2d 237, 243 (1967) (holding even ministerial
25 functions of each governmental branch frequently overlap, and it is in the area of "inherent
26 ministerial powers and functions that prohibited encroachments upon the basic powers of [a branch]
27 most frequently occur"). As such, every argument made by Defendant Neal based on this false
28 premise necessarily fails.

1 In the end, there is no dispute that the Court must assume to be true all facts alleged in
2 NPRI's Amended Complaint if addressing Defendant Neal's current motion to dismiss, that NPRI
3 has met its burden to set forth cognizable legal theories based on those facts, and that Defendant
4 Neal has not provided any legally cognizable theory to warrant dismissal of the Amended
5 Complaint. For all of these reasons, Defendant Neal's motion to dismiss and the joinders thereto
6 should be denied and the instant case should be allowed to proceed in the normal course.

7 II.

8 FACTUAL ALLEGATIONS

9 The facts properly at issue with regard to the motion and joinders thereto are those set forth
10 in NPRI's Amended Complaint filed on July 28, 2020 [Doc. 12], a copy of which is on file herein.
11 In the interest of judicial and party economy, NPRI will not reattach the Amended Complaint here
12 and will only repeat those facts herein as necessary to support the arguments that follow.

13 III.

14 LEGAL ARGUMENT

15 A. NRCP 12(b)(5) Dismissals Are Subject to Rigorous Review.

16 A district court's decision to dismiss a complaint for failure to state a claim will be subject to
17 a rigorous, de novo appellate review. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224,
18 227, 181 P.3d 670, 672 (2008). A motion brought pursuant to NRCP 12(b)(5) may, in fact, only be
19 granted if the claimant would be entitled to no relief under the facts set forth in the pleading. *Morris*
20 *v. Bank of America Nevada*, 110 Nev. 1274, 1277, 886 P.2d 454, 457 (1994) (citing *Edgar v.*
21 *Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)). Nevada remains a notice-pleading
22 jurisdiction, where all that is required is for a pleading to provide fair notice to the adverse party of
23 the nature of the claims stated therein and the basis or grounds for such claims. *Crucil v. Carson*
24 *City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Western States Constr. v. Michoff*, 108
25 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). "[N]otice pleading" simply requires a claimant to set
26 forth a general recitation of facts that support a cognizable legal theory. *See Liston v. Las Vegas*
27 *Metropolitan Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995) (citing *Swartz v. Adams*,
28 93 Nev. 240, 245, 563 P.2d 74, 77 (1977)).

1 NPRI has clearly met the above pleading standard in the instant case as to Defendant Neal.

2 **B. Defendant Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5) Is Legally**
3 **Unsound and Must Fail.**

4 The entirety of Defendant Neal's and Joinder Defendants' dismissal request pursuant to
5 NRCP 12(b)(5) rests on the false premise that the separation of powers clause in the Nevada
6 Constitution is restricted in its application solely to public officials or officers. Section III(B) of the
7 motion contains the purported legal analysis in this regard. It begins with the correct citation to
8 Article 3, Section 1 of the Nevada Constitution, which contains the express provision prohibiting any
9 one branch of government from encroaching on the functions of another. *See* Neal MTD at 4:6-10.
10 But that is where any relevant and supported legal discussion ends. The very next sentence
11 proclaims, without any case law reference whatsoever to back it up, that "NPRI's lawsuit is fatally
12 flawed because this provision has been interpreted to prohibit *public officials or officers*, as opposed
13 to mere *public employees*, from holding positions in separate branches of government." *See* Neal
14 MTD at 4:11-13. The remainder of Section III(B), then, builds on this wholly unsupported assertion
15 with page after page of discussion regarding which government employees do and do not exercise
16 sovereign functions, ostensibly with only the latter being subject to a separation of powers challenge.

17 This wag the dog approach, however, is completely contrary to the Supreme Court opinion
18 on file herein, as well as any fair interpretation of its binding precedent, and should be wholly
19 disregarded, for the reasons stated below.

20 1. **The Supreme Court Has Expressly Confirmed That the Question Regarding**
21 **Whether State and Local Government Employees Can Simultaneously Serve**
22 **as Legislators Remains Unsettled.**

23 In its recent opinion and remand order, the Supreme Court unequivocally stated in part:

24 Our refusal to grant standing [to NPRI] under these circumstances could
25 result in serious public injury – either by the continued allegedly unlawful
26 service of the above-named officials, or by the refusal of qualified persons
27 to run for office for fear of acting unconstitutionally – because the
28 unsettled issue continues to arise. (Citation omitted.) Indeed, this court
has previously been asked to decide a similar question regarding whether
state and local government employees could simultaneously serve as
members in the Legislature. (Citation omitted.) In *Heller*, the Nevada
Secretary of State asked this court to declare that dual service violates the

1 separation-of-powers clause and to order the Legislature to oust those
2 legislators who were also employed by the state executive branch and
local governments. This court declined to reach the issue....

3 *Cannizzaro*, 138 Nev. Adv. Op. 28 at *10 (emphasis added); *see also* at *11 (stating “future
4 guidance is necessary because of the lack of judicial interpretation of Nevada’s separation-of-powers
5 clause,” and expressing in a footnote concerning the prior non-binding opinions issued by the
6 Nevada Attorney General and Nevada Legislative Counsel Bureau that these opinions “serve to
7 demonstrate the recurring and unresolved nature of the dual service issue.”).

8 2. ***The Nevada Supreme Court Has Expressly Acknowledged the***
9 ***Appropriateness of Using Declaratory and Injunctive Relief Actions to***
10 ***Bring a Separation of Powers Challenge Against Executive Branch***
Employees Who Are Not Invested With Sovereign Power.

11 Notwithstanding the Supreme Court’s obvious statements of unsettled separation of powers
12 precedent, there is clear indication that public employees may not escape scrutiny. In *Secretary of*
13 *State v. Nevada State Legislature (“Heller”)*, 120 Nev. 456, 93 P.3d 746 (2004), then-Secretary of
14 State, Dean Heller, sought by writ of mandamus to challenge State and local government employees’
15 service in the Legislature as violating the Nevada Constitution’s separation of powers doctrine. The
16 Supreme Court ultimately denied the requested writ relief after determining, among other things, that
17 the Secretary of State did not have a discernable beneficial interest to confer standing to bring a writ
18 of mandamus action and that he sued the wrong party, i.e. the Legislature as a whole, to prevent
19 service therein by executive branch employees. *Id.*, 120 Nev. at 462-63, 93 P.3d at 750. But in so
20 doing, it provided a clear path for how to raise such a challenge, which is exactly the path NPRI
21 successfully traveled in the instant case.

22 Specifically, the Court recognized two mechanisms for challenging what it deemed the “dual
23 service issue.” *Heller*, 120 Nev. at 472, 93 P.3d at 756. It held that, “[t]he dual service issue may be
24 raised as a separation-of-powers challenge to legislators working in the executive branch, as the
25 qualifications of legislators employed in the executive branch are not constitutionally reserved to that
26 branch.” *Id.*, 120 Nev. at 472, 93 P.3d at 757 (citation omitted). It went on to opine that, “[s]uch a
27 challenge might be well suited for quo warranto or a declaratory relief action filed in the district
28 court.” *Id.* Most telling, and particularly relevant to the instant case, however, is the distinction the

1 Court draws between how each of the two types of actions might be employed, and by whom, stating
2 clearly that:

3 A quo warranto action could be used to challenge any executive branch
4 employees invested with sovereign power, who thereby occupy public
5 offices within quo warranto's exclusive reach. And, declaratory relief,
possibly coupled with injunctive relief, could be sought against other
executive branch employees.

6 The party with the clearest standing to bring the quo warranto action
7 would be the attorney general, and declaratory relief could be sought by
someone with a "legally protectable interest," such as a person seeking the
8 executive branch position held by the legislator. Individual legislators
9 would need to be named as either quo warranto respondents or declaratory
relief defendants.

10 *Id.*, 120 Nev. at 472-73, 93 P.3d at 757 (citations omitted) (emphasis added).

11 In sum, the Nevada Supreme Court holding in *Heller* squarely endorses the bringing of the
12 causes of action alleged by NPRI, i.e. declaratory and injunctive relief, against executive branch
13 employees without sovereign power, such as Defendant Neal and Joinder Defendants. There are no
14 restrictions stated by the Court as to the functions engaged in by the executive branch employees so
15 challenged, and rightfully so, given the Court's prior recognition that it is precisely in the area of
16 non-sovereign, ministerial functions that separation of powers violations most frequently arise. *See*
17 *Galloway v. Truesdell*, 83 Nev. 13, 22, 422 P.2d 237, 243 (1967) (holding ministerial functions of
18 each government branch frequently overlap, and it is in "inherent ministerial powers and functions
19 that prohibited encroachments upon the basic powers of [a branch] most frequently occur").

20 The only condition precedent to NPRI bringing the instant case, then, was a legally
21 protectable interest, which the Supreme Court granted NPRI when it reversed this Court's
22 predecessor and conferred standing via an appropriate expansion of the public-importance standing
23 exception. *Cannizzaro*, 138 Nev. Adv. Op. 28 at *9, n. 2. As such, any argument that NPRI is not
24 properly before this court because it did not limit its lawsuit to public officials and officers fails in its
25 entirety and dismissal on that basis is improper.

26 ///

27 ///

28 ///

3. *The Supreme Court Has Previously Recognized That “Prohibited Encroachments” on the Separation of Powers Are Most Likely to Occur in the Exercise of Inherent Ministerial Powers and Functions.*

Specifically, in 1967 the Supreme Court invalidated a statute that required district courts to issue marriage certificates, finding that such activities were not judicial in nature and thus the Legislature could not compel the Judiciary to perform them, in light of Nevada’s separation of powers doctrine. Before reaching that conclusion, however, the Court conducted an exhaustive analysis of the separation of powers doctrine more broadly and the role it plays in Nevada’s system of government specifically. The Court began by describing separation of powers as “probably the most important single principle of government declaring and guaranteeing the liberties of the people.” *Galloway*, 83 Nev. at 20, 422 P.2d at 242. The Court then explained that in addition to the constitutionally expressed powers and functions belonging to each branch of government, each branch also “possesses inherent and incidental powers that are properly termed ministerial.” *Id.* The Court continued, “Ministerial functions are methods of implementation to accomplish or put into effect the basic function of each Department. No Department could properly function without the inherent ministerial functions.” *Id.*

Having identified ministerial functions as an essential and fundamental part of the exercise of power itself, the Court would then caution against the “error” of adopting too restricted a view of Nevada’s separation of powers doctrine:

However, it is in the area of inherent ministerial powers and functions that prohibited encroachments upon the basic powers of a Department most frequently occur. All Departments must be constantly alert to prevent such prohibited encroachments lest our fundamental system of governmental division of powers be eroded. To permit even one seemingly harmless prohibited encroachment and adopt an indifferent attitude could lead to very destructive results. There are not a small number of decisions of courts of last resort in this country that have fallen into this trap of error. It is essential to the perpetuation of our system that the principle of the separation of powers be understood. The lack of understanding about the principle is widespread indeed, and creates a problem of no small proportions. There must be a fullness of conception of the principle of the separation of powers involving all of the elements of its meaning and its correlations to attain the most efficient functioning of the governmental system, and to attain the maximum protection of the rights of the people.

Galloway, 83 Nev. at 22, 422 P.2d at 243-44 (emphasis added).

1 As quoted above, the Court stressed that, in order to ensure that not even one “seemingly
2 harmless prohibited encroachment” is tolerated, the separation of powers doctrine must be given a
3 “fullness of conception, involving all of the elements of its meaning and its correlations,” while
4 warning that prohibited encroachments are most likely to occur in the area of ministerial functions.
5 Thus, the Court long ago rejected the reasoning set forth by the Defendant Neal and the Joinder
6 Defendants that only sovereign functions are sufficient to trigger violations, having specifically
7 warned against prohibited encroachments that occur in the non-sovereign area of functions deemed
8 ministerial. And, while the Court’s reasoning is fundamentally at odds with the arguments put forth
9 by the Defendant Neal and the Joinder Defendants, it perfectly aligns with the text of Nevada’s
10 separation of powers clause, which NPRI properly seeks herein to enforce.

11 **IV.**

12 **CONCLUSION**

13 Respectfully, there is no legitimate dispute that NPRI has more than adequately pled its
14 claims for declaratory and injunctive relief, that Defendant Neal and the Joinder Defendants are on
15 notice of the nature of these claims, and that NPRI should be permitted to proceed with its
16 substantive action in the normal course.

17 For all of the reasons stated herein, NPRI respectfully requests that this Honorable Court
18 deny NSHE Defendant Neal’s Motion to Dismiss Pursuant to NRCP 12(b)(5) and all Joinders
19 thereto, respectively, on each and every ground asserted therein.

20 Dated this 18th day of July, 2022.

21 **FOX ROTHSCHILD LLP**

22 By: /s/ Colleen E. McCarty

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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 18th day of July, 2022, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO NSHE DEFENDANT DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5) AND ALL JOINDERS THERETO** 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.

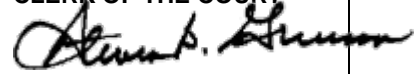
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

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

**NSHE DEFENDANT DINA NEAL'S
OPPOSITION TO PLAINTIFF'S
MOTION TO STRIKE MOTION TO
DISMISS PURSUANT TO
NRCP 12(b)(5)**

Date of Hearing: August 23, 2022
Time of Hearing: 10:00 am

1 **NSHE DEFENDANT DINA NEAL’S OPPOSITION TO PLAINTIFF’S MOTION TO**
2 **STRIKE MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)**

3 Defendant Dina Neal (“Neal” also referred to as “NSHE Defendant”), sued herein as an
4 employee of Nevada State College, hereby files this Opposition to Plaintiff’s Motion to Strike NSHE
5 Defendant Dina Neal’s Motion to Dismiss Pursuant to NRCP 12(b)(5) (“Opposition”). This Opposition
6 is based upon the following Memorandum of Points and Authorities and upon all of the pleadings and
7 papers on file herein.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. INTRODUCTION**

10 Plaintiff Nevada Policy Research Institute (“NPRI”) seeks to strike the Motions to Dismiss filed
11 by NSHE Defendant Dina Neal, the Nevada Legislature and all joinders thereto. NPRI contends that
12 the parties omitted defenses or objections and that the parties cannot raise issues that were omitted in
13 earlier filings. Based on the rule upon which NPRI relies, then, NPRI asserts that the Motions must be
14 stricken. The facts demonstrate that the issues were not omitted and, therefore, the rule at issue does not
15 apply.

16 In the initial round of pleadings, on September 24, 2020, the NSHE Defendants filed a Motion
17 to Dismiss for failure to state a claim under NRCP 12(b)(5). NSHE Defendants submitted the following
18 arguments, including NPRI cannot state a claim for a violation of the separation clause of the Nevada
19 Constitution because the NSHE Defendants are not public officers or officials. NSHE Defendants also
20 based its Motion to Dismiss on NPRI’s failure to join required parties under NRCP 19.

21 Following remand, NSHE Defendant filed a Motion to Dismiss for failure to state a claim under
22 NRCP 12(b)(5) and a joinder to Nevada Legislature’s Motion to Dismiss for NPRI’s failure to join
23 required parties under NRCP 19. Because the issues raised in the Motions to Dismiss were raised in the
24 original set of motions, none of the issues were omitted and NPRI’s Motion to Strike must be denied.

25 **II. LEGAL ANALYSIS**

26 **A. The Court did not reach the merits of the remaining issues set forth in the original**
27 **Motion to Dismiss and should address them now.**

28 On December 8, 2020, the Court issued its Omnibus Order Granting Motions to Dismiss.

1 NPRI contends that the Court might have considered other issues when deciding the issue on standing
2 and, therefore, the Motion to Strike should be granted. Motion to Strike, 7:14-16. The Court,
3 however, expressly stated in its order that “standing is the determinative issue above all else.” Order
4 2:25-26. Further, without standing, the Court could not render any decisions on the merits of the
5 remaining arguments set forth in the motions.

6 [W]hether a party has standing is a question that goes to the court's jurisdiction, and
7 questions of jurisdiction can never be waived or stipulated away by the parties.
8 Furthermore, they may be raised at any time, even sua sponte by the court for the first
9 time on appeal. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964-65, 194 P.3d
10 96, 105 (2008); *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506,
11 515-16 (2002). This is so because questions of jurisdiction go to whether the court has the
12 fundamental power to grant the requested relief and enforce its own judgment. If the
13 court has no power to grant relief—either because it lacks jurisdiction over the subject
14 matter, an indispensable party is absent from the litigation, the dispute is moot or not yet
15 ripe, or a party does not have the legal right to seek or receive the requested relief—then
16 its ruling is legally void and not much more than a meaningless advisory opinion whether
17 or not any party raised a timely objection below. *See State Indus. Ins. Sys. v. Sleeper*, 100
18 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) (“There can be no dispute that lack of subject
19 matter jurisdiction renders a judgment void.”). ... Consequently, ..., [a party’s] standing,
20 or lack thereof, is a critical matter that must be addressed before we even get to the
21 merits, if any, underlying [a party’s] arguments.

22 *Wallace v. Smith*, 134 Nev. 1027 at 3 (Nev. App. 2018) (emphasis added).

23 Now that the matter has been remanded back to this Court, NSHE Defendant Neal is asking the
24 Court to address the issue of whether NPRI’s Complaint states a claim upon which relief can be
25 granted. The Court could not have addressed the issues in the original Motions to Dismiss. Now that
26 standing has been conferred, it is appropriate for the Court to consider the matter and deny NPRI’s
27 Motion to Strike.

28 **B. NSHE Defendant Neal did not omit any defenses; therefore, NPRI’s Motion to Strike
must be denied.**

29 In support of its Motion to Strike, NPRI cites the “plain language” of NRCP 12(g)(2) which
30 states: “**Limitation on Further Motions.** Except as provided in Rule 12(h)(2) or (3), a party that
31 makes a motion under this rule must not make another motion under this rule raising a defense or
32 objection that was available to the party but omitted from its earlier motion.” Motion to Strike, 6:12.
33 Although citing to the plain language, NPRI seems to ignore it.

1 This rule prohibits a party from raising a defense that was available but omitted. NEV. R. CIV. P.
2 12(g)(2). As set forth above, the issues currently raised by NSHE Defendant Neal were not omitted in
3 earlier filings. NSHE Defendants challenged NPRI's Amended Complaint for failure to state a claim
4 upon which relief can be granted and failure to join required parties. Accordingly, the rule does not
5 preclude this Court from ruling on NSHE Defendant Neal's current Motion to Dismiss.

6 **V. CONCLUSION**

7 This Court now has the opportunity to consider Motions to Dismiss that it could not have
8 addressed without jurisdiction. Now that the Court has jurisdiction, it is appropriate to consider the
9 Motions to Dismiss. While NPRI contends that the rules prevent NSHE Defendant Neal from bringing
10 her Motion, the defenses were not omitted in the original Motion to Dismiss and the Court should
11 consider them now.

12 For the reasons stated above, NSHE Defendant Neal respectfully requests that NPRI's Motion
13 to Strike be denied.

14
15 Respectfully submitted this 27th day of July, 2022.

16 /s/ Berna L. Rhodes-Ford

17 BERNAL RHODES-FORD

18 Nevada Bar No. 7879

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26 *Attorney for Defendant*

27 *Dina Neal*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of General Counsel for Nevada State College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party to the within cause. Pursuant to NRCP 5, I further certify that on July 27, 2022, I caused the following document, **NSHE DEFENDANT DINA NEAL'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5)**, to be served as follows:



BY ELECTRONIC SERVICE Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail to the attorneys listed below at the address indicated below.

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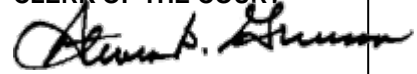
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BY MAIL I caused such envelope(s) with first class postage thereon fully prepaid to be placed in the U.S. Mail in Henderson, Nevada.

Edwin Maguinto

An employee of the Office of General Counsel
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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

**NEVADA LEGISLATURE'S
OPPOSITION TO PLAINTIFF'S
MOTION TO STRIKE THE
LEGISLATURE'S MOTION TO
DISMISS AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Date of Hearing: August 4, 2022

Time of Hearing: 2:00 p.m.

OPPOSITION

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 Opposition to Plaintiff's Motion to Strike the Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief. This opposition is made under EDCR 2.20 and is based upon the attached Memorandum of Points and Authorities, all pleadings, documents and exhibits on file in this

1 case and any oral arguments the Court may allow.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. Introduction.**

4 On July 13, 2022, Plaintiff Nevada Policy Research Institute (“NPRI”) filed a motion to strike the
5 Legislature’s motion to dismiss. On July 18, 2022, NPRI also filed an opposition to the Legislature’s
6 motion to dismiss. In both its motion to strike and its opposition to the motion to dismiss, NPRI
7 presents many duplicative arguments. Therefore, the Legislature has been compelled to respond to
8 NPRI’s duplicative arguments in the Legislature’s opposition to the motion to strike and in the
9 Legislature’s reply in support of its motion to dismiss. For the reasons set forth in the Legislature’s
10 opposition to the motion to strike and in the Legislature’s reply in support of its motion to dismiss, the
11 Legislature respectfully requests that the Court enter an order denying NPRI’s motion to strike the
12 Legislature’s motion to dismiss.

13 **II. NPRI’s motion to strike must be denied because the civil rules do not authorize a party**
14 **to file a motion to strike another party’s motion; rather, the civil rules require the party to file an**
opposition to the motion to dismiss and make its legal arguments in the opposition.

15 Under NRCP 12(f), courts may strike “a pleading.” However, under NRCP 7, a motion is not a
16 pleading, and “courts have held that Rule 12(f) does not authorize courts to strike motions, affidavits, or
17 memoranda in support of motions.” Silva v. Swift, 333 F.R.D. 245, 248 (N.D. Fla. 2019) (collecting
18 cases); 5C Wright & Miller, et al., Fed. Prac. & Proc. Civ. § 1380 (3d ed. & Westlaw Apr. 2022 update)
19 (collecting cases). As stated by Nevada’s federal district court, “motions to strike apply only to
20 pleadings, and courts are generally unwilling to construe the rule broadly and refuse to strike motions,
21 briefs, objections, affidavits, or exhibits attached thereto.” Trustees of Nev. Resort Ass’n—Int’l
22 Alliance of Theatrical Stage Employees Local 720 Pension Tr. v. Grasswood Partners, No. 2:11-CV-
23 00044-MMD, 2013 WL 1249617, at *4 (D. Nev. Mar. 27, 2013). For example, in O’Connor v. Nevada,
24 507 F. Supp. 546 (D. Nev. 1981), the plaintiff moved to strike the State of Nevada’s motion to dismiss.

1 The court held that “a Rule 12(f) motion to strike only concerns striking matters from pleadings and a
2 motion to dismiss is not a pleading. Therefore, the plaintiff’s motion to strike is hereby denied.” Id. at
3 547-48 (citations omitted). Consequently, if a party wants to oppose another party’s motion to dismiss
4 on the basis that the movant is barred from filing the motion, the proper procedure for opposing the
5 motion to dismiss is to file an opposition to the motion and argue that the motion must be denied. Id.;
6 Silva, 333 F.R.D. at 248 (“A party opposing a motion must address the arguments contained in a motion
7 and thereby attempt to demonstrate that the motion lacks merit under the law, the facts of the case, or
8 both. He cannot simply move to strike the motion under Rule 12(f).”).

9 In this case, NPRI moved to strike the Legislature’s motion to dismiss on the basis that the
10 Legislature is barred from filing the motion because it is a successive motion to dismiss that violates
11 NRCP 12(g)(2). Under the civil rules, NPRI is authorized to file an opposition to the motion to dismiss
12 and make its legal arguments in the opposition. However, NPRI is not authorized to file a motion to
13 strike the motion to dismiss. Therefore, NPRI’s motion to strike must be denied because the civil rules
14 do not authorize its motion to strike the Legislature’s motion to dismiss.

15 **III. NPRI’s motion to strike must be denied because the Legislature’s motion to dismiss is**
16 **not a successive motion to dismiss that is barred by NRCP 12(g)(2).**

17 NPRI argues that, in the prior proceedings, the Legislature sought dismissal of the amended
18 complaint under NRCP 12(b) and that, as a result, the Legislature is barred from filing a successive
19 motion to dismiss under NRCP 12(g)(2). However, NPRI’s interpretation of NRCP 12(g)(2) is wrong as
20 a matter of law. The civil rule states that:

21 Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must
22 not make **another motion** under this rule raising a defense or objection that was **available**
to the party but omitted from its earlier motion.

23 NRCP 12(g)(2) (emphasis added).
24

1 In this case, the Legislature’s motion to dismiss is not “another motion” under NRCP 12 because
2 the Legislature never filed a motion to dismiss under NRCP 12(b) in the prior proceedings. The
3 Legislature did not become a party in this case and was not entitled to file a motion to dismiss under
4 NRCP 12(b) until Dec. 8, 2020, when the district court entered an order granting the Legislature’s
5 motion to intervene. On that same date, the district court entered its omnibus order dismissing NPRI’s
6 amended complaint based on NPRI’s lack of standing, which deprived the district court of subject-
7 matter jurisdiction over NPRI’s claims on Dec. 8, 2020. Consequently, in the prior proceedings, the
8 Legislature never filed a motion to dismiss under NRCP 12(b) at any time before the district court
9 entered its omnibus order dismissing NPRI’s amended complaint on Dec. 8, 2020, and thereby depriving
10 the district court of subject-matter jurisdiction over NPRI’s claims on that date.

11 On appeal, the Nevada Supreme Court reversed the district court’s order dismissing the amended
12 complaint based on NPRI’s lack of standing and remanded for “further proceedings” on NPRI’s claims.
13 Nev. Policy Research Inst. v. Cannizzaro, 138 Nev. Adv. Op. 28, 507 P.3d 1203, 1211 (2022) (“NPRI”).
14 Based on well-established rules of appellate practice, “[u]pon remand from an appellate court, the lower
15 court is required to proceed from **the point at which the error occurred.**” Giancola v. Azem, 109
16 N.E.3d 1194, 1200 (Ohio 2018) (quoting State ex rel. Douglas v. Burlew, 833 N.E.2d 293, 295 (Ohio
17 2005) (emphasis added)). Under such circumstances, the Supreme Court’s remand “returned the parties
18 to the same position they were in prior to the error,” Giancola, 109 N.E.3d at 1200, and “[t]he parties are
19 relegated to their prejudgment status and are free to re-plead or re-press their claims as well as
20 defenses.” Smedsrud v. Powell, 61 P.3d 891, 896 (Okla. 2002).

21 In this case, the point at which the error occurred was when the district court entered its omnibus
22 order dismissing NPRI’s amended complaint based on NPRI’s lack of standing. Therefore, based on the
23 Supreme Court’s remand, the Legislature has been returned to the same position that it held in this case
24 prior to the error. At that point, the Legislature was a new party-defendant that had not filed a motion to

1 dismiss under NRCP 12(b) in the prior proceedings. Consequently, the Legislature's motion to dismiss
2 is not a successive motion to dismiss that is barred by NRCP 12(g)(2) because the Legislature never
3 filed a motion to dismiss under NRCP 12(b) in the prior proceedings.

4 In an attempt to avoid this result, NPRI argues that the Legislature filed a motion to dismiss under
5 NRCP 12(b) in the prior proceedings when the Legislature joined the other Defendants in the joint
6 countermotion to dismiss all remaining defendants based on NPRI's lack of standing, which the district
7 court granted on Dec. 28, 2020. However, as just discussed, the Supreme Court's remand returned this
8 case to the point at which the error occurred in the prior proceedings, which was when the district court
9 entered its **omnibus order** dismissing NPRI's amended complaint based on NPRI's lack of standing.
10 When, twenty days later, the district court entered its order granting the joint countermotion to dismiss
11 all remaining defendants based on NPRI's lack of standing, the district court did not commit a new and
12 distinct error that was unrelated to its omnibus order dismissing NPRI's amended complaint based on
13 NPRI's lack of standing. Instead, the district court continued the error from its omnibus order by
14 directing the dismissal of all remaining defendants based on NPRI's lack of standing.

15 Accordingly, upon the Supreme Court's remand, this case was returned to the point at which the
16 error occurred in the omnibus order dismissing NPRI's amended complaint based on NPRI's lack of
17 standing. At that point, the Legislature was a new party-defendant that had not filed a motion to dismiss
18 under NRCP 12(b) in the prior proceedings. Consequently, the Legislature's motion to dismiss is not a
19 successive motion to dismiss that is barred by NRCP 12(g)(2) because the Legislature never filed a
20 motion to dismiss under NRCP 12(b) in the prior proceedings.

21 Finally, even assuming that the Legislature's motion to dismiss is a successive motion to dismiss,
22 it still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the motion
23 to dismiss were not **available** when the Legislature joined the other Defendants in the joint
24 countermotion to dismiss all remaining defendants based on NPRI's lack of standing. When the district

1 court entered its omnibus order dismissing NPRI's amended complaint based on NPRI's lack of
2 standing, the district court was precluded from considering the merits of any other defenses and
3 objections raised by Defendants because the district court did not have any power to reach the merits,
4 which meant that all other defenses and objections were rendered moot and unavailable. See
5 Righthaven LLC v. Hoehn, 716 F.3d 1166, 1172-73 (9th Cir. 2013) (holding that after the district court
6 granted defendant's motion to dismiss based on plaintiff's lack of standing, the district court lacked
7 subject-matter jurisdiction to consider the merits of any other defenses and objections raised by
8 defendant because the district court did not have any power to reach the merits).

9 Therefore, even assuming that the Legislature's motion to dismiss is a successive motion to
10 dismiss, it still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the
11 motion to dismiss were not available when the Legislature joined in the joint countermotion to dismiss
12 all remaining defendants based on NPRI's lack of standing. At that time, because the district court
13 lacked subject-matter jurisdiction to consider the merits of any defenses and objections except for lack
14 of standing, all defenses and objections were rendered moot and unavailable except for lack of standing.
15 Accordingly, even assuming that the Legislature's motion to dismiss is a successive motion to dismiss, it
16 still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the motion to
17 dismiss were not **available** when the Legislature joined the other Defendants in the joint countermotion
18 to dismiss all remaining defendants based on NPRI's lack of standing.

19 **IV. NPRI's motion to strike must be denied because the Legislature's motion to dismiss is**
20 **not a successive motion to dismiss that is barred by NRCP 12(g)(2) because the issues raised in the**
21 **motion to dismiss—lack of subject-matter jurisdiction and failure to join all necessary party-**
22 **defendants—may be raised at any time in the proceedings.**

23 It is well established that issues of subject-matter jurisdiction may be raised at any stage of the
24 litigation, and the district court has an obligation to address such issues whenever they are raised by the
parties or are otherwise brought to the district court's attention, even if the district court must act *sua*

1 *sponte*. See Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 964-65 (2008); Vaile v. Dist. Ct., 118
2 Nev. 262, 276 (2002). Similarly, issues of failure to join all necessary party-defendants may be raised at
3 any stage of the litigation, and the district court has an obligation to address such issues whenever they
4 are raised by the parties or are otherwise brought to the district court's attention, even if the district court
5 must act *sua sponte*. See Johnson v. Johnson, 93 Nev. 655, 656 (1977); Blaine Equip. Co. v. State
6 Purchasing Div., 122 Nev. 860, 864-66 (2006).

7 In this case, even assuming that the Legislature's motion to dismiss is a successive motion to
8 dismiss, NPRI's motion to strike must be denied because the issues raised in the motion to dismiss—
9 lack of subject-matter jurisdiction and failure to join all necessary party-defendants—may be raised at
10 any time in the proceedings. Therefore, the district court has an obligation to address such issues in this
11 litigation because they have been raised by the parties or otherwise brought to the district court's
12 attention, even if the district court must act *sua sponte* to address such issues.

13 **V. NPRI's motion to strike must be denied because the Legislature's motion to dismiss is**
14 **not a successive motion to dismiss that is barred by NRCP 12(g)(2) because, under the civil rules,**
15 **the district court has broad discretion to consider successive motions to dismiss in order to**
16 **promote the just, speedy and efficient resolution of important issues in this case.**

17 Under the civil rules, the district court retains broad discretion to consider successive motions to
18 dismiss in order to promote the just, speedy and efficient resolution of important issues in litigation,
19 even if any movants failed to raise the defenses or objections in their earlier motions to dismiss. See
20 Fast Access Specialty Therapeutics, LLC v. UnitedHealth Grp., Inc., 532 F. Supp. 3d 956, 962 (S.D.
21 Cal. 2021) (“[G]iven that Specialty’s preemption defense can still be raised in an answer, a motion for
22 judgment on the pleadings, and at trial, it makes little sense to delay ruling on the issue because it was
23 not raised in United’s first motion to dismiss.”); Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F.
24 Supp. 2d 1164, 1175 (C.D. Cal. 2011) (“Rather than further delay this case, the Court invokes the
‘substantial amount of case law which provides that successive Rule 12(b)(6) motions [to dismiss] may

1 be considered where they have not been filed for the purpose of delay, where entertaining the motion
2 would expedite the case, and where the motion would narrow the issues involved.” (quoting Doe v.
3 White, No. 08-1287, 2010 WL 323510, at *2 (C.D. Ill. Jan. 20, 2010) (collecting cases))). As explained
4 by the Ninth Circuit, such broad discretion in the district court is necessary because “[d]enying late-filed
5 Rule 12(b)(6) motions [to dismiss] and relegating defendants to the three procedural avenues specified
6 in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of Rule 1.” In re
7 Apple iPhone Antitrust Litig., 846 F.3d 313, 318 (9th Cir. 2017), *aff’d sub nom.* Apple Inc. v. Pepper,
8 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019). Consequently, the Ninth Circuit has stated that “as a
9 reviewing court, we should generally be forgiving of a district court’s ruling on the merits of a late-filed
10 Rule 12(b)(6) motion [to dismiss].” Apple iPhone, 846 F.3d at 319.

11 In this case, even assuming that the Legislature’s motion to dismiss is a successive motion to
12 dismiss, the district court should exercise its broad discretion to consider the motion to dismiss in order
13 to promote the just, speedy and efficient resolution of important issues in this litigation. Otherwise, if
14 the Legislature’s motion to dismiss is denied on the basis that it is a successive motion to dismiss barred
15 by NRCP 12(g)(2), the Legislature would still have the right to file an answer and a motion for judgment
16 on the pleadings in which it raises the issues of lack of subject-matter jurisdiction and failure to join all
17 necessary party-defendants, which are issues that may be raised at any time in the proceedings. Given
18 that the parties have fully briefed the merits of these important issues in the context of the Legislature’s
19 motion to dismiss, and given that these issues are ripe for the district court’s consideration, it would
20 make little sense to delay a ruling on the merits of these important issues at this time, when such a ruling
21 would prevent having to rebrief and rehear these issues in the context of a motion for judgment on the
22 pleadings which would be filed immediately upon the filing of the Legislature’s answer. Therefore,
23 even assuming that the Legislature’s motion to dismiss is a successive motion to dismiss, the district
24 court should exercise its broad discretion to consider the Legislature’s motion to dismiss in order to

1 promote the just, speedy and efficient resolution of important issues in this litigation.

2 **CONCLUSION AND AFFIRMATION**

3 Based on the foregoing, the Legislature respectfully requests that the Court enter an order denying
4 NPRI's motion to strike the Legislature's motion to dismiss.

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

7 DATED: This 27th day of July, 2022.

8 Respectfully submitted,

9 By: /s/ Kevin C. Powers

10 **KEVIN C. POWERS**

General Counsel

Nevada Bar No. 6781

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14 *Attorneys for Defendant Legislature of the State of Nevada*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 27th day of July, 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 to Strike the 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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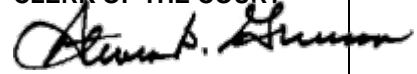
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*Attorney for Defendant
Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

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

**NSHE DEFENDANT DINA NEAL'S
JOINDER TO NEVADA
LEGISLATURE'S OPPOSITION TO
PLAINTIFF'S MOTION TO STRIKE
THE LEGISLATURE'S MOTION TO
DISMISS AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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*Attorney for Defendant
Dina Neal*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State
3 College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party
4 to the within cause. Pursuant to NRCP 5, I further certify that on July 28, 2022, I caused the following
5 document, **NSHE DEFENDANT DINA NEAL'S JOINDER TO NEVADA LEGISLATURE'S**
6 **OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE THE LEGISLATURE'S MOTION TO**
7 **DISMISS AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**, to be
8 served as follows:

- 9 ☒ **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to be
10 electronically served through the Eighth Judicial District Court's electronic filing system, with
11 the date and time of the electronic service substituted for the date and place of deposit in the mail
12 to the attorneys listed below at the address indicated below.

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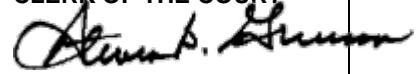
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25 ☐ **BY MAIL** I caused such envelope(s) with first class postage thereon fully prepaid to be
26 placed in the U.S. Mail in Henderson, Nevada.

27 *Edwin Maguinto*

28 An employee of the Office of General Counsel
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Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

BRITTNEY MILLER, an individual engaging in
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Assembly and Clark County School District;
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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

**NSHE DEFENDANT DINA NEAL'S
REPLY IN SUPPORT OF MOTION
TO DISMISS PURSUANT TO
NRCP 12(b)(5)**

Date of Hearing: August 4, 2022
Time of Hearing: 2:00 pm

1 **NSHE DEFENDANT DINA NEAL’S MOTION TO DISMISS**

2 Defendant Dina Neal (“Neal” also referred to as “NSHE Defendant”), sued herein as an
3 employee of Nevada State College, hereby files this Reply (“Reply”) in Support of her Motion to
4 Dismiss Plaintiff Nevada Policy Research Institute’s (“NPRI”) Amended Complaint for Declaratory and
5 Injunctive Relief.

6 This Reply is based upon the following Memorandum of Points and Authorities and upon all of
7 the pleadings and papers on file herein.

8 **I. INTRODUCTION**

9 For employees working in the Nevada System of Higher Education (“NSHE”), the law clarifies
10 who can and who cannot exercise a sovereign function relating to another branch. An adjunct professor
11 is not one of those individuals.

12 Because NSHE Defendant Dina Neal cannot exercise sovereign functions in her position as an
13 adjunct professor, her employment does not violate the separation of powers clause and this case should
14 be dismissed for failure to state a claim upon which relief can be granted.

15 **II. LEGAL ANALYSIS**

16 **A. The Supreme Court’s decision does not preclude this Court from dismissing the case.**

17 In its Opposition to NSHE Defendant Dina Neal’s Motion to Dismiss (“Opposition”), Plaintiff
18 contends that the Motion should not be granted because of language in the Nevada Supreme Court
19 opinion reversing and remanding the case to the district court. *See* Opp’n at 4:1-12. In fact, NPRI
20 contends that Neal’s position is “completely contrary to the Supreme Court’s remand order.” *See*
21 Opp’n at 4:8-9. The Supreme Court’s position, however, is not as open and shut as NPRI suggests.

22 A close reading of the opinion makes clear that the Nevada Supreme Court based its decision
23 upon a public official’s duties. *Nevada Policy Research Institute v. Cannizzaro et al.*, 507 P.3d 1203
24 (2022). Specifically, the Supreme Court granted standing under the public importance doctrine to
25 allow a plaintiff “to enforce a public official’s compliance with a public duty pursuant to the
26 separation-of-powers clause” in certain circumstances. *NPRI*, 507 P.3d at 1208. The Court continued,
27 stating “Thus, the question of whether respondents’ dual service violates the separation-of-powers
28 clause is one that implicates specific conduct of state officials ...” *NPRI*, 507 P.3d at 1209.

1 NPRI has sued the defendants in their capacity as employees of the executive branch.
2 Therefore, any compliance that is sought and referenced by the Supreme Court must be compliance by
3 the defendants as employees.¹ The Supreme Court's express wording clarifies its concern regarding
4 the duties of "public officials" and "state officials". Accordingly, this Court may consider the Motion
5 as presented.

6 NPRI conflates the issue of standing with whether the case may be dismissed for failure to
7 state a claim. NPRI contends that "the only condition precedent to NPRI bringing the instant case,
8 then, was a legally protectable interest, which the Supreme Court granted NPRI when it reversed this
9 Court's predecessor and conferred standing via an appropriate expansion of the public-importance
10 standing exception." See Opp'n at 8:20-23. NPRI then extrapolates by further contending that
11 because it has standing, any argument that it is not properly before the court fails and dismissal is not
12 proper. See Opp'n at 8:23-25. Such reasoning is not sound.

13 Standing is simply the right to challenge an issue in court. *Doe v. Bryan*, 102 Nev. 523, 525
14 (1986) ("Nevada has a long standing history of requiring an actual justiciable controversy as a
15 predicate to judicial relief.") Once the right is conferred, it allows the Court to address the legal issues
16 – both procedural and substantive – of the case. Now that NPRI has been granted standing, NSHE
17 Defendant Neal is asking the Court to address the issue of whether NPRI's Complaint states a claim
18 upon which relief can be granted. Without standing, the Court could not entertain the Motion. Now
19 that standing has been conferred, it is appropriate for the Court to consider the matter.

20 **B. The case should be dismissed as to NSHE Defendant Neal because she does not violate the**
21 **separation of powers clause by virtue of her duties as an adjunct professor.**

22 NPRI has not questioned whether NSHE Defendant Neal is a public official or officer. Although
23 NPRI asserts that there is no case law supporting NSHE Defendant Neal's position, the Motion is replete
24 with case law. As stated in the Motion, public employees do not generally exercise sovereign functions.
25 See *State ex rel. Kendall v. Cole*, 38 Nev. 215, 229 (1915); *State ex rel. Mathews v. Murray*, 70 Nev.

26 ¹ In these proceedings, NPRI has clarified that it did not sue the defendants in their capacity as legislators. Pl. Motion to
27 Disqualify Official Attorneys, 8:3-6 ("On the contrary, in the instant case the Defendants were named solely because of
28 their individual decisions to serve in the Nevada State Legislature while also being employed by a State or local
government. Nothing about the controversy at issue involves any actual act or omission relating to the carrying out of their
public duties.") Therefore, the Supreme Court must necessarily be referring to the legislators in their capacity as employees
not in the carrying out of their public duties.

1 116, 120-21 (1953); *Eads v. City of Boulder City*, 94 Nev. 735, 737 (1978). As further stated in the
2 Motion, public officers are the only persons who exercise the sovereign functions of state
3 government and, therefore, only public officers can be in violation of Article 3 and the separation of
4 powers clause. *See* NEV. CONST. art. III, §1, cl. 1; *Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at
5 737.

6 There are no allegations in the Amended Complaint that NSHE Defendant Neal is a member of
7 the NSHE Board of Regents or a college or university president who is considered a public officer only
8 for the limited purpose of the Ethics Law. The Amended Complaint does not allege that NSHE
9 Defendant Neal serves in a position created by law or that she exercises sovereign duties of the executive
10 branch.

11 Due to the dearth of any allegations that NSHE Defendant Neal meets the criteria to violate the
12 separation of powers clause, the Amended Complaint must be dismissed for failure to state a claim.

13 **V. CONCLUSION**

14 Now that NPRI has standing, this Court may consider procedural and substantive issues raised
15 in the case. NSHE Defendant Neal's Motion requests the Court's review of the Amended Complaint
16 for failure to state a claim for relief.

17 Upon review, NSHE Defendant Neal urges the Court to dismiss the Amended Complaint because
18 the position in which she serves is not that of a public official or officer and she does not exercise any
19 sovereign functions and she, therefore, cannot violate the separation of powers clause.

20 For the reasons stated above, NSHE Defendant Neal respectfully requests that NPRI's Amended
21 Complaint be dismissed.

22 Respectfully submitted this 28th day of July, 2022.

23 /s/ Berna L. Rhodes-Ford

24 BERNAL RHODES-FORD

25 Nevada Bar No. 7879

26 General Counsel

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Attorney for Defendant

Dina Neal

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State
3 College, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party
4 to the within cause. Pursuant to NRCP 5, I further certify that on July 28, 2022, I caused the following
5 document, **NSHE DEFENDANT DINA NEAL'S REPLY IN SUPPORT OF MOTION TO**
6 **DISMISS PURSUANT TO NRCP 12(b)(5)**, to be served as follows:

7 ☒

8 **BY ELECTRONIC SERVICE** Pursuant to N.E.F.C.R. 9 and EDCR 8.05(a) and 8.05(f), to
9 be electronically served through the Eighth Judicial District Court's electronic filing system,
10 with the date and time of the electronic service substituted for the date and place of deposit in the
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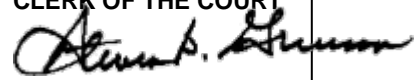
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24 ☐

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28 An employee of the Office of General Counsel
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*Attorney for Defendant,
James Ohrenschall*

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

vs.

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Assembly and Clark County School District;
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employment with the Nevada State Senate and
Nevada State College; JAMES
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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: VIII

**REPLY TO PLAINTIFF'S OPPOSITION
TO DEFENDANT JAMES
OHRENSCHALL'S MOTION TO DISMISS
AND ALL JOINDERS THERETO**

HEARING DATE: August 4, 2022

HEARING TIME: 2:00 PM

Defendant JAMES OHRENSCHALL (hereinafter "State Senator Ohrenschall") submits this
reply in support of his *Motion to Dismiss* ("Motion"). Specifically, this reply responds to Plaintiff's
Opposition to Defendant James Ohrenschall's Motion to Dismiss and All Joinders Thereto (the
"Opposition").

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1 This reply is supported by the points and authorities contained herein, the exhibits attached
2 hereto, the papers and pleadings on file herein, and any oral argument the Court may entertain.

3 DATED this 28th day of July, 2022.

4 **WILEY PETERSEN**

5 */s/ Jonathan D. Blum*

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15 *James Ohrenschall*

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **1. INTRODUCTION**

18 Plaintiff's Opposition improperly frames the key issues in the Motion and fails to even address
19 the arguments (and persuasive precedent) cited therein. The Motion does not argue that the Nevada
20 Supreme Court has already squarely ruled upon the separation of powers issue raised in the Complaint.
21 Obviously, as the Opposition points out, if such a ruling existed, this case would not have been filed.
22 However, Plaintiff mistakenly takes the position that because the Nevada Supreme Court has not
23 squarely decided the key separation of powers issue raised in the Complaint, this Court cannot dismiss
24 the complaint. That is incorrect. It also argues that because the Nevada Supreme Court recognized
25 that NPRI has standing, and it is procedurally permitted to seek the relief sought in the Amended
26 Complaint (under *Heller*), a dismissal pursuant to NRCP 12(b) is essentially impossible. That is also
27 incorrect, as explained below.

28 The Motion argues that this Court should look to three primary areas on which to decide this issue,
and that this issue can be decided now, at the motion to dismiss stage:

1. The text of the Nevada Constitution, Article 3, Section 1 itself;
2. Nevada Supreme Court precedent; and,
3. Persuasive California precedent on the same issue.

1 As every party to this case knows, whether by motion to dismiss, motion for summary judgment, or
2 trial, this court will initially decide the issue raised by the Complaint. This court will (presumably)
3 decide this case in one of three ways:

4 A. The Nevada Constitution separation of powers provision forbids “dual service” of any kind,
5 by anyone, with any type of dual employment, including all of the named defendants;

6 B. The Nevada Constitution separation of powers provision forbids “dual service” of only
7 certain types of employment (e.g. those employed directly by the State of Nevada, as
8 opposed to local political subdivisions, or public officers, versus mere public employees)
9 including, potentially some, but not all, of the named defendants;

10 C. The Nevada Constitution separation of powers provision does not forbid “dual service” of
11 any of the kind currently engaged in by any of the named defendants.

12 The parties all know that, regardless of this court’s decision, the non-prevailing party(ies) will appeal,
13 and the Nevada Supreme Court will ultimately decide the issue, either affirming this court, reversing
14 this court, or some combination thereof.

15 The Motion presently before this court argues that, based on the three categories of persuasive
16 sources noted above, this Court can and should dismiss this case against State Senator Ohrenschall,
17 and issue a ruling consistent with “Option B”, as a matter of law. Nothing raised in the Opposition
18 precludes this result. Indeed, nothing in the Opposition even addresses the merits or strength of the
19 arguments set forth in the Motion, erroneously suggesting that this Court’s hands are tied unless and
20 until the Supreme Court renders a controlling opinion. This is simply false. This Court can, and should,
21 use the weight of authority set forth in the Motion, and highlighted again below, to rule that the
22 separation of powers provision of the Nevada Constitution does not apply to State Senator Ohrenschall,
23 since he is a local government employee, and, separately, is a mere public employee, as opposed to
24 public officer. As such, the Motion should be granted.

25 **II. ARGUMENT**

26 A. Plaintiff’s Main Argument is based on an Erroneous Avoidance of Precedent

27 Plaintiff mistakenly argues that the Motion to Dismiss must be denied because it is based on “a
28 legal conclusion for which there is no legal precedent.” *See* Opposition, p. 3:17-18. This is incorrect.

1 Plaintiff then states that this Supreme Court’s remand order somehow ties this Court’s hands from
2 rendering a decision. It goes on to state, with regard to *Heller*, “the Nevada Supreme Court gave clear
3 instruction for challenging the dual employment of executive branch employees, separate and apart
4 from those employees invested with sovereign power unequivocally endorses the declaratory and
5 injunctive relief actions alleged by NPRI against executive branch employees without sovereign
6 power.” *Id.* at 3:25-28. However, this does not support denial of the Motion. The Motion does not
7 challenge NPRI’s procedural method used in this litigation (declaratory and injunctive relief actions).¹
8 That method was indeed suggested and approved in *Heller*. And, now that standing has been conferred
9 upon NPRI following the appeal, Plaintiff is correct that it is procedurally entitled to pursue the claims
10 in its complaint.

11 However, contrary to the argument in the Opposition, *Heller* does not support its position that
12 the distinction between public officers and local government employees is not important, or even
13 dispositive on the separation of powers issue. The Opposition goes so far as to infer from *Heller* that
14 its lack of distinction is a “holding” that “remains binding on this Court.” *Heller* made no such holding,
15 and Plaintiff is grasping at straws suggesting that there is any such holding “binding on this court.”
16 *Heller* merely comments on the appropriate procedure to raise the issue and does not reach or even
17 comment on the merits of the distinction between public officers with sovereign powers and other local
18 government employees. Notably, the Opposition provides no such quotations in support of this
19 supposed binding holding. Indeed, the great weight of Nevada Supreme Court cases, as cited in the
20 Motion and addressed below, recognize this distinction, as this Court should, and as the Nevada
21 Supreme Court will (in all likelihood) reconfirm upon ultimately deciding this case.

22 B. The Issues Presented are Purely Legal, and the Precedent Supports Dismissal

23 The issue of whether Article 3, Section 1 applies to local government employees, like State
24 Senator Ohrenschall, is purely legal. The Opposition states, “the truth is that it is precisely for the
25 purpose-and only for the purpose-of having the Supreme Court settle these matters that NPRI filed its
26

27 ¹ It was challenged previously on the issue of standing, but that issue has been resolved by the Nevada
28 Supreme Court. *See Nev. Pol’y Rsch. Inst., Inc. v. Cannizzaro*, 138 Nev. Adv. Op. 28, 507 P.3d 1203
(Nev. 2022).

1 Amended Complaint for both declaratory and injunctive relief in the district court seeking to exclude
2 legislators from employment with the executive branch....” See Motion at p. 6:23-26. This Court can
3 and should rule on this issue at the motion to dismiss stage, and Plaintiff can still get what it seeks:
4 “having the Supreme Court settle these matters”, without having drawn out proceedings at the district
5 court level. It is not uncommon for a district court to dismiss a complaint pursuant to NRCP 12(b)(5)
6 and then, upon appeal, have the Nevada Supreme Court determine that the dispositive issue, “is a matter
7 of first impression in Nevada”, and go on to uphold the dismissal. See e.g. *Knittle v. Progressive Cas.*
8 *Ins. Co.*, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996). Dismissal at the pleading stage is not dependent
9 on the Nevada Supreme Court having issued an on-point direct decision on the exact issue at hand (as
10 suggested in the Opposition). In this case, there is more than sufficient persuasive law on the subject
11 for this Court to make a decision on this purely legal issue. Indeed, dismissal is warranted under the
12 case law cited in the Motion. Accepting all of the factual allegations in the complaint as true, there are
13 no set of facts that Plaintiff could prove that would entitle it to relief. Indeed, the Opposition cites no
14 factual issues that warrant discovery, and it is unclear what they advocate as the proper time for the
15 district court to rule on this issue given that it believes that this court has no guidance from the Nevada
16 Supreme Court. In fact, there is ample precedent on this issue in many Nevada Supreme Court
17 decisions, all of which are essentially ignored in the Opposition.

18 C. Plaintiff Fails to Address the Cited Case Law Regarding Local Government Employees,
19 Which Support Dismissal

20 The Motion does not argue that the Nevada Supreme Court has squarely decided this issue.
21 Plaintiff rests on this proposition and fails to address the substantive legal arguments and case law set
22 forth in the Motion. Specifically, the wording of Nev. Const. Art. 3, § 1 itself, and the numerous cases
23 noting the distinction between state government and political subdivisions. See Motion p. 4:24- 9:16.
24 That is because Plaintiff is unable to effectively distinguish or nullify those cases, which support
25 dismissal.

26 Plaintiff’s conclusory attempt to distinguish *Fernley* and *City of Sparks* as “inapposite” fails.
27 *Fernley* makes clear that the Nevada Supreme Court recognizes that there is a real distinction between
28 the branches of the Nevada’s state government and the political subdivisions, such as counties,

specifically with respect to Article 3 of the Nevada Constitution. *City of Fernley v. State*, 132 Nev. 32, 366 P.3d 699 (2016). The Supreme Court states, “Further, the language of the separation of powers provision in the Constitution does not extend any protection to political subdivisions. Nev. Const. art. 3, § 1 (“The powers of the Government of the State of Nevada shall be divided into three separate departments”) *Id.* at 707. In *City of Sparks v. Sparks Mun. Ct.*, the Nevada Supreme Court stated clearly, “While municipal courts are included within the state constitutional judicial system, they are nonetheless primarily city entities, rather than an extension of the state.” 129 Nev. 348, 362 n.5 (2013) Mr. Ohrenschall is employed by a political subdivision (County of Clark) which the Nevada Supreme Court recognizes is distinct from being employed by the State of Nevada.

These rulings are consistent with the Nevada Supreme Court’s decisions in *Nunez* and *DR Partners*, also ignored in the Opposition. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117 Nev. 195, 203-04 (2001) (“Neither state-owned institutions, **nor state departments**, nor public corporations are synonymous with political subdivisions of the state. (emphasis added); *Nunez v. City of N Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000) (“[M]unicipal courts are primarily city, not state entities. Although municipal courts are created by the legislature pursuant to authority vested in that body by the Nevada Constitution, these courts are separate branches of their respective city governments.”) Plaintiff cites no law suggesting that political subdivision employees, such as State Senator Ohrenschall, are a part of the executive branch of the state of Nevada, at all.

Plaintiff also fails to address the other case law cited in the Motion stating merely that such law “significantly predates the Attorney General Opinion”. See Opposition, p. 8:20-25. However, the ignored case law is compelling on this issue, and the fact that it predates the Attorney General Opinion is irrelevant. Specifically, *Mason* concluded that the actions of a board of county commissioners was not subject to Nevada’s separation of powers constitutional provision. This reasoning logically translates downward to the employees of such political subdivisions. *State ex rel. Mason v. Bd. of Cnty. Comm’rs*, 6 Nev. 392, 396-97 (1872).

The Opposition also fails to address or dispute the Nevada Supreme Court’s 2001 holding in *Harvey* which states, “since Nevada relied upon the California Constitution as a basis for developing the Nevada Constitution, it is appropriate for us to look to the California Supreme Court’s interpretation

of the ex officio language in the California Constitution.” *State ex rel. Harvey v. Second Judicial Dist. Ct.*, 117 Nev. 754, 763, 32 P.3d 1263, 1269 (2001). The key case of *Provines*, which analyzed an analogous provision in the California Constitution and concluded that it did not apply to local governments, was also ignored. *People ex rel. Att’y Gen. v. Provines*, 34 Cal. 520 (1868). “We understand the Constitution to have been formed for the purpose of establishing a *State* Government; and we here use the term ‘State Government’ in contradistinction to local, or to county or municipal governments.” *Id.* at 532 (emphasis original). It goes on to conclude, “the Third Article of the Constitution means that the powers of the State Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments.” *Id.* at 534. The Opposition ignores these persuasive authorities and offers no contrary caselaw to suggest that county government is the same as state government, as related to this particular question, or any other. Other cases are cited in the Motion with the same findings and are also ignored. *See* Motion p. 7:7 – 8:12.

This Court can and should decide the issue of local government employees based on a fair reading of the Constitutional provision itself, in conjunction with the cited case law, including but not limited to California’s thorough analysis of their analogous provision, and the Nevada Supreme Court’s repeated pronunciations regarding the distinctions between state and local government. Because local political subdivisions in this state are not included within one of the three departments of state government, their employees also are not part of one of the three departments of state government. Thus, the separation of powers provision does not prohibit legislators from holding positions of public employment with local governments. This ends the inquiry with regard to State Senator Ohrenschall and warrants dismissal.

By Plaintiff’s logic, this Court would have no ability to make a decision, even after discovery, on this purely legal issue because the Nevada Supreme Court has yet to address it 100 percent squarely on the merits. Again, the Nevada Supreme Court upholds dismissals pursuant to NRCP 12(b)(5) regularly on issues of first impression. Based on the cited case law, in conjunction with the language of the constitutional provision itself, this Court should dismiss the Complaint against State Senator Ohrenschall.

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1 D. The Opposition Does Not Rebut the Public Employee versus Public Officer Distinction

2 Plaintiff completely ignores the arguments in the Motion regarding the public officer versus
3 public employee distinction repeatedly confirmed in Nevada’s statutory and case law. *See* Motion p.
4 9:17 – 14:2. The entirety of their argument regarding that separate and independent grounds for
5 granting dismissal is, “Simply put, the Nevada Supreme Court has not yet rendered a decision on these
6 ultimate issues, let alone one that mandates dismissal in the instant case.” *See* Motion, p. 6:20-22.
7 Plaintiff does not directly address the persuasive authorities and legal argument presented. It simply
8 re-asserts that its complaint for declaratory and injunctive relief is procedurally proper, which is not in
9 dispute.

10 Failure to oppose an argument raised is deemed a concession that it is correct. *See Dezzani v.*
11 *Kern & Assocs.*, 134 Nev. 61, 65, 412 P.3d 56, 60 (2018) (“*Bates v. Chronister*, 100 Nev. 675, 682,
12 691 P.2d 865, 870 (1984) (treating the failure to respond to the opposing party's arguments as a
13 confession of error”)². Indeed, even without such a concession, it is clear that the Nevada Supreme
14 Court has made a clear distinction between the nature of a public officer versus a mere public employee.

15
16 The nature of a public office as distinguished from mere employment is the subject of
17 a considerable body of authority, and many criteria of determination are suggested by
18 the courts. *See* Ann.: 53 A.L.R. 595, 93 A.L.R. 333, 140 A.L.R. 1076. Upon one point
19 at least the authorities uniformly appear to concur. **A public office is distinguishable
from other forms of employment in that its holder has by the sovereign been
invested with some portion of the sovereign functions of government.**

20 ...
21 The fact that a public employment is held at the will or pleasure of another, **as a
deputy** or servant, who holds at the will of his principal, is held to distinguish a

22
23 ² *See also, Shull v. Ocwen Loan Servicing, LLC*, No. 13-CV-2999-BEN (WVG), 2014 U.S. Dist.
24 LEXIS 50686, at *6-7 (S.D. Cal. Apr. 10, 2014) (“By failing to respond to the arguments raised by
25 Defendant on these claims, Plaintiff failed to oppose the motion to dismiss these claims. Where a party
26 fails to address arguments against a claim raised in a motion to dismiss, the claims are abandoned and
27 dismissal is appropriate. (“[T]he Court finds that Plaintiff concedes his ... claim should be dismissed
28 by failing to address Defendants' arguments in his Opposition.”) (citations omitted); (dismissing a
claim without leave to amend where the plaintiff did not address the defendant's arguments); (where
opposition to motion to dismiss failed to address arguments in motion to dismiss, the plaintiff failed to
demonstrate a continuing interest in pursuing a claim for relief and it was "effectively abandoned" and
could not be raised on appeal).” (internal citations omitted).

1 mere employment from a public office; for in such cases no part of the
2 state's sovereignty is delegated to such employees.'

3 *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953)(emphasis
4 added)

5 As noted above, the Nevada Supreme Court need not have decided a particular issue prior to a District
6 Court granting a motion to dismiss. Here, it is clear that the weight of Nevada precedent, on a related
7 and directly relevant issue, suggests that the Nevada Supreme Court would again draw a distinction
8 between public officers and public employees with regard to triggering the separation of powers
9 prohibition on dual service. Plaintiff fails to make any contrary argument. As such, dismissal on this
10 ground, as well as the local government ground, is both ripe and appropriate.

11 E. Plaintiff Failed to Include Necessary Parties

12 With respect to the issue of failure to join necessary parties, State Senator Ohrenschall has filed
13 a joinder, in part, to the Legislature of the State of Nevada's Motion to Dismiss on that issue, and does
14 not separately add to that argument, other than to state that Plaintiff should be required to join the
15 necessary parties, or face dismissal.

16 II. CONCLUSION

17 For the reasons set forth above, State Senator Ohrenschall respectfully requests that his motion
18 to dismiss be granted as to all claims.

19 DATED this 28th day of July, 2022.

20 **WILEY PETERSEN**

21 */s/ Jonathan D. Blum*

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*Attorney for Defendant,
James Ohrenschall*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of WILEY PETERSEN, and the 28th day of July 2022,
3 I caused to be served a true and correct copy of the foregoing **REPLY TO PLAINTIFF'S**
4 **OPPOSITION TO DEFENDANT JAMES OHRENSCHALL'S MOTION TO DISMISS AND**
5 **ALL JOINDERS THERETO** in the following manner:

6 (ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced
7 document was electronically filed on the date hereof and served through the Notice of Electronic Filing
8 automatically generated by the Court's facilities to those parties listed on the Court's Master Service
9 List.

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*Attorneys for Defendants,
Brittney Miller and Selena Torres*

DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,

vs.

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

Defendants.

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

**DEFENDANTS BRITTNEY MILLER
AND SELENA TORRES'S OMNIBUS
JOINDER**

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DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S OMNIBUS JOINDER

1 Defendants Britney Miller and Selena Torres hereby join in, and adopt by reference and
2 incorporate herein as if set forth in full at this point, the following filed documents:

3 1. Nevada Legislature's Opposition to Plaintiff's Motion to Strike the Legislature's
4 Motion to Dismiss Amended Complaint (filed July 27, 2022);

5 2. NSHE Defendant Dina Neal's Opposition to Plaintiff's Motion to Strike Motion
6 to Dismiss (filed July 27, 2022);

7 3. NSHE Defendant Dina Neal's Reply in Support of Motion to Dismiss (filed July
8 28, 2022);

9 4. Nevada Legislature's Reply in Support of Motion to Dismiss (filed July 28,
10 2022);

11 5. Defendant James Ohrenschall's Reply in Support of Motion to Dismiss (filed July
12 28, 2022).

13
14 DATED this 28th day of July, 2022.

15 **WOLF, RIFKIN, SHAPIRO,**
16 **SCHULMAN & RABKIN, LLP**

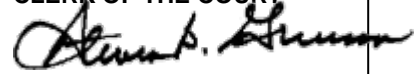
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24 *Attorneys for Defendants,*
25 *Brittney Miller and Selena Torres*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 28th day of July, 2022, a true and correct copy of the foregoing
3 **DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S OMNIBUS JOINDER**
4 was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system
5 and serving all parties with an email address on record, pursuant to Administrative Order 1402 and
6 Rule 9 of the N.E.F.C.R.

7
8 By: /s/ Melissa Shield
9 Melissa Shield, an Employee of
10 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
11 RABKIN, LLP
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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

**NEVADA LEGISLATURE'S REPLY IN
SUPPORT OF THE LEGISLATURE'S
MOTION TO DISMISS AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Date of Hearing: August 4, 2022

Time of Hearing: 2:00 p.m.

REPLY

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 Reply in Support of the Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief. The Legislature's reply 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

1 any oral arguments the Court may allow.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. Introduction.**

4 On July 13, 2022, Plaintiff Nevada Policy Research Institute (“NPRI”) filed a motion to strike the
5 Legislature’s motion to dismiss. On July 18, 2022, NPRI also filed an opposition to the Legislature’s
6 motion to dismiss. In both its motion to strike and its opposition to the motion to dismiss, NPRI
7 presents many duplicative arguments. Therefore, the Legislature has been compelled to respond to
8 NPRI’s duplicative arguments in the Legislature’s opposition to the motion to strike and in the
9 Legislature’s reply in support of its motion to dismiss. For the reasons set forth in the Legislature’s
10 motion to dismiss, its opposition to the motion to strike and its reply in support of the motion to dismiss,
11 the Legislature respectfully requests that the Court enter an order: (1) denying NPRI’s motion to strike;
12 and (2) granting the Legislature’s motion to dismiss.

13 **II. The Legislature’s motion to dismiss is not a successive motion to dismiss that is barred** 14 **by NRCP 12(g)(2).**

15 In its opposition to the Legislature’s motion to dismiss, NPRI incorporates, by reference, the legal
16 arguments that it makes in its motion to strike the Legislature’s motion to dismiss. In its motion to
17 strike, NPRI argues that the Legislature’s motion to dismiss is a successive motion to dismiss that is
18 barred by NRCP 12(g)(2).

19 As a preliminary matter, NPRI’s motion to strike is procedurally improper and invalid because the
20 civil rules do not authorize a party to file a motion to strike another party’s motion to dismiss; rather, the
21 civil rules require the party to file an opposition to the motion to dismiss and make its legal arguments in
22 the opposition. Silva v. Swift, 333 F.R.D. 245, 248 (N.D. Fla. 2019); O’Connor v. Nevada, 507 F. Supp.
23 546, 547-48 (D. Nev. 1981); 5C Wright & Miller, et al., Fed. Prac. & Proc. Civ. § 1380 (3d ed. &
24 Westlaw Apr. 2022 update).

1 Because NPRI makes its legal arguments in its procedurally improper and invalid motion to strike,
2 instead of making them directly in its opposition to the Legislature’s motion to dismiss, the district court
3 should disregard those legal arguments because NPRI did not support them properly when it failed to
4 include “cogent argument and citation to relevant authority” directly in its opposition to the
5 Legislature’s motion to dismiss. See Berkson v. Lepome, 126 Nev. 492, 501-02 (2010) (“It is well
6 established that this court need not consider issues not supported by cogent argument and citation to
7 relevant authority.”). Furthermore, even if the district court considers the legal arguments made by
8 NPRI in its motion to strike, the district court should reject those legal arguments because the
9 Legislature’s motion to dismiss is not a successive motion to dismiss that is barred by NRCP 12(g)(2).

10 NPRI argues that, in the prior proceedings, the Legislature sought dismissal of the amended
11 complaint under NRCP 12(b) and that, as a result, the Legislature is barred from filing a successive
12 motion to dismiss under NRCP 12(g)(2). However, NPRI’s interpretation of NRCP 12(g)(2) is wrong as
13 a matter of law. The civil rule states that:

14 Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must
15 not make **another motion** under this rule raising a defense or objection that was **available**
to the party but omitted from its earlier motion.

16 NRCP 12(g)(2) (emphasis added).

17 In this case, the Legislature’s motion to dismiss is not “another motion” under NRCP 12 because
18 the Legislature never filed a motion to dismiss under NRCP 12(b) in the prior proceedings. The
19 Legislature did not become a party in this case and was not entitled to file a motion to dismiss under
20 NRCP 12(b) until Dec. 8, 2020, when the district court entered an order granting the Legislature’s
21 motion to intervene. On that same date, the district court entered its omnibus order dismissing NPRI’s
22 amended complaint based on NPRI’s lack of standing, which deprived the district court of subject-
23 matter jurisdiction over NPRI’s claims on Dec. 8, 2020. Consequently, in the prior proceedings, the
24 Legislature never filed a motion to dismiss under NRCP 12(b) at any time before the district court

1 entered its omnibus order dismissing NPRI's amended complaint on Dec. 8, 2020, and thereby depriving
2 the district court of subject-matter jurisdiction over NPRI's claims on that date.

3 On appeal, the Nevada Supreme Court reversed the district court's order dismissing the amended
4 complaint based on NPRI's lack of standing and remanded for "further proceedings" on NPRI's claims.
5 Nev. Policy Research Inst. v. Cannizzaro, 138 Nev. Adv. Op. 28, 507 P.3d 1203, 1211 (2022) ("NPRI").
6 Based on well-established rules of appellate practice, "[u]pon remand from an appellate court, the lower
7 court is required to proceed from **the point at which the error occurred.**" Giancola v. Azem, 109
8 N.E.3d 1194, 1200 (Ohio 2018) (quoting State ex rel. Douglas v. Burlew, 833 N.E.2d 293, 295 (Ohio
9 2005) (emphasis added)). Under such circumstances, the Supreme Court's remand "returned the parties
10 to the same position they were in prior to the error," Giancola, 109 N.E.3d at 1200, and "[t]he parties are
11 relegated to their prejudgment status and are free to re-plead or re-press their claims as well as
12 defenses." Smedsrud v. Powell, 61 P.3d 891, 896 (Okla. 2002).

13 In this case, the point at which the error occurred was when the district court entered its omnibus
14 order dismissing NPRI's amended complaint based on NPRI's lack of standing. Therefore, based on the
15 Supreme Court's remand, the Legislature has been returned to the same position that it held in this case
16 prior to the error. At that point, the Legislature was a new party-defendant that had not filed a motion to
17 dismiss under NRCP 12(b) in the prior proceedings. Consequently, the Legislature's motion to dismiss
18 is not a successive motion to dismiss that is barred by NRCP 12(g)(2) because the Legislature never
19 filed a motion to dismiss under NRCP 12(b) in the prior proceedings.

20 In an attempt to avoid this result, NPRI argues that the Legislature filed a motion to dismiss under
21 NRCP 12(b) in the prior proceedings when the Legislature joined the other Defendants in the joint
22 countermotion to dismiss all remaining defendants based on NPRI's lack of standing, which the district
23 court granted on Dec. 28, 2020. However, as just discussed, the Supreme Court's remand returned this
24 case to the point at which the error occurred in the prior proceedings, which was when the district court

1 entered its **omnibus order** dismissing NPRI's amended complaint based on NPRI's lack of standing.
2 When, twenty days later, the district court entered its order granting the joint countermotion to dismiss
3 all remaining defendants based on NPRI's lack of standing, the district court did not commit a new and
4 distinct error that was unrelated to its omnibus order dismissing NPRI's amended complaint based on
5 NPRI's lack of standing. Instead, the district court continued the error from its omnibus order by
6 directing the dismissal of all remaining defendants based on NPRI's lack of standing.

7 Accordingly, upon the Supreme Court's remand, this case was returned to the point at which the
8 error occurred in the omnibus order dismissing NPRI's amended complaint based on NPRI's lack of
9 standing. At that point, the Legislature was a new party-defendant that had not filed a motion to dismiss
10 under NRCP 12(b) in the prior proceedings. Consequently, the Legislature's motion to dismiss is not a
11 successive motion to dismiss that is barred by NRCP 12(g)(2) because the Legislature never filed a
12 motion to dismiss under NRCP 12(b) in the prior proceedings.

13 Finally, even assuming that the Legislature's motion to dismiss is a successive motion to dismiss,
14 it still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the motion
15 to dismiss were not **available** when the Legislature joined the other Defendants in the joint
16 countermotion to dismiss all remaining defendants based on NPRI's lack of standing. When the district
17 court entered its omnibus order dismissing NPRI's amended complaint based on NPRI's lack of
18 standing, the district court was precluded from considering the merits of any other defenses and
19 objections raised by Defendants because the district court did not have any power to reach the merits,
20 which meant that all other defenses and objections were rendered moot and unavailable. See
21 Righthaven LLC v. Hoehn, 716 F.3d 1166, 1172-73 (9th Cir. 2013) (holding that after the district court
22 granted defendant's motion to dismiss based on plaintiff's lack of standing, the district court lacked
23 subject-matter jurisdiction to consider the merits of any other defenses and objections raised by
24 defendant because the district court did not have any power to reach the merits).

1 Therefore, even assuming that the Legislature’s motion to dismiss is a successive motion to
2 dismiss, it still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the
3 motion to dismiss were not available when the Legislature joined in the joint countermotion to dismiss
4 all remaining defendants based on NPRI’s lack of standing. At that time, because the district court
5 lacked subject-matter jurisdiction to consider the merits of any defenses and objections except for lack
6 of standing, all defenses and objections were rendered moot and unavailable except for lack of standing.
7 Accordingly, even assuming that the Legislature’s motion to dismiss is a successive motion to dismiss, it
8 still would not be barred by NRCP 12(g)(2) because the defenses and objections raised in the motion to
9 dismiss were not **available** when the Legislature joined the other Defendants in the joint countermotion
10 to dismiss all remaining defendants based on NPRI’s lack of standing.

11 **III. The Legislature’s motion to dismiss is not barred by NRCP 12(g)(2) because the issues**
12 **raised in the motion to dismiss—lack of subject-matter jurisdiction and failure to join all**
13 **necessary party-defendants—may be raised at any time in the proceedings.**

14 It is well established that issues of subject-matter jurisdiction may be raised at any stage of the
15 litigation, and the district court has an obligation to address such issues whenever they are raised by the
16 parties or are otherwise brought to the district court’s attention, even if the district court must act *sua*
17 *sponte* to address such issues. See NRCP 12(h)(3) (“If the court determines at any time that it lacks
18 subject-matter jurisdiction, the court must dismiss the action.”); In re George J., 128 Nev. 345, 348 n.2
19 (2012) (“[R]egardless of whether the State properly raised the issue, this court can *sua sponte* consider
20 jurisdictional issues.”); Landreth v. Malik, 127 Nev. 175, 179 (2011) (“[W]hether a court lacks subject
21 matter jurisdiction ‘can be raised by the parties at any time, or *sua sponte* by a court of review, and
22 cannot be conferred by the parties.’” (quoting Swan v. Swan, 106 Nev. 464, 469 (1990))); Vaile v. Dist.
23 Ct., 118 Nev. 262, 276 (2002) (“[S]ubject matter jurisdiction cannot be waived and may be raised at any
24 time, or *sua sponte* by a court of review.”), *overruled on other grounds by* Senjab v. Alhulaibi, 137 Nev.
Adv. Op. 64, 497 P.3d 618 (2021).

1 Similarly, issues of failure to join all necessary party-defendants may be raised at any stage of the
2 litigation, and the district court has an obligation to address such issues whenever they are raised by the
3 parties or are otherwise brought to the district court's attention, even if the district court must act *sua*
4 *sponte* to address such issues. See Blaine Equip. Co. v. State Purchasing Div., 122 Nev. 860, 864-66
5 (2006) ("This court has previously determined that a district court is obligated to, *sua sponte*, join a
6 necessary party under NRCP 19(a) if the litigants have not joined that party and the failure of a litigant
7 to join a necessary party does not constitute a waiver." (footnotes omitted)); Univ. of Nev. v. Tarkanian,
8 95 Nev. 389, 396 (1979); Johnson v. Johnson, 93 Nev. 655, 656 (1977).

9 In its motion to dismiss, the Legislature raises issues of subject-matter jurisdiction. Specifically,
10 the Legislature argues that NPRI's claims must be dismissed for lack of subject-matter jurisdiction
11 because NPRI failed to comply with the statutory requirements under NRS Chapter 41 to invoke the
12 conditional waiver of sovereign immunity of the state and its state officers or employees and each
13 political subdivision and its local officers or employees. Additionally, in its motion to dismiss, the
14 Legislature raises issues of failure to join all necessary party-defendants. Specifically, the Legislature
15 argues that NPRI's claims must be dismissed because NPRI failed to join all necessary party-defendants
16 who are needed for a just adjudication of this action as required by the Due Process Clause, NRCP 19
17 and the Uniform Declaratory Judgments Act in NRS Chapter 30.

18 Accordingly, even assuming that the Legislature's motion to dismiss is a successive motion to
19 dismiss, it still would not be barred by NRCP 12(g)(2) because the issues raised in the motion to
20 dismiss—lack of subject-matter jurisdiction and failure to join all necessary party-defendants—may be
21 raised at any time in the proceedings. Therefore, the district court has an obligation to address such
22 issues in this litigation because they have been raised by the parties or otherwise brought to the district
23 court's attention, even if the district court must act *sua sponte* to address such issues.

1 **IV. The Legislature’s motion to dismiss is not barred by NRCP 12(g)(2) because, under the**
2 **civil rules, the district court has broad discretion to consider successive motions to dismiss in**
3 **order to promote the just, speedy and efficient resolution of important issues in this case.**

4 Under the civil rules, the district court retains broad discretion to consider successive motions to
5 dismiss in order to promote the just, speedy and efficient resolution of important issues in litigation,
6 even if any movants failed to raise the defenses or objections in their earlier motions to dismiss. See
7 Fast Access Specialty Therapeutics, LLC v. UnitedHealth Grp., Inc., 532 F. Supp. 3d 956, 962 (S.D.
8 Cal. 2021) (“[G]iven that Specialty’s preemption defense can still be raised in an answer, a motion for
9 judgment on the pleadings, and at trial, it makes little sense to delay ruling on the issue because it was
10 not raised in United’s first motion to dismiss.”); Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F.
11 Supp. 2d 1164, 1175 (C.D. Cal. 2011) (“Rather than further delay this case, the Court invokes the
12 ‘substantial amount of case law which provides that successive Rule 12(b)(6) motions [to dismiss] may
13 be considered where they have not been filed for the purpose of delay, where entertaining the motion
14 would expedite the case, and where the motion would narrow the issues involved.’” (quoting Doe v.
15 White, No. 08-1287, 2010 WL 323510, at *2 (C.D. Ill. Jan. 20, 2010) (collecting cases))). As explained
16 by the Ninth Circuit, such broad discretion in the district court is necessary because “[d]enying late-filed
17 Rule 12(b)(6) motions [to dismiss] and relegating defendants to the three procedural avenues specified
18 in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of Rule 1.” In re
19 Apple iPhone Antitrust Litig., 846 F.3d 313, 318 (9th Cir. 2017), *aff’d sub nom.* Apple Inc. v. Pepper,
20 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019). Consequently, the Ninth Circuit has stated that “as a
21 reviewing court, we should generally be forgiving of a district court’s ruling on the merits of a late-filed
22 Rule 12(b)(6) motion [to dismiss].” Apple iPhone, 846 F.3d at 319.

23 In this case, even assuming that the Legislature’s motion to dismiss is a successive motion to
24 dismiss, the district court should exercise its broad discretion to consider the motion to dismiss in order
to promote the just, speedy and efficient resolution of important issues in this litigation. Otherwise, if

1 the Legislature's motion to dismiss is denied on the basis that it is a successive motion to dismiss barred
2 by NRCP 12(g)(2), the Legislature would still have the right to file an answer and a motion for judgment
3 on the pleadings in which it raises the issues of lack of subject-matter jurisdiction and failure to join all
4 necessary party-defendants, which are issues that may be raised at any time in the proceedings. Given
5 that the parties have fully briefed the merits of these important issues in the context of the Legislature's
6 motion to dismiss, and given that these issues are ripe for the district court's consideration, it would
7 make little sense to delay a ruling on the merits of these important issues at this time, when such a ruling
8 would prevent having to rebrief and rehear these issues in the context of a motion for judgment on the
9 pleadings which would be filed immediately upon the filing of the Legislature's answer. Therefore,
10 even assuming that the Legislature's motion to dismiss is a successive motion to dismiss, the district
11 court should exercise its broad discretion to consider the Legislature's motion to dismiss in order to
12 promote the just, speedy and efficient resolution of important issues in this litigation.

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

16 In its opposition, NPRI contends that the district court's subject-matter jurisdiction has already
17 been settled by the Supreme Court in its published opinion when it stated that "[w]e therefore reverse
18 the district court order dismissing NPRI's complaint and **remand for further proceedings on its**
19 **claims.**" NPRI, 507 P.3d at 1211 (emphasis added). However, NPRI is wrong as a matter of law
20 because, under the law-of-the-case doctrine, the only issue that the Supreme Court expressly discussed,
21 decided and settled regarding the district court's subject-matter jurisdiction was the issue of NPRI's
22 standing. Therefore, "[i]t is what is decided that is authority, not what is said." Dellamonica v. Lyon
23 Cnty. Bank Mortg. Corp., 58 Nev. 307, 316 (1938). Accordingly, except for the issue of NPRI's
24 standing, the district court is not barred from hearing and adjudicating any other issues regarding

1 subject-matter jurisdiction. In fact, the district court has an obligation to address all such issues
2 regarding subject-matter jurisdiction whenever they are raised by the parties or are otherwise brought to
3 the district court's attention, even if the district court must act *sua sponte* to address such issues.
4 NRCp 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court
5 must dismiss the action.").

6 Under the law-of-the-case doctrine, when the Supreme Court "decides a principle or rule of law,
7 that decision governs the same issues in subsequent proceedings in that case." Dictor v. Creative Mgmt.
8 Servs., 126 Nev. 41, 44 (2010). However, in order for the law-of-the-case doctrine to apply, the
9 Supreme Court "must actually address and decide the issue explicitly or by necessary implication." Id.
10 In applying the law-of-the-case doctrine, it is well established that "[s]ubjects an appellate court does not
11 discuss, because the parties did not raise them, do not become the law of the case by default." Id. at 45
12 (quoting Bone v. City of Lafayette, 919 F.2d 64, 66 (7th Cir. 1990)). Therefore, the law-of-the-case
13 doctrine "does not bar a district court from hearing and adjudicating issues not previously decided, and
14 does not apply if the issues presented in a subsequent [proceeding] differ from those presented in a
15 previous appeal." Dictor, 126 Nev. at 44-45 (citations omitted). Furthermore, with regard to issues of
16 subject-matter jurisdiction, it is well established that courts do not decide such issues *sub silentio*
17 without expressly discussing the issues. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144-
18 45 (2011). As a result, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a
19 [court's] decision, the decision does not stand for the proposition that no defect existed." Id. at 144.

20 In the prior orders in this case, the only issue that the district court decided regarding subject-
21 matter jurisdiction was the issue of NPRI's standing. On appeal, the only issue that the parties raised
22 regarding subject-matter jurisdiction was the issue of NPRI's standing. Finally, in its published opinion,
23 the only issue that the Supreme Court expressly discussed, decided and settled regarding subject-matter
24 jurisdiction was that NPRI has standing to bring its claims under the public-importance exception to

1 traditional standing. NPRI, 507 P.3d at 1207-11.

2 Consequently, except for the issue of NPRI's standing, the district court is not barred from hearing
3 and adjudicating any other issues regarding subject-matter jurisdiction. In fact, the district court has an
4 obligation to address all remaining issues regarding subject-matter jurisdiction in this litigation because
5 those issues have been raised by the parties or otherwise brought to the district court's attention, even if
6 the district court must act *sua sponte* to address those issues. Accordingly, the district court has an
7 obligation to address whether NPRI's claims must be dismissed for lack of subject-matter jurisdiction
8 because NPRI failed to comply with the statutory requirements under NRS Chapter 41 to invoke the
9 government's conditional waiver of sovereign immunity. NRS 41.031; NRS 41.0337; NRS 41.039.¹

10 Under Nevada law, if a plaintiff files a lawsuit against state or local government officers or
11 employees but fails to comply with the statutory requirements under NRS Chapter 41 to invoke the
12 government's conditional waiver of sovereign immunity, the court lacks subject-matter jurisdiction to
13 entertain the lawsuit. See Craig v. Donnelly, 135 Nev. 37, 39-40 (Nev. Ct. App. 2019); Wayment v.
14 Holmes, 112 Nev. 232, 237-38 (1996). In this case, because NPRI failed to comply with those statutory
15 requirements in bringing this lawsuit, the district court must dismiss NPRI's amended complaint for lack
16 of subject-matter jurisdiction.

17 In its opposition, NPRI contends that the statutory requirements under NRS Chapter 41 apply only
18 to **tort** actions against the state or its political subdivisions. In support of its contention, NPRI states that
19 the statutory provisions are commonly referred to as the Nevada Tort Claims Act and that the
20 regulations in the Nevada Administrative Code interpreting the statutory provisions are entitled "Tort
21 Claims Against the State, its Agencies and Political Subdivisions." However, NPRI is wrong as a matter
22 of law because the Supreme Court recently rejected similar arguments in Echeverria v. State, 137 Nev.
23 Adv. Op. 49, 495 P.3d 471, 475 (2021).

24 ¹ NRS 41.031, NRS 41.0337 and NRS 41.039 are reproduced in the Addendum following the
Memorandum of Points and Authorities.

1 In Echeverria, the Supreme Court held that NRS Chapter 41 applies to all causes of action against
2 the state or its political subdivisions, including tort actions and **non-tort** actions. Echeverria, 495 P.3d
3 at 475-77. The Supreme Court also rejected the argument that the statutory provisions must be
4 interpreted to apply only to tort actions simply because the provisions have been inaccurately referred to
5 as the “tort claims act” or “tort liability act,” stating that:

6 If courts and attorneys insist upon referring to NRS 41.031 et seq. by a name rather than by
7 a code citation, we think “government liability act” more accurately reflects the content of
8 the statutes. Cf. City of Stockton v. Superior Court, 42 Cal. 4th 730, 68 Cal. Rptr. 3d 295,
9 171 P.3d 20, 27-28 (2007) (adopting the practice of referring to California’s claims statute
10 as the “Government Claims Act,” rather than the “Tort Claims Act,” **in recognition that the
statute applies to claims other than torts**).

11 Echeverria, 495 P.3d at 477 n.8 (emphasis added).

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

23 Under such circumstances, the district court must dismiss the amended complaint for lack of
24 subject-matter jurisdiction because NPRI failed to comply with the statutory requirements under
NRS Chapter 41 to invoke the conditional waiver of sovereign immunity of: (1) the state and its state

1 officers or employees; and (2) each political subdivision and its local officers or employees.
2 Specifically, in violation of NRS Chapter 41, NPRI failed to bring this lawsuit in the name of: (1) the
3 state on relation of each particular department or other agency that employs the individual Defendants
4 who are state employees; and (2) each political subdivision that employs the individual Defendants who
5 are local employees. Craig, 135 Nev. at 39-40; NRS 41.031; NRS 41.0337; NRS 41.039. Therefore, the
6 district court must dismiss NPRI's amended complaint because the lack of subject-matter jurisdiction is
7 apparent on the face of the amended complaint.

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

11 In its motion to dismiss, the Legislature argues that NPRI failed to join all necessary party-
12 defendants as required by the Due Process Clause, NRCP 19 and the Uniform Declaratory Judgments
13 Act in NRS Chapter 30. In its opposition, NPRI limits its arguments to NRCP 19 and does not address
14 any of its arguments to the requirements of the Due Process Clause and the Uniform Declaratory
15 Judgments Act. As a result, the district court should conclude that NPRI has conceded that it failed to
16 join all necessary party-defendants as required by the Due Process Clause and the Uniform Declaratory
17 Judgments Act.

18 With regard to NRCP 19, NPRI argues that complete relief can be accorded to all current parties
19 without joining the absent parties. NPRI also argues that because the absent parties presumably know
20 about the litigation but have made no effort to intervene, their lack of interest suggests that they do not
21 fear the impairment of their rights. In support of its arguments, NPRI contends that, after the issuance of
22 the Supreme Court's published opinion, all members of the judicial branch who are engaging in dual
23 employment with the Nevada System of Higher Education ("NSHE") are aware of this litigation, but
24 they have made no effort to intervene, thereby demonstrating that complete relief can be accorded to all
current parties without joining the absent parties. NPRI is wrong as a matter of law for several reasons.

1 First, the burden is on NPRI to join all necessary party-defendants. Olsen Family Trust v. Dist.
2 Ct., 110 Nev. 548, 552-54 (1994). The law does not impose any burden on a person to intervene
3 voluntarily in an action when that person has not been made a party to the action by service of process.
4 Id. Thus, “[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest
5 assured that a judgment recovered therein will not affect his legal rights.” Chase Nat’l Bank v. City of
6 Norwalk, 291 U.S. 431, 441 (1934). Accordingly, due process is not satisfied by the fact that a person
7 has knowledge of the action and an opportunity to intervene. Martin v. Wilks, 490 U.S. 755, 762-65
8 (1989); Olsen Family Trust, 110 Nev. at 552-53. Instead, “[j]oinder as a party, rather than knowledge of
9 a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the
10 jurisdiction of the court and bound by a judgment or decree.” Martin, 490 U.S. at 765; Olsen Family
11 Trust, 110 Nev. at 553. Therefore, even assuming that all members of the judicial branch who are
12 engaging in dual employment with NSHE are aware of this litigation, the Due Process Clause imposes
13 the burden on NPRI to join them as necessary party-defendants.

14 Second, NPRI’s burden to join all necessary party-defendants is not limited to members of the
15 **judicial** branch. Instead, NPRI has the burden to: (1) identify any other members of the **legislative**
16 branch who currently serve in dual roles with NSHE or with any other state executive branch employer
17 or local government employer; and (2) join these members of the legislative branch as necessary party-
18 defendants. Moreover, after NPRI meets its burden to identify all members of the **judicial** branch and
19 the **legislative** branch who currently serve in dual roles and join them as necessary party-defendants,
20 NPRI has the burden to join all the respective state executive branch employers and local government
21 employers because they are also necessary party-defendants to this action.

22 In order for a judgment in this case to provide complete and effective relief, the judgment would
23 have to be binding on all those members of the **judicial** branch and the **legislative** branch who currently
24 serve in dual roles **and** their state executive branch employers and local government employers. Unless

1 all those members of the **judicial** branch and the **legislative** branch **and** their state executive branch
2 employers and local government employers are joined as necessary party-defendants to this action, there
3 cannot be “a complete decree to bind them all.” Olsen Family Trust, 110 Nev. at 553.

4 If the district court were to grant the relief requested by NPRI, such relief would clearly impair as
5 a practical matter the employment interests of all the members of the **judicial** branch and the **legislative**
6 branch who currently serve in dual roles, **and** such relief would also clearly impair as a practical matter
7 the interests of their state executive branch employers and local government employers which have
8 devoted substantial time, effort and resources to developing and utilizing their skills and expertise as
9 employees. Under such circumstances, NPRI has the burden to join all members of the **judicial** branch
10 and the **legislative** branch who currently serve in dual roles **and** all the respective state executive branch
11 employers and local government employers because they are necessary party-defendants to this action.
12 Accordingly, NPRI’s claims must be dismissed because NPRI failed to join all necessary party-
13 defendants who are needed for a just adjudication of this action as required by the Due Process Clause,
14 NRCP 19 and the Uniform Declaratory Judgments Act in NRS Chapter 30.

15 **VII. The Legislature’s motion to dismiss was not untimely.**

16 In its opposition, NPRI contends in a footnote that the Legislature’s motion to dismiss should be
17 denied because the motion was untimely when it was filed electronically on July 1, 2022, instead of
18 June 30, 2022. The district court should reject NPRI’s contentions for several reasons.

19 First, the district court may reject contentions that are raised only in a footnote. See John Wyeth
20 & Bro. v. CIGNA Int’l, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (“[A]rguments raised in passing (such
21 as, in a footnote), but not squarely argued, are considered waived.”).

22 Second, LCB Legal served the Legislature’s motion to dismiss on NPRI and the other parties on
23 June 30, 2022, by electronic mail sent to the electronic mail addresses registered by the parties for the
24 district court’s Electronic Filing System (“EFS”). However, due to technical problems experienced by

1 LCB Legal with the EFS, it was unable to file the motion electronically with the EFS until July 1, 2022.
2 Under NRCP 5(d)(1), “[a]ny paper after the complaint that is required to be served must be filed no later
3 than a reasonable time after service.” In this case, LCB Legal filed the motion to dismiss within
4 “reasonable time after service.” Furthermore, because LCB Legal served the Legislature’s motion to
5 dismiss on NPRI and the other parties on June 30, 2022, NPRI suffered no prejudice, and LCB Legal
6 gained no advantage.

7 Third, although NPRI contends that there was an oral stipulation among the parties that all
8 responsive pleadings would be filed on or before June 30, 2022, that oral stipulation was not effective
9 and binding on the parties because it was not in the form of a written stipulation or entered in the
10 minutes of the court in the form of an order. EDCR 7.50 (“No agreement or stipulation between the
11 parties or their attorneys will be effective unless the same shall, by consent, be entered in the minutes in
12 the form of an order, or unless the same is in writing subscribed by the party against whom the same
13 shall be alleged, or by the party’s attorney.”); Casentini v. Hines, 97 Nev. 186, 187 (1981) (concluding
14 that the district court erred in entering judgment on a stipulation that was not reduced to writing or
15 entered into the minutes of the court in the form of an order).

16 Therefore, the district court should reject NPRI’s contentions that the Legislature’s motion to
17 dismiss was untimely.

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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.
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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 28th day of July, 2022, pursuant to NRCP 5(b) and NEFCR 9, I served a true and correct copy of the Nevada Legislature's Reply in Support of the 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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COLLEEN E. MCCARTY, ESQ.

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*Attorneys for Plaintiff Nevada
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BERNA L. RHODES-FORD, ESQ.

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Attorneys for Defendant Dina Neal

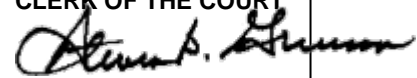
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13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: VIII

**PLAINTIFF'S NOTICE OF NON-
OPPOSITION BY BRITTNEY
MILLER AND SELENA TORRES TO
PLAINTIFF'S MOTION TO STRIKE
THEIR JOINDER TO NSHE
DEFENDANT DINA NEAL'S
MOTION TO DISMISS AND
PARTIAL JOINDERS TO
INTERVENOR-DEFENDANT
NEVADA LEGISLATURE'S AND
DEFENDANT JAMES
OHRENSCHALL'S MOTIONS TO
DISMISS**

Date of Hearing: August 4, 2022

Time of Hearing: 2:00 p.m.

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

TO THE COURT, THE DEFENDANTS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE THAT 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, filed and served its *Motion to Strike: (1) NSHE Defendant Dina Neal’s Motion to Dismiss Pursuant to NRCF 12(b)(5), (2) Nevada Legislature’s Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief, and (3) All Joinders Thereto* (“Motion to Strike”) on July 13, 2022. The time for filing and serving written opposition thereto, therefore, ended fourteen (14) days later on July 27, 2022, pursuant to EDCR 2.20(e). Further, unlike EDCR 2.20(d), which provides an additional seven (7) day time period for filing any joinder to a motion, no corresponding additional time period is provided in EDCR 2.20(e), or otherwise in EDCR 2.20, for the filing of a joinder to an opposition.

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1 Accordingly, pursuant to EDCR 2.20(e), NPRI respectfully requests that this Court construe
2 the failure of Defendants Brittney Miller and Selena Torres to file any written or timely opposition to
3 the Motion to Strike their Joinder and Partial Joinders, respectively, to all pending motions to
4 dismiss as an admission that the Motion to Strike is meritorious as to them and as a consent to
5 granting the same.¹

6 Dated this 29th day of July, 2022.

7 **FOX ROTHSCHILD LLP**

8 By: /s/ Colleen E. McCarty

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11 COLLEEN E. MCCARTY

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16 Attorneys for Plaintiff

17 Nevada Policy Research Institute

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27 ¹ NPRI notes that NSHE Defendant Dina Neal filed a simple joinder to the Nevada Legislature's Opposition
28 to the Motion to Strike one day late, on July 28, 2022. As Defendant Neal did not insert any additional
arguments in her late-filed Joinder and otherwise timely filed her own Opposition to the Motion to Strike,
NPRI does not seek to challenge Defendant Neal's additional filing at this time.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 29th day of July, 2022, I caused the foregoing document entitled **PLAINTIFF'S NOTICE OF NON-OPPOSITION BY BRITTNEY MILLER AND SELENA TORRES TO PLAINTIFF'S MOTION TO STRIKE THEIR JOINDER TO NSHE DEFENDANT DINA NEAL'S MOTION TO DISMISS AND PARTIAL JOINDERS TO INTERVENOR-DEFENDANT NEVADA LEGISLATURE'S AND DEFENDANT JAMES OHRENSCHALL'S MOTIONS TO DISMISS** 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.

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Bradley Schrager, Esq.
Royi Moas, Esq.
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An Employee of Fox Rothschild LLP

NOTC
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*Attorneys for Defendants,
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DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

Plaintiff,
vs.

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

Defendants.

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

**DEFENDANTS BRITTNEY MILLER
AND SELENA TORRES'S RESPONSE TO
PLAINTIFF'S NOTICE OF NON-
OPPOSITION**

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DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S RESPONSE TO PLAINTIFF'S NOTICE OF
NON-OPPOSITION

1 This issue is not worth the Court's time, nor was it worth the time Plaintiffs took in drafting
2 and filing it. Defendants Miller and Torres submitted joinders to both the Legislature's and Ms.
3 Neal's opposition to Plaintiff's motion to strike. The motion to strike was, itself, not based on
4 Miller and Torres' lack of a right to join their co-defendants' filings, but rather on the procedural
5 propriety of the underlying motions to dismiss—topics which are ably addressed in the opposition
6 briefs filed by co-defendants, which Miller and Torres have joined. The Court does not need further
7 argument on these points repeating the same things again and again.

8 Even if somehow the joinders were struck for whatever reason Plaintiffs suggest, if the
9 motions to dismiss are granted Miller and Torres will simply file motions for judgment on the
10 pleadings on the same grounds immediately thereafter. This sort of multiplication of the litigation
11 seems rather pointless.

12
13 DATED this 29th day of July, 2022.

14 **WOLF, RIFKIN, SHAPIRO,**
15 **SCHULMAN & RABKIN, LLP**

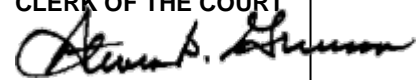
16 By: /s/ Bradley S. Schrager
17 BRADLEY SCHRAGER, ESQ. (SBN 10217)
18 ROYI MOAS, ESQ. (SBN 10686)
19 DANIEL BRAVO, ESQ. (SBN 13078)
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21 Las Vegas, NV 89169
22 (702) 341-5200/Fax: (702) 341-5300

23 *Attorneys for Defendants,*
24 *Brittney Miller and Selena Torres*
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 29th day of July, 2022, a true and correct copy of the foregoing
3 **DEFENDANTS BRITTNEY MILLER AND SELENA TORRES'S RESPONSE TO**
4 **NOTICE OF NON-OPPOSITION** was served by electronically filing with the Clerk of the Court
5 using the Odyssey eFileNV system and serving all parties with an email address on record,
6 pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

7
8 By: /s/ Melissa Shield
9 Melissa Shield, an Employee of
10 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
11 RABKIN, LLP
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13 Attorneys for Plaintiff

14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: VIII

**PLAINTIFF NEVADA POLICY
RESEARCH INSTITUTE'S REPLY IN
SUPPORT OF MOTION TO STRIKE:**

**(1) NSHE DEFENDANT DINA NEAL'S
MOTION TO DISMISS PURSUANT
TO NRCP 12(B)(5),**

**(2) NEVADA LEGISLATURE'S
MOTION TO DISMISS AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF, AND**

(3) ALL JOINDERS THERETO

Date of Hearing: August 4, 2022

Time of Hearing: 2:00 p.m.

individual engaging in dual employment with the Nevada State Assembly and Nevada State College; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; TERESA BENITEZ-THOMPSON, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Defendants.

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 submits its omnibus Reply in support of its Motion to Strike [Doc. 157] and in response to the Oppositions filed by NSHE Defendant Dina Neal [Doc. 163] and the Nevada Legislature [Doc. 164], and the late-filed Joinders thereto filed by Defendants Brittney Miller and Selena Torres [Doc. 170]. NPRI’s Reply is based on the Memorandum of Points and Authorities herein, the pleadings and papers on file, and any oral argument permitted by the Court.

Dated this 1st day of August, 2022.

FOX ROTHSCHILD LLP

By: /s/ Colleen E. McCarty

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Attorneys for Plaintiff

Nevada Policy Research Institute

1 **REPLY IN SUPPORT OF MOTION TO STRIKE ALL IMPROPERLY FILED SECOND**
2 **GENERATION MOTIONS TO DISMISS AND THEIR JOINDERS**

3 **I.**

4 **INTRODUCTION**

5 As stated in the underlying Motion to Strike, all NPRI is rightfully seeking herein is for the
6 Court to avoid the obvious delay that would result from any consideration of the improperly-filed,
7 second dismissal motions containing arguments that already were or should have been brought as
8 first generation motions. The Court's rules do allow newly-appearing Defendant Ohrenschall's
9 Motion to Dismiss [Doc. 136] to be considered at the Court's upcoming special setting on August 4,
10 2022, but no other motions to dismiss or their joinders, including the joinder to Defendant
11 Ohrenschall's matter, are properly before this Court, pursuant to the plain language of NRC
12 12(g)(2), and these filings [Docs. 135, 138, 139, 140, 143, 144, 145, 152, 153 and 154] should be
13 summarily stricken.

14 Remarkably, NSHE Defendant Neal raises as her sole oppositional argument that she has, in
15 fact, already been heard on the same NRC 12(b) arguments she seeks to raise now and the Court
16 should deny NRC 12(g)(2) relief on that basis. *See* Doc. 163 at 2:23-24.¹ Whether or not Judge
17 Crockett chose to grant his dismissal previously on standing alone does not mean that he did
18 consider the merits of all first generation dismissal arguments. And NPRI reminds the Court that it
19 sought clarification from Judge Crockett prior to the entry of any final order, as he had decided all
20 pending matters by minute order the day prior to the scheduled oral arguments, and all then-
21 appearing Defendants strenuously opposed NPRI's request and sought a countermotion for full
22 dismissal of all parties based on "all pleadings, documents and exhibits on file in this case." *See* Doc.
23 104 at 2:18-20. It is axiomatic that NSHE Defendant Neal is now precluded from bringing her
24 second motion to dismiss, whether because it was already heard or whether it could and should have
25 been raised previously in the final countermotion for dismissal granted by the Court's predecessor.

26 Equally unavailing is the Nevada Legislature's argument that NPRI is procedurally precluded
27 from seeking relief by way of its Motion to Strike and may only oppose substantively its second

28

¹ For ease of reference for the Court, given the number of filings being cited and the similarity and length of
their titles, all citations to said documents herein will be to the assigned Document Filing Numbers.

1 generation dismissal request. First, where the Court declined to hear NPRI's strike request on order
2 shortening time, NPRI did substantively oppose Nevada Legislature's motion, and its Opposition
3 even attempts to take NPRI to task for its purported "duplicative arguments." *See* Doc. 164 at 2:7-8.
4 Second, NPRI did not invoke NRCP 12(f) in its request to strike, as the Opposition presumes, nor
5 was it required to. *See Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007)
6 (holding a court has inherent power to protect the dignity and decency of its proceedings and may
7 issue sanctions for litigation abuses). Further, the Nevada Legislature invokes in its Opposition the
8 very discretion it seeks to deny NPRI. *See* Doc. 164 at 7:16-18.

9 For reasons still unknown to NPRI, other than an errant belief that justice delayed will mean
10 justice denied for NPRI only, Defendants continue to do everything in their power to prevent this
11 matter from reaching the appellate court on its merits, including filing and/or joining successive
12 motions to dismiss that are prohibited by NRCP 12(g)(2). This violation of the rules must not be
13 sanctioned by the Court, especially in light of the Nevada Supreme Court's clear directive that this
14 case be "remanded for further proceedings on [NPRI's] claims." *See Nev. Policy Research Inst. v.*
15 *Cannizzaro*, 138 Nev. Adv. Op. 28 at *15 (2022) (emphasis added), on file herein.

16 II.

17 LEGAL ARGUMENT

18 A. NRCP 12(g)(2), Read in Its Entirety and for Its Plain Meaning, Precludes All 19 Second Generation Dismissal Motions and Joinders on File Herein.

20 Both Defendant Neal and Nevada Legislature argue for a different reading of NRCP 12(g)(2)
21 than that plainly required. First, and easiest for the Court to disregard, is Nevada Legislature's claim
22 that the issues it seeks to raise now, i.e., lack of subject matter jurisdiction and failure to join all
23 necessary party-defendants, may be raised at any time in the proceedings. *See* Doc 164 at 7:7-12.
24 This argument fails in its entirety where the only exceptions contemplated in NRCP 12(g)(2), i.e.
25 those found in NRCP 12(h)(2) and (3), are wholly inapplicable in the instant case.

26 With regard to NRCP 12(h)(2), the entire argument regarding the purported failure of NPRI
27 to join required parties is being made pursuant to NRCP 19(a) [*see* Doc. 143 at 14:4-17:2], but the
28 exception to the limitation of further motions clearly pertains only to motions brought to NRCP
19(b). It makes perfect sense, too, when the Court takes into account the distinction the Nevada

1 Legislature willfully ignores, which is that NRCP 19(b) applies where joinder of a party is not
2 feasible and dismissal remains a possibility and, conversely, NRCP 19(a) applies where joinder if
3 feasible may be required or not as the Court sees fit but actual dismissal is not a possibility. Any
4 dismissal request based on NRCP 19(a) must clearly be filed in the first instance, that Nevada
5 Legislature failed to do so in the instant case, and NRCP 12(g)(2) precludes it from doing so now.

6 With regard to the exception found in NRCP 12(h)(3), it is simply not the case here that lack
7 of subject matter jurisdiction remains an issue. The Nevada Supreme Court made that clear in its
8 remand order, as noted above, and none of the NRS Chapter 41 provisions cited in the Nevada
9 Legislature's purportedly new jurisdiction argument, i.e., NRS 41.031, NRS 41.0337 and NRS
10 41.039, carry with them the remedy of dismissal. These provisions, in fact, do nothing more that set
11 forth the requirements when a party files a tort action against the State of Nevada, either directly or
12 indirectly, through one of its agencies or political subdivisions, as the subtitle in NRS Chapter 41 –
13 LIABILITY OF AND ACTIONS AGAINST THIS STATE, ITS AGENCIES AND POLITICAL
14 SUBDIVISIONS – and the Nevada Administrative Code provisions interpreting it found in NAC
15 Chapter 41 – TORT CLAIMS AGAINST THE STATE, ITS AGENCIES AND POLITICAL
16 SUBDIVISIONS – make clear.

17 As noted in the Motion to Strike, the Nevada Legislature appears to know that it filed an
18 impermissibly successive motion under NRCP 12(g)(2), which is why it attempted to make a subject
19 matter jurisdiction argument, pursuant to the exception for application of NRCP 12(g)(2) for subject
20 matter jurisdiction challenges found in NRCP 12(h)(3). And it should know but fails to concede or
21 otherwise address it in its Opposition that the provisions of NRS Chapter 41 it cites do not apply to
22 the instant case. The instant case in no way implicates liability for any party, let alone the State of
23 Nevada, and there is no question of subject matter jurisdiction being challenged for the failure to
24 meet any requirements of a wholly inapplicable chapter of the Nevada Revised Statutes.
25 Accordingly, NPRI respectfully asks the Court to see these arguments for what they truly are,
26 nothing more than unconscionable delay tactics unsupported by prevailing law, and disregard them
27 in their entirety.
28

1 **B. All Second Generation Dismissal Motions and Joinders on File Herein Contain**
2 **Arguments the Court’s Predecessor Considered, and Further Consideration by**
3 **the Current Court Is Improper.**

4 Defendant Neal argues in her Opposition for additional consideration of her prior arguments
5 on the basis that the prior Court “could not have addressed the issues in the original Motion to
6 Dismiss.” *See* Doc. 163 at 3:20. Nevada Legislature, in turn, argues in its Opposition that its motion
7 to dismiss is “not ‘another motion’ under NRCP 12 because the Legislature never filed a motion to
8 dismiss under NRCP 12(b) in the prior proceedings.” *See* Doc. 164 at 4:1-2. Both positions are
9 belied by the instant record and must also be disregarded in their entirety.

10 As the record herein shows, Defendant Neal along with two of her colleagues who later
11 ceased their dual employment positions, filed and fully briefed a motion to dismiss based on NRCP
12 12(b) at the outset of the litigation in 2020. *See* Docs. 47, 77. The arguments she puts forward in
13 her current motion to dismiss are identical, and at times verbatim, to those already submitted to this Court’s
14 predecessor. Additionally, the arguments are also wholly inconsistent with the Supreme Court’s opinion,
15 which is officially the law of the case. Specifically, the entire premise of Defendant Neal’s current
16 motion to dismiss is the unsupported and erroneous conclusion that the separation of powers clause
17 found in the Nevada Constitution “has been interpreted to prohibit *public officials or officers*, as
18 opposed to mere *public employees*, from holding positions in separate branches of government.” *See*
19 Doc. 135 at 4:11-13. This assertion, however, is completely contrary to the Supreme Court’s remand
20 order, which unequivocally states that the separation of powers issue remains unresolved. *See*
21 *Cannizzaro*, 138 Nev. Adv. Op. 28 at *10-11 (stating, among other things, that “future guidance is
22 necessary because of the lack of judicial interpretation of Nevada’s separation-of-powers clause”).
23 So whether Judge Crockett could have but chose not to address the dismissal arguments of
24 Defendant Neal and others as an alternative in his decision, having been fully briefed on all matters,
25 or whether the Nevada Supreme has already resolved Defendant Neal’s specific arguments in favor
26 of NPRI as the law of the case, Defendant Neal’s issues have been fully addressed.

27 The record herein also shows that, prior to the entry of Judge Crockett’s final order, NPRI
28 sought clarification as to basis of his decision to dismiss the case in its entirety, as well as to grant
 the Nevada Legislature’s intervention request. *See* Doc. 102. The Nevada Legislature then authored

1 the joint opposition on behalf of all Defendants, whether or not formally appearing, and further
2 sought by way of countermotion the full dismissal of all parties based on “all pleadings, documents
3 and exhibits on file in this case.” *See* Doc. 104 at 2:18-20. The countermotion by its plain language
4 relied entirely on NRCP 12 and provided ample opportunity for the Nevada Legislature, as well as
5 all other then-appearing Defendants, to raise and secure a decision on all possible dismissal grounds.
6 Instead, all Defendants chose to hang their collective hats, as did the Court’s predecessor, on the
7 standing issue alone, and now that they have lost on that issue, they hope this Court will disregard
8 the rules and allow them to have a complete dismissal do-over. The Court must not allow, however,
9 Defendants to previously make every possible argument for dismissal, then strenuously oppose
10 NPRI’s request for clarification when Judge Crockett based his dismissal decision on standing alone,
11 and now circle back for yet another bite at the proverbial apple. NRCP 12(g)(2) precludes such
12 litigation abuses and justifies the granting of NPRI’s Motion to Strike in its entirety.

13 **C. Joinders by Defendants Brittney Miller, Selena Torres, and James Ohrenschall**
14 **Must Also Be Stricken.**

15 Defendants Brittney Miller and Selena Torres did not timely or properly oppose NPRI’s
16 Motion to Strike their Joinders, as shown in NPRI’s subsequently filed Notice of Non-Opposition.
17 *See* Doc. 172. Substantively, although not seeking a second round of motions to dismiss of their
18 own, Defendants Miller and Torres have filed a Joinder to the dismissal request of Defendant Neal
19 [Doc. 138], a Partial Joinder to the dismissal request of Intervenor-Defendant Nevada Legislature
20 [Doc. 145], and, finally, a Partial Joinder to the dismissal request of newly-appearing Defendant
21 James Ohrenschall [Doc. 139]. For the same reasons stated herein, these Joinders, should be deemed
22 successive where Defendants Miller and Torres also filed and joined fully briefed prior motions to
23 dismiss brought pursuant to NRCP 12. *See* Docs. 35, 65, 66, 67 and 100.

24 As far as Defendant Ohrenschall is concerned, NPRI does not dispute his ability to file a first
25 motion to dismiss pursuant to NRCP 12 and has timely opposed the same. *See* Doc. 160. But he did
26 not oppose NPRI’s Motion to Strike his Joinders to the motions to dismiss filed by the other
27 Defendants, if also stricken, and this failure should be construed as an admission that the Motion to
28 Strike is meritorious and a consent to granting the same. *See* EDCR 2.20(e). Further, the local rules

1 do not permit any consideration of his Joinders to Defendants' motions if stricken regardless.
2 Specifically, EDCR 2.20(d) only permits a joinder to become its own, stand-alone motion where the
3 underlying motion "becomes moot or is withdrawn by the movant." Should the Court agree with
4 NPRI and strike the other Defendants' motions to dismiss, the arguments contained in the motions
5 should not be considered through Defendant Ohrenschall's Joinders otherwise, as they should
6 themselves either be disregarded, pursuant to EDCR 2.20(e), or stricken if appropriate, pursuant to
7 EDCR 2.20(d).

8 **III.**

9 **CONCLUSION**

10 For the foregoing reasons, as well as those set for in the original motion, NPRI respectfully
11 requests this Honorable Court grant its Motion to Strike all improperly filed motions to dismiss and
12 their joinders, as permitted both under the law and in the interest of judicial and party economy.

13 Dated this 1st day of August, 2022.

14 **FOX ROTHSCHILD LLP**

15
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CERTIFICATE OF SERVICE

Pursuant to NRCF 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 1st day of August, 2022, I caused the foregoing document entitled **PLAINTIFF NEVADA POLICY RESEARCH INSTITUTE’S REPLY IN SUPPORT OF MOTION TO STRIKE: (1) NSHE DEFENDANT DINA NEAL’S MOTION TO DISMISS PURSUANT TO NRCF 12(b)(5), (2) NEVADA LEGISLATURE’S MOTION TO DISMISS AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, AND (3) ALL JOINDERS THERETO** 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.

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