

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada
domestic nonprofit corporation,

Appellant,

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 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 Clark County Public Charter School; and
THE LEGISLATURE OF THE STATE OF NEVADA,

Respondents.

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Case No. 85935

District Court Case No.:
A-20-817757-C

RESPONDENT DINA NEAL'S APPENDIX

/s/ Berna L. Rhodes-Ford

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of General Counsel for Nevada State University, located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party to the within case. I further certify that on August 11, 2023 I caused the foregoing document, *Respondent Dina Neal's Appendix*, to be sent via electronic means to the following at their last known email addresses pursuant to NEFCR 9 and NRAP 25(c):

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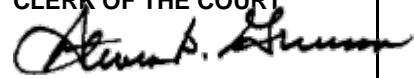
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Dated August 11, 2023

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12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 NEVADA POLICY RESEARCH
15 INSTITUTE, a Nevada domestic nonprofit
16 corporation,

17 Plaintiff,

18 vs.

19 NICOLE J. CANNIZZARO, an individual
20 engaging in dual employment with the
21 Nevada State Senate and Clark County
22 District Attorney; KASINA DOUGLASS-
23 BOONE, an individual engaging in dual
24 employment with the Nevada State Assembly
25 and Clark County School District; JASON
26 FRIERSON, an individual engaging in dual
27 employment with the Nevada State Assembly
28 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;

Case No. A-20-817757-C

Dept. No.: II

HEARING REQUESTED

**DEFENDANT BRITTNEY MILLER'S
MOTION TO DISMISS COMPLAINT**

NA00001

1 MELANIE SCHEIBLE an individual
2 engaging in dual employment with the
3 Nevada State Senate and Clark County
4 District Attorney; TERESA BENITEZ-
5 THOMPSON, an individual engaging in dual
6 employment with the Nevada State Assembly
7 and University of Nevada, Reno; JILL
8 TOLLES, an individual engaging in dual
9 employment with the Nevada State Assembly
10 and University of Nevada, Reno; and
11 SELENA TORRES, an individual engaging
12 in dual employment with the Nevada State
13 Assembly and Clark County School District,
14
15 Defendants.

16
17 Defendant Brittney Miller moves this Court to dismiss the Amended Complaint of Plaintiff
18 the Nevada Policy Research Institute (“NPRI”), pursuant to NRCP 12(b)(1) and NRCP 12(b)(5).
19 This motion is based on the points and authorities below, all papers and exhibits on file herein, and
20 any oral argument this Court sees fit to allow at hearing on this matter.

21 DATED this 18th day of September, 2020.

22
23 **WOLF, RIFKIN, SHAPIRO,**
24 **SCHULMAN & RABKIN, LLP**

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1

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 Standing is the key that unlocks the courthouse doors to a litigant, in Nevada and every
5 other jurisdiction. Here, NPRI lacks standing to bring and prosecute its claim that Ms. Miller’s
6 service as a Clark County middle school teacher violates the Nevada Constitution, art. 3, sec. 1. It
7 has suffered, and can claim, no particular injury itself, and cannot meet the elements of the only—
8 and both recent and very narrow—exception to that specific-injury requirement to standing in
9 Nevada. Neither has NPRI named the parties its suit would require by statute, even if it could be
10 argued that it otherwise can establish standing to sue.

11 In Nevada, an organization, no matter how earnest of enthusiastic about the issue with
12 which it is concerned, cannot simply file a lawsuit to resolve that matter, absent legal standing to
13 bring the suit. To do so is not only to flaunt the rules of standing, but also to invite demands for
14 what are essentially advisory opinions from the Nevada judiciary. As such, NPRI’s suit must be
15 dismissed for lack of jurisdiction of the Court, and for failure to state a claim for which relief may
16 be granted.

17 **II. LEGAL STANDARDS**

18 Pursuant to NRCP 12(b)(5), “[a] complaint should only be dismissed for failure to state a
19 claim if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it
20 to relief.” *Kim v. Dickinson Wright, PLLC*, 135 Nev. 161, 164, 442 P.3d 1070, 1073 (2019)
21 (quoting *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641, 403 P.3d 1280, 1283
22 (2017)). The court should “presume that all alleged facts in the complaint are true and draw all
23 inferences in favor of the complainant.” *Benko v. Quality Loan Serv. Corp.*, 135 Nev. 483, 486,
24 454 P.3d 1263, 1266 (2019). Furthermore, the court is not required to assume the truth of legal
25 conclusions merely because they are cast in the form of factual allegations. *W. Min. Council v.*
26 *Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see also Sproul Homes of Nev. v. State*, 96 Nev. 441, 445,
27 611 P.2d 620, 622 (1980) (motion to dismiss not fairly surmountable where complaint is replete
28 with generalizations and conclusory matter).

1 Motions brought for lack of standing that the Court construes as jurisdictional in nature are
2 subject to NRCP 12(b)(1), but the standards for such determination are the same as those for a
3 12(b)(5) motion. Lack of standing is a defect in subject matter jurisdiction, and may be challenged
4 under Rule 12(b)(1). *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct.
5 1326 (1986).

6 The burden of demonstrating a particularized injury and thus establishing standing falls to
7 the parties bringing the suit. *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

8 **III. NPRI'S PREVIOUS CASES ON THIS ISSUE**

9 NPRI long has been involved in bringing a number of cases on the “dual service”
10 constitutional theory, usually acting as counsel for plaintiffs it secures in order to mount
11 challenges to the legislative service or public employment of targeted officials.

12 In 2011, its legal arm acted as counsel in *Pojunis v Denis*, First Judicial District Court Case
13 No. 11 OC 00394 (filed Nov. 30, 2011) (*see* Exhibit A, a true and accurate copy of the Complaint
14 in that action).¹ In *Pojunis*, plaintiff William Pojunis, secured by NPRI to undertake the suit,
15 argued that the employment as a computer technician with the Public Utilities Commission of
16 Nevada by Nevada State Senator Moises Denis violated Nev. Const. art 3, sec. 1. Pojunis argued
17 that he “is duly qualified, holds the job requirements established by the Public Utilities
18 Commission of Nevada, and earnestly seeks the position of Computer Technician currently held
19 by Defendant MOISES DENIS.” *See* Ex. A, at ¶ 3. The action was later dismissed as moot by the
20 district court, but there was no motion entertained that Mr. Pojunis lacked standing as plaintiff in
21 the lawsuit. Additionally, in that suit Mr. Pojunis and NPRI named both the State of Nevada and
22 the Public Utilities Commission of Nevada as defendants in the action, in keeping with NRS
23 41.0337.

24 In 2017, NPRI, again as plaintiff’s counsel, brought the case of *French v. Gansert*, First
25

26 ¹ Defendant requests the Court take judicial notice of Exhibit A pursuant to NRS 47.130(2)(b), as
27 a matter of fact capable of accurate and ready determination by resort to sources whose accuracy
28 cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.

1 Judicial District Court Case No. 17 OC 00231B (filed May 1, 2017) (*see* Exhibit B, a true and
2 accurate copy of the Amended Complaint in that action).² There, the plaintiff challenged State
3 Senator Heidi Seevers Gansert’s employment with the University of Nevada, Reno. Again, it was
4 argued that Mr. French “is duly qualified, holds the job requirements for and earnestly seeks the
5 position of Executive Director, External Relations at the University of Nevada, Reno, currently
6 held by Defendant HEIDI GANSERT.” *See* Ex. B, at ¶ 4. The suit was dismissed but not for lack
7 of standing on Mr. French’s part. Also again, Mr. French and NPRI named, as defendants, the
8 State of Nevada, the University of Nevada, Reno, the Nevada System of Higher Education, and
9 the Nevada Board of Regents, in keeping with NRS 41.0337.

10 Note that in both these previous actions, NPRI presented an individual plaintiff with
11 arguable standing, and it named as party defendants the State and the political subdivisions—the
12 employers—of the targeted public officials. Here it has done neither of those, opting instead to
13 become the plaintiff itself and to sue only the individuals like Ms. Miller, in her capacity as an
14 employee of a political subdivision, the Clark County School District. The Nevada Supreme
15 Court, in *Heller v. Legislature*, 120 Nev. 456, 472-473, 93 P.3d 746, 757 (2004), made very clear,
16 in dismissing that original writ proceeding, that the manner in which the kind of suit and relief
17 NPRI is pursuing here “could be sought by someone with a legally protectible interest, such as a
18 person seeking the executive branch position held by the legislator.” (internal quotation and
19 citation omitted). Furthermore, NRS 41.0337 would require the naming as defendants of
20 additional parties, even if standing existed otherwise. The failure to establish standing or to sue
21 appropriate parties is fatal to NPRI’s case, and to this Court’s jurisdiction to hear the action, and
22 this case should be dismissed.

23 **IV. ARGUMENT**

24 **A. NPRI Lacks Standing To Bring Its Claims**

25 Standing is the threshold inquiry in any lawsuit; without it, no suit may proceed.

27 ² Defendant requests the Court take judicial notice of Exhibit B.

1 Standing ”consists of both a case or controversy requirement stemming from Article III, Section 2
2 of the Constitution, and a subconstitutional prudential element.” *In re AMERCO Derivative*
3 *Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011). While Nevada state courts do not have a
4 strict requirement of constitutional Article III standing, “Nevada has a long history of requiring an
5 actual justiciable controversy as a predicate to judicial relief.” *Doe v. Bryan*, 102 Nev. 523, 525,
6 728 P.2d 443, 444 (1986). “The question of standing concerns whether the party seeking relief has
7 a sufficient interest in the litigation.” *Schwartz*, 132 Nev. at 743 (citing *Szilagyi v. Testa*, 99 Nev.
8 834, 838, 673 P.2d 495, 498 (1983)). This applies, as well, to suits for declaratory or injunctive
9 relief, and in fact the gravamen of the present action demands a very exacting standing inquiry by
10 this Court. *Stockmeier v. Nev. Dep’t of Corr. Psych. Rev. Panel* (“*Stockmeier I*”), 122 Nev. 385,
11 393-94, 135 P.3d 220, 225-26 (2006) (noting that while state courts are not required to comply
12 with federal “case or controversy” requirement, “[i]n cases for declaratory relief and where
13 constitutional matters arise, **this court has required plaintiffs to meet increased jurisdictional**
14 **standing requirements**” (footnotes omitted)), *abrogated on other grounds*, *Buzz Stew, LLC v.*
15 *City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (emphasis supplied). Standing in
16 Nevada is a jurisdictional determination, addressed either by a motion to dismiss under NRCP
17 12(b)(1), NRCP 12(b)(5), or—because it is jurisdictional—in a *sua sponte* order by the Court
18 itself.

19 1. NPRI does not meet the basic standing requirements in Nevada

20 For a controversy to exist sufficient to bring a lawsuit, parties “must show a personal
21 injury and not merely a general interest that is common to all members of the public.” *Schwartz*,
22 132 Nev. at 732 (citing *Doe*, 102 Nev. at 525). The “injury-in-fact” analysis requires the claimant
23 to show that the action caused or threatened to cause the claimant's injury-in-fact, and that the
24 relief sought will remedy the injury. *See generally Simon v. E. Ky. Welfare Rights Org.*, 426 U.S.
25 26, 38-39, 96 S. Ct. 1917 (1976). As stated, the burden of demonstrating a particularized injury
26 and thus establishing standing falls to the parties bringing the suit. *Id.*, 132 Nev. at 743.

27 Here, unlike the individual plaintiffs it produced in its previous forays into this subject
28 matter in years past, NPRI does not and cannot show that it has or will suffer a direct injury,

1 separate from advancing a general interest common to the public at large. It concedes as much in
2 its Complaint: apart from stating no injury it has suffered or that can be alleviated by seeking relief
3 from this Court, it repeatedly claims it is acting “in the public interest” in bringing this lawsuit.
4 Compl., at ¶¶ 1, 6, 23, 30.

5 There is no generalized taxpayer standing in this state. In fact, the Nevada Supreme Court
6 has been at pains to decline, expressly, to establish such a doctrine in numerous cases over many
7 years. *See Katz v. Incline Village General Improvement District*, 414 P.3d 300, 2018 WL 1129140
8 (unpublished decision), Nev. S. Ct. Case No. 70440 (Feb. 26, 2018) (“This court recently
9 reaffirmed the general rule that a taxpayer lacks standing when he or she has not suffered a special
10 or peculiar injury different from that sustained by the general public.”) (citing *Schwartz*, 132 Nev.
11 at 743). *See also Blanding v. City of Las Vegas*, 52 Nev. 52, 74, 280 P. 644, 650 (1929) (“It is
12 contended that appellants as taxpayers may join and maintain this action without showing special
13 injury. This contention is untenable.”).

14 **2. The public-importance exception to the requirement of a particularized** 15 **injury**

16 In 2015, the Nevada Supreme Court did establish, in *Schwartz*, “an exception to [the]
17 injury requirement in certain cases involving issues of public importance.” *Id.*, 132 Nev. at 743.
18 Under its terms, courts *may* “grant standing to a Nevada citizen to raise constitutional
19 challenges to legislative expenditures or appropriations without a showing of a special or personal
20 injury.” *Id.* “We stress,” however, “that this public-importance exception is narrow and available
21 only if the following criteria are met:

22 First, the case must involve an issue of significant public importance. Second, the
23 case must involve a challenge to a legislative expenditure or appropriation on the
24 basis that it violates a specific provision of the Nevada Constitution. And third,
25 the plaintiff must be an ‘appropriate’ party, meaning that there is no one else in a
better position who will likely bring an action and that the plaintiff is capable of
fully advocating his or her position in court.

26 *Id.* (internal citations omitted). *See also Laborers’ Intl. Union of N. America, Local 169 v.*
27 *Douglas County*, 454 P.3d 1259, 2019 WL 6999885 (unpublished decision), Nev. S.Ct. Case No.
28 77062 (Dec. 19, 2019) (Reiterating the narrowness of the *Schwartz* exception to basic standing

1 requirements). All three elements of this exception must be met, and even in that event the court
2 must be convinced to employ its prudential discretion to determine that a plaintiff has standing to
3 maintain suit.

4 NPRI appears to rely entirely upon this “public-importance exception” articulated in
5 *Schwartz*, in order to bring its lawsuit against Ms. Miller. But even if the suit is assumed to
6 address an issue of “significant public importance,” NPRI clearly cannot meet the second and third
7 prongs of the *Schwartz* test because it is not challenging a legislative appropriation and is not an
8 appropriate party in the sense expressed by the Supreme Court in *Schwartz*.

9
10 **(a) NPRI is not challenging a legislative expenditure or appropriation**

11 NPRI does not—and cannot, given the manner in which it has framed its pleading—allege
12 or challenge of *legislative appropriation or expenditure* in this action. The closest it comes to
13 making such an allegation is its contention that “taxpayer monies will be paid to Defendants.”
14 Compl., at ¶¶ 5, 28. Clearly, NPRI is here referring to Ms. Miller’s salary as a Clark County
15 middle school teacher, but that cannot suffice to invoke the narrow *Schwartz* public-importance
16 exception to the normal rules of standing. No legislature has made direct appropriation to Ms.
17 Miller by official act, and NPRI does not allege that any legislature has, in fact, done so.

18 An appropriation is “the provision of funds, through an annual appropriations act or a
19 permanent law, for federal agencies to make payments out of the Treasury for specified purposes.”
20 https://www.senate.gov/reference/glossary_term/appropriation.htm (last visited Sept. 16, 2020).
21 Here, the funds NPRI is alleging were “appropriated” or expended” when the Legislature enacted
22 its budget, and funded the Distributive School Account or the myriad other accounts that go to
23 fund education statewide under the Nevada Plan. The *Schwartz* exception requires not just an
24 expenditure or an appropriation, but specifically a *legislative* expenditure or appropriation that a
25 plaintiff plausibly alleges violates a specific provision of the Nevada Constitution. Nowhere in its
26 Complaint does NPRI allege it is challenging a legislative appropriation.

27 In *Schwartz*—the only instance in which the narrow public-importance exception has been
28 recognized and permitted by the Nevada Supreme Court thus far—the plaintiffs “allege[d] that

1 [the challenged enactment] allows millions of dollars of public funds to be diverted from public
2 school districts to private schools, in clear violation of specific provisions in the Nevada
3 Constitution.” 132 Nev. at 744, 382 P.3d at 895. The *Schwartz* plaintiffs sued the State, through
4 the State Treasurer, to challenge an act of the Nevada Legislature in appropriating and expending
5 public funds on an enormous scale budgeted for public and private education. *Id.*

6 In the only other instance in which the Supreme Court has considered a proposed
7 application of the public-importance exception, the Court reiterated the need for a discrete,
8 legislative expenditure or appropriation, and found that the plaintiffs in *Laborers’ Intl.* had not
9 alleged such an official, legislative act. *See Laborer’s Intl.*, 2019 WL 6999885, at *2 (noting that
10 public-importance exception applies “under certain, *specific* circumstances,” and concluding that
11 plaintiff “does not meet this narrow exception because it does not allege that Douglas County
12 violated a specific Nevada constitutional provision *via an expenditure or appropriation*”) (emphasis added). At least, however, although its case failed and standing was rejected, plaintiffs
13 in *Laborers’ Intl.* sued Douglas County, which is arguably a legislative body within the meaning
14 of the *Schwartz* standing exception; NPRI has failed to name anyone other than individuals like
15 Ms. Miller.
16

17 The simple payment by her employer to Ms. Miller of her salary for her employment
18 cannot activate the *Schwartz* exception. Such an interpretation would swallow the rule entirely,
19 turning a “narrow” exception into an expansive one. *Schwartz*, 132 Nev. at 743. It cannot be
20 seriously suggested that NPRI considers Ms. Miller’s actual salary to be an appropriation, or that
21 in her absence her middle school classroom will be empty and no other teacher will be hired to
22 replace her and paid the funds that were appropriated by the Nevada Legislature to provide
23 instruction at her school. Clearly, the Nevada Supreme Court had in mind a rare standing
24 exception for significantly-important public cases challenging, on constitutional grounds,
25 budgetary activities of legislative bodies in Nevada.

26 NPRI is claiming that Ms. Miller, by the very existence of her employment as a middle
27 school teacher, is violating the Nevada Constitution through what it terms “dual service” in
28 multiple government branches, not that a legislative body has appropriated or expended funds in

1 derogation of the Nevada Constitution. Only the latter would provide an opportunity to argue to
2 this Court that NPRI may avail itself of the public-importance standing exception announced in
3 *Schwartz*. Because NPRI has not challenged, and cannot challenge, a specific legislative
4 appropriation, it cannot so avail itself, and it cannot establish standing to maintain its action. This
5 is not to say that the case NPRI wants to make is utterly unavailable to an appropriate plaintiff,
6 only that NPRI itself cannot invoke the jurisdiction of this Court to determine its action because it
7 fails to establish its standing to do so here.

8 **(b) NPRI is not an appropriate party**

9 NPRI also fails to satisfy the third prong of the *Schwartz* exception, because it is not an
10 “appropriate” party within the meaning of the Supreme Court’s opinion. To qualify, NPRI must
11 show that “no one else is in a better position” to bring its suit. *Schwartz*, 132 Nev. at 743.

12 The Nevada Supreme Court has already spoken on the nature of truly “appropriate” parties
13 to cases claiming dual service of legislators in violation of the state’s constitutional separation of
14 powers clause: “someone with a legally protectible interest, such as a person seeking the executive
15 branch position held by the legislator.” *Heller*, 120 Nev. at 472-73. NPRI has shown previously
16 that it understands this issue; in both of its previous suits, *Pojunis* and *French*, it presented
17 plaintiffs that fit this description. It cannot claim that such a task is difficult, or that plaintiffs are
18 hard to find—it has found them before. NPRI was under no obligation to sue thirteen sitting
19 legislators all at once, so it cannot claim that the rules of standing ought to be foregone simply
20 because it framed its suit in this fashion. Each defendant, Ms. Miller included, is entitled to
21 demand that NPRI demonstrate that it—instead of an individual “with a legally protectible
22 interest, such as a person seeking the executive branch position held by the legislator”—is the
23 appropriate party to prosecute this suit.

24 In *Schwartz*, the plaintiffs granted the newly-formulated standing exception were
25 individuals, “citizens and taxpayers of Nevada, and most are also parents of children who attend
26 public schools.” *Schwartz*, 132 Nev. at 744. They alleged that SB 302 (2015) “allows millions of
27 dollars of public funds to be diverted from public schools districts to private schools, in clear
28 violation of specific provisions in the Nevada Constitution, which will result in irreparable harm to

1 the public school system.” *Id.* These plaintiffs, the Court reasoned, “are appropriate parties to
2 litigate these claims.” *Id.* Compared to the particular and obvious interests the *Schwartz* plaintiffs
3 demonstrated in their case, NPRI alleges only that it acts “in the public interest,” generally and
4 without any specific contention beyond that regarding its appropriateness under the public
5 importance standing exception.

6 NPRI cannot demonstrate its appropriateness as a plaintiff here, beyond its general
7 political orientation, and so for reasons in addition to the failure to challenge a legislative
8 appropriation or expenditure, NPRI cannot satisfy the narrow terms and requirements of the
9 *Schwartz* public importance exception and the claim against Ms. Miller should be dismissed.

10 **B. NPRI Has Not Plead This Action In Conformance With NRS 41.0337(2)**

11 Even if NPRI could establish standing to maintain its claims here, this case cannot be
12 brought as plead because NPRI has not named the parties it is required to name by law.

13 NRS 41.0337(2) states that:

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

- 16 (a) Local judicial officer or state judicial officer;
- 17 (b) Officer or employee of the State or of any political subdivision;
- 18 (c) Immune contractor; or
- (d) State Legislator

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

20 NRS 41.0337(2).

21 This suit is a tort action: NPRI is claiming “a wrongful act other than a breach of contract
22 for which relief may be obtained in the form of damages or an injunction.”
23 <https://www.merriam-webster.com/dictionary/tort> (last visited Sept. 15, 2020). *See also*
24 <https://dictionary.law.com/Default.aspx?selected=2137> (“tort, n., from French for “wrong,” a civil
25 wrong or wrongful act, whether intentional or accidental, from which injury occurs to another”)
26 (last visited Sept. 15, 2020). In fact, what NPRI is trying to allege is more specifically denoted as a
27 constitutional tort, “a violation of one's constitutional rights by a government servant.”
28 https://www.law.cornell.edu/wex/constitutional_tort (last visited Sept. 15, 2020). NPRI is alleging

1 a violation of the Nevada Constitution by Ms. Miller, whom it alleges is a government servant,
2 and that this violation has done NPRI—and, it seems, the public generally—harm to constitutional
3 rights to enforce the separation of governmental powers.

4 That this is a tort action under the terms of NRS 41.0337 is further confirmed by legislative
5 history. In the hearings at which SB 27 (2013), which enacted this particular provision of the NRS,
6 Deputy Attorney General Keith Munro, in presenting, explained that “When you talk about tort
7 claims, you are usually talking about employees. When you talk about employees, you are talking
8 about issues involving hiring, training, and supervision.” Minutes of the Assembly Committee on
9 Judiciary, at 6 (May 13, 2013). It makes perfect sense in both law and policy that NRS 41.0337
10 would apply to NPRI’s suit here. Stripped of its political veneer, this is essentially an employment
11 matter. In Ms. Miller’s instance, Clark County School District is paying her salary; it made the
12 decision to hire and retain her; it will be affected by the loss of a teacher, during a teacher shortage
13 and a public health crisis; its decision to hire and retain Ms. Miller is under assault by NPRI. If
14 indeed NPRI is going to argue that it is Clark County School District’s actions in paying Ms.
15 Miller’s salary that is the “appropriation or expenditure” at issue here, granting it standing, then it
16 is entirely understandable that the *expendor*—the District—would be necessary to the resolution
17 of this lawsuit.

18 NPRI has not named as a defendant either the State or the political subdivision that
19 employs Ms. Miller—the Clark County School District. As such, the suit cannot be maintained,
20 pursuant to NRS 41.0337. This is not simply a matter of not having named necessary parties under
21 NRCP 19; this is a statutory requirement that, when unfulfilled, removes the Court’s jurisdiction
22 to entertain the action entirely: “No tort action may be brought” in the absence of the State or the
23 appropriate political subdivision. Therefore, even assuming *arguendo* that NPRI can convince this
24 Court to grant it standing under the *Schwartz* exception, the suit cannot proceed in its current form
25 because NPRI has not plead in conformance with NRS 41.0337, and the claim against Ms. Miller
26 should be dismissed.

27 **V. CONCLUSION**

28 It boils down simply. NPRI sued more than a dozen legislators, including Ms. Miller but

1 also the Speaker of the State Assembly, the Majority Leader of the State Senate, and others—all at
2 once and in clear derogation of appropriate civil procedure and Supreme Court precedent—
3 because it valued a big splash of a case during an election season. But whatever its public relations
4 value, this was not a legally sound approach. NPRI has no standing to make its claim against Ms.
5 Miller under any doctrine recognized in Nevada, and even if one were to grant that it did, the
6 failure to name “the State or the appropriate subdivision as a party defendant,” per NRS 41.0337,
7 means this suit cannot be maintained against her.

8 Lacking any protectible interest in this litigation sufficient to generate an actual legal
9 controversy between itself and Ms. Miller, NPRI is essentially asking for an advisory opinion on a
10 public question about which it is concerned. The rules of procedure and standing, however, do not
11 bend to politics, and do not admit of any shortcuts. The Court should grant Ms. Miller’s motion to
12 dismiss in its entirety.

13 DATED this 18th day of September, 2020.

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

16 By: /s/ Bradley Schrager
17 BRADLEY SCHRAGER, ESQ. (SBN 10217)
18 DANIEL BRAVO, ESQ. (SBN 13078)
19 3556 E. Russell Road, Second Floor
20 Las Vegas, Nevada 89120
21 (702) 341-5200/Fax: (702) 341-5300

22 *Attorneys for Defendant Brittney Miller*
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2020, a true and correct copy of the foregoing **DEFENDANT BRITTNEY MILLER’S MOTION TO DISMISS** was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an email address on record, pursuant to Administrative Order 1402 and Rule 9 of the N.E.F.C.R.

By: /s/ Dannielle Fresquez
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

EXHIBIT A

EXHIBIT A

1 JOSEPH F. BECKER, ESQ.

2 Nevada Bar No. 12178

3 NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION

4 7130 Placid Street

5 Las Vegas, NV 89119

6 Telephone: (702) 450-6256

7 Fax: (702) 549-3680

8 Attorney for Plaintiff

REC'D & FILED

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ALAN GLOVER

BY **V. GUTIERREZ**
DEPUTY

9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR CARSON CITY

11 WILLIAM POJUNIS;

12 Plaintiff,

Case No. *110C00394*

Dept. No. *I*

13 vs.

14 MOISES DENIS; THE PUBLIC UTILITIES COMMISSION
15 OF NEVADA; and THE STATE OF NEVADA on
16 Relation of The Public Utilities Commission of Nevada,

17 Defendants

18 **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

19 For his Complaint, Plaintiff alleges:

20 1. On or before February 7, 2011, Defendant MOISES DENIS, began service in the
21 Nevada Legislature despite concurrently holding a position in the Executive Branch of the State of
22 Nevada, contrary to The Constitution of Nevada Art. 3, §1, ¶1.
23

24 2. Plaintiff thus brings this action, pursuant to NRS §§ 30.030 and 33.010 to challenge
25 the validity of Defendant MOISES DENIS holding his Executive Branch employee position on the
26 basis the Nevada Constitution expressly prohibits said employment by members of the Nevada
27 Legislature.
28

1 **PARTIES**

2 3. Plaintiff WILLIAM POJUNIS (hereinafter "POJUNIS") is a resident of Las Vegas,
3 Nevada, a citizen of the United States, and not a debtor in bankruptcy. He is duly qualified, holds
4 the job requirements established by the Public Utilities Commission of Nevada, and earnestly
5 seeks the position of Computer Technician currently held by Defendant MOISES DENIS.

6 4. Defendant MOISES DENIS (hereinafter "DENIS") is a resident of Las Vegas,
7 Nevada and currently holds the Nevada Executive Branch position of Computer Technician for the
8 Public Utilities Commission of Nevada, despite serving concurrently as a Senator in the Seventy-
9 sixth Session of the Nevada State Legislature.

10 5. Defendant PUBLIC UTILITIES COMMISSION OF NEVADA (hereinafter "PUCN")
11 resides in Carson City, Nevada and the PUCN, pursuant to NRS § 12.105, is named as a
12 Defendant herein as the employer of Defendant DENIS, despite Defendant DENIS serving
13 concurrently as a Senator in the Seventy-sixth Session of the Nevada State Legislature.

14 6. Defendant STATE OF NEVADA (hereinafter "NEVADA") resides in Carson City,
15 Nevada and the NPUC, pursuant to NRS § 12.105, is named as a Defendant herein as the
16 employer of Defendant DENIS, despite Defendant DENIS serving concurrently as a Senator in the
17 Seventy-sixth Session of the Nevada State Legislature.

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

19 20 7. On or about February 7, 2011, Defendant DENIS was sworn-in to the Seventy-sixth
21 Session of the Nevada Legislature, despite holding a position as an employee of the Nevada
22 Executive Branch.

23 24 8. The Nevada Constitution reads, in relevant part: "The powers of the Government of
25 the State of Nevada shall be divided into three separate departments, the Legislative, the
26 Executive and the Judicial; and no persons charged with the exercise of powers properly belonging
27 to one of these departments shall exercise *any functions*, appertaining to either of the others. . ."
28 Nevada Const. Art. 3, §1, ¶1 (emphasis added).

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

10. Defendant DENIS' employment in Nevada State Executive Branch position expressly violates the Nevada Constitution and undermines liberty by diluting the separation of powers, concentrating power, creating conflicts of interests and appearances thereof.

FIRST CLAIM FOR RELIEF

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

11. Plaintiff hereby incorporates Paragraphs 1 through 10 as though fully set out herein.

12. Defendant DENIS holds the Nevada executive branch position of Computer Technician at the PUCN while concurrently sitting as a Senator in the Nevada Legislature, thus directly violating Art. 3, §1, ¶1 of the Nevada Constitution.

13. This constitutional violation by Defendant harms Plaintiff POJUNIS' legally protectable interests as he is earnestly seeking the executive branch position currently held by Defendant DENIS.

SECOND CLAIM FOR RELIEF

(Declaratory and Injunctive Relief – Violation of U.S. Constitution 5th and 14th Amends.)

14. Plaintiffs hereby incorporate Paragraphs 1 through 13 as though fully set out herein.

15. All Defendants, by failing to follow the clear language of the Constitution of the State of Nevada, specifically, Nevada Constitution Art. 3, §1, ¶1, violate Plaintiff POJUNIS' right to due process guaranteed to him under the 5th Amendment to the U.S. Constitution, and as applied to the State of Nevada and its citizens under the 14th Amendment to the U.S. Constitution, §1.

16. This constitutional violation by Defendants harms Plaintiff POJUNIS' legally protectable interests as he is earnestly seeking the executive branch position currently held by Defendant DENIS.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that Defendant DENIS, who holds a Nevada executive branch position while concurrently sitting in the Seventy-sixth Session of the Nevada Legislature, violates the Nevada Constitution Art. 3, §1, ¶1 in holding said Executive Branch position.

2. Declare that Nevada's failure to follow the clear language of its own State Constitution, specifically, Nevada Constitution Art. 3, §1, ¶1, violates Plaintiff POJUNIS' right to due process guaranteed to Plaintiff under the 5th Amendment to the U.S. Constitution, as applied to the states under the 14th Amendment to the U.S. Constitution, §1.

3. Enjoin Defendant DENIS from continuing in his Nevada executive branch employment position and from retaining any monetary or employment benefits derived from said position from such time as he began serving in the Nevada Legislature.

4. Award Plaintiff his reasonable costs and attorney fees.

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

DATED this 30th day of November, 2011.

NPRI CENTER FOR JUSTICE AND
CONSTITUTIONAL LITIGATION

BY:

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Attorney for Plaintiff

EXHIBIT B

EXHIBIT B

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9 cjcl@npri.org

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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SUSAN MERRIN WITHER
CLERK
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JURISDICTION AND VENUE

2. Plaintiff thus brings this action, pursuant to NRS §§ 30.030 and 33.010 to challenge the constitutionality of Defendant HEIDI GANSERT holding her Executive Branch employee position on the basis the Nevada Constitution expressly prohibits said employment by members of the Nevada Legislature.

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.

PARTIES

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.

5. Defendant HEIDI GANSERT is named in her official capacity as Executive Director, External Relations for the University of Nevada, Reno; (hereinafter "GANSERT") is a resident of Reno, Nevada and currently holds the Nevada Executive Branch position of Executive Director, External Relations for the University of Nevada, Reno, a sub-unit of the Nevada System of Higher Education, despite concurrent service as a Senator in the Seventy-ninth Session of the Nevada State Legislature.

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 **FIRST CLAIM FOR RELIEF**

12
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 **PRAYER FOR RELIEF**

24
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
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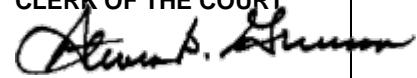
Attorney for Plaintiff

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~~JOSEPH F. BECKER~~



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*Attorneys for Defendants
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

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

Case No.: A-20-817757-C

Dept. No.: 18

**NSHE DEFENDANTS
FUMO, GANSERT, AND
NEAL'S JOINDER IN
DEFENDANT BRITTNEY
MILLER'S MOTION TO DISMISS
COMPLAINT**

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.

NSHE Defendants Heidi Seevers Gansert, Dina Neal and Osvaldo Fumo hereby join in Defendant Brittney Miller's Motion to Dismiss Complaint filed herein on September 18, 2020, and adopt by reference and incorporate herein Defendant Miller's Motion, Memorandum of Points and

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1 Authorities and Exhibits as if set forth in full at this point.
2

3 DATED this 24th day of September, 2020.
4

5 /s/ Berna L. Rhodes-Ford
6

7 BERNAL RHODES-FORD
8 Nevada Bar No. 7879
9 General Counsel
10 Nevada State College
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14 Fax: (702) 974-0750
15 berna.rhodes-ford@nsc.edu

16 /s/ Gary A. Cardinal
17

18 GARY A. CARDINAL
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27 *Attorneys for Defendants*
28 *Osvaldo Fumo, Heidi Seevers Gansert,*
and Dina Neal

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee in the Office of General Counsel for Nevada State College,
3 located at 1300 Henderson, Nevada 89002, I am over the age of 18 years, and I am not a party to the
4 within cause. Pursuant to NRCP 5, I further certify that on September 24, 2020, I caused the following
5 document, **NSHE DEFENDANTS FUMO, GANSERT AND NEAL'S JOINDER IN**
6 **DEFENDANT BRITTNEY MILLER'S MOTION TO DISMISS COMPLAINT**, to be served as
7 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, 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.

13 Deanna L. Forbush, Esq.
14 **FOX ROTHSCHILD LLP**
15 Email: dforbush@foxrothschild.com
16 *Attorneys for Plaintiff*

Colleen E. McCarty, Esq.
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Email: cmccarty@foxrothschild.com
Attorneys for Plaintiff

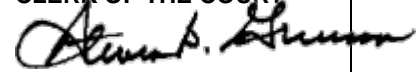
17 Bradley Schrager, Esq.
18 **WOLF, RIFKIN, SHAPIRO,**
19 **SCHULMAN & RABKIN, LLP**
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Attorneys for Defendant Brittney Miller

20 ☐

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

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25 An employee of the Office of General Counsel
26 Nevada State College
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*Attorneys for Defendants
Osvaldo Fumo, Heidi Seevers Gansert,
and Dina Neal*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE,
a Nevada domestic nonprofit corporation,

Plaintiff,

v.

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

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

No.: 18

HEARING NOT REQUESTED

**DEFENDANTS OSVALDO FUMO,
HEIDI SEEVERS GANSERT, AND
DINA NEAL'S MOTION TO DISMISS
PURSUANT TO
NRCP 12(b)(5) and NRCP 12(b)(6)**

1 Vegas; HEIDI SEEVERS GANSERT, an
2 individual engaging in dual employment with
3 the Nevada State Senate and University of
4 Nevada Reno; GLEN LEAVITT, an individual
5 engaging in dual employment with the Nevada
6 State Assembly and Regional Transportation
7 Commission; BRITTNEY MILLER, an
8 individual engaging in dual employment with
9 the Nevada State Assembly and Clark County
10 School District; DINA NEAL, an individual
11 engaging in dual employment with the Nevada
12 State Assembly and Nevada State College;
13 JAMES OHRENSCHALL, an individual
14 engaging in dual employment with the Nevada
15 State Senate and Clark County Public Defender;
16 MELANIE SCHEIBLE, an individual engaging
17 in dual employment with the Nevada State
18 Senate and Clark County District Attorney;
19 TERESA BENITEZ-THOMPSON, an
20 individual engaging in dual employment with
21 the Nevada State Assembly and University of
22 Nevada, Reno; JILL TOLLES, an individual
23 engaging in dual employment with the Nevada
24 State Assembly and University of Nevada,
25 Reno; and SELENA TORRES, an individual
26 engaging in dual employment with the Nevada
27 State Assembly and Clark County School
28 District,

Defendants.

NSHE DEFENDANTS' MOTION TO DISMISS

Defendant Heidi Seevers Gansert ("Gansert"), sued herein as an employee of the University of Nevada, Reno, an institution of the Nevada System of Higher Education ("NSHE"), Defendant Dina Neal ("Neal"), sued herein as an employee of Nevada State College, also an NSHE institution, and Defendant Osvaldo Fumo ("Fumo"), sued herein as an employee of the University of Nevada, Las Vegas, also an NSHE institution, (Gansert, Neal and Fumo, collectively the "NSHE Defendants") hereby move to dismiss Plaintiff Nevada Policy Research Institute's ("NPRI") Amended Complaint for Declaratory and Injunctive Relief on the basis that it fails to state a claim upon which relief can be granted in favor of NPRI or against the NSHE Defendants, and on the further basis that NPRI has failed to join required parties.

1 This motion is brought pursuant to NRCP 12(b)(5), NRCP 12(b)(6) and NRCP 19(a) and is based
2 upon the following memorandum of points and authorities, all of the pleadings and documents on file
3 herein, and any argument to be made at a hearing, if any.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 NPRI is at it again – suing citizen legislators who happen to also be employees of an NSHE
7 institution. This time, NPRI is attacking adjunct instructors at Nevada State College and the University
8 of Nevada, Las Vegas, and renewing its attack on Heidi Seevers Gansert, an employee of the University
9 of Nevada, Reno, arguing that their mere employment within two separate branches of government
10 violates the Nevada Constitution. As was the case the last time it sued Gansert, NPRI has failed to state
11 a claim for which relief can be granted. And as was the case last time, NPRI's lawsuit should be
12 dismissed with prejudice on that ground alone.

13 Moreover, as Judge Russell intimated in *French v. Gansert*, Case No. 1700000231B, filed in the
14 First Judicial District Court of the State of Nevada in 2017, NPRI has failed to include indispensable
15 parties to this litigation, as several other state employees – including NSHE adjunct instructors also
16 employed by the judicial branch – have an interest relating to the subject of this suit and are so situated
17 that the disposition of the matter in their absence may, as a practical matter, impair or impede their
18 interests. As such, the case should also be dismissed because it fails to include these necessary and
19 indispensable parties.

20 **II. STATEMENT OF FACTS**

21 The Amended Complaint alleges that Osvaldo Fumo is an Adjunct Instructor for the University
22 of Nevada, Las Vegas (Am. Compl. ¶ 10), that Dina Neal is an Adjunct Instructor for Nevada State
23 College (*Id.* ¶ 14), and that Heidi Seevers Gansert is the Executive Director, External Relations for the
24 University of Nevada, Reno (*Id.* ¶ 11). Beyond describing Fumo and Neal as adjunct instructors and
25 Gansert as a director, however, the Amended Complaint contains no allegations as to their duties as
26 employees of NSHE institutions.

27 Nor does the Amended Complaint allege that any of the positions held by NSHE Defendants are
28 created by the Nevada Constitution or by statute, or that adjunct instructor positions or director positions

1 are “public officer” positions. To be clear, however, adjunct instructors and directors by their very titles
2 are not “public officers” in that they are not college or university presidents, and they are not members
3 of the Board of Regents of NSHE (“Board of Regents”).

4 Notably, the Amended Complaint does not reference any members of the judiciary who also
5 hold employment positions in Nevada State or local governments, such as four sitting judges in Nevada
6 State courts who teach at NSHE institutions:¹

- 7 • The Honorable Jerome T. Tao, Nevada Court of Appeals Judge and Adjunct Professor at
8 William S. Boyd School of Law at the University of Nevada, Las Vegas;²
- 9 • The Honorable Frank P. Sullivan, Clark County Family Court Judge and Adjunct
10 Professor at William S. Boyd School of Law at the University of Nevada, Las Vegas;³
- 11 • The Honorable Scott N. Freeman, Second Judicial District Court Judge and instructor at
12 the University of Nevada, Reno;⁴ and
- 13 • The Honorable Dixie Grossman, Second Judicial District Court Judge and instructor at
14 the University of Nevada, Reno.⁵

15 These NSHE employees, who also work in another branch of government, undoubtedly have an interest
16 in the outcome of this matter. But again, NPRI has failed to join them or include any allegations
17 regarding their dual employment. (*See generally* Am. Compl.)

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

21 // //

22 // //

24 ¹ The Court may take judicial notice of information on governmental websites. *See* discussion *infra* Section III.B.1.a.

25 ² *See* Nevada Supreme Court website at:

26 https://nvcourts.gov/Supreme/Court_Information/Court_of_Appeals/Judges/Judge_Jerome_T_Tao/ and Boyd School of
27 Law’s list of Adjunct Faculty at: <https://law.unlv.edu/faculty/adjuncts>.

28 ³ *See* Clark County Courts website at: <http://www.clarkcountycourts.us/departments/judicial/> and Boyd School of Law’s
list of Adjunct Faculty at: <https://law.unlv.edu/faculty/adjuncts>.

⁴ *See* Second Judicial District Court Website at: <https://www.washoecourts.com/Judges/Main/D9> and University of Nevada,
Reno Employee Directory at: <https://apps.unr.edu/CampusDirectory/index.aspx?AcceptsCookies=1>.

⁵ *See* Second Judicial District Court Website at: <https://www.washoecourts.com/Judges/Main/D2> and University of Nevada,
Reno Employee Directory at: <https://apps.unr.edu/CampusDirectory/index.aspx?AcceptsCookies=1>.

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

2 **A. Legal Standard**

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

7 When considering a Rule 12(b)(5) motion to dismiss, the Court will construe the pleading
8 liberally and consider well-pled factual allegations as though they were true. *Buzz Stew*, 124 Nev. at
9 226–227, 181 P.3d at 672. But a plaintiff cannot survive a motion to dismiss when its “complaint is
10 replete with generalizations and conclusory matter.” *Sproul Homes of Nev. v. State*, 96 Nev. 441, 445,
11 611 P.2d 620, 622 (1980).

12 A court may take judicial notice of matters of public record without converting a motion to
13 dismiss into a motion for summary judgment. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847,
14 858 P.2d 1258, 1261 (1993). A court may properly take judicial notice of factual information “capable
15 of accurate and ready determination by resort to sources whose accuracy cannot reasonably be
16 questioned.” NEV. REV. STAT. § 47.130; *see also Mack v. Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106
17 (2009). Accordingly, it is appropriate to take judicial notice of information made publicly available on
18 a governmental website. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-999 (9th Cir. 2010).

19 **B. Analysis**

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

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

22 The powers of the Government of the State of Nevada shall be divided into three separate
23 departments, — the Legislative, — the Executive and the Judicial; and no persons charged
24 with the exercise of powers properly belonging to one of these departments shall exercise
25 any functions, appertaining to either of the others, except in the cases expressly directed or
26 permitted in this constitution.

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

1 Moreover, there is well-established case law to support the tenet that public employees do not
2 generally exercise sovereign functions. *See State ex rel. Kendall v. Cole*, 38 Nev. 215, 229 (1915);
3 *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21 (1953) (finding a public office distinguishable
4 from other forms of employment in that its holder has, by the sovereign, been invested with some
5 portion of the sovereign functions of government); *Eads v. City of Boulder City*, 94 Nev. 735, 737
6 (1978). Public officers are the only persons who exercise the sovereign functions of state
7 government and, therefore, only public officers can be in violation of Article 3 and the separation of
8 powers clause. *See* NEV. CONST. art. III, §1, cl. 1; *Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at
737.

9 **a. The NSHE Defendants are not public officials or officers**

10 For purposes of the Amended Complaint, the issue is whether the NSHE Defendants' positions
11 at their respective institution is one of a public officer or one of public employment. *See Mathews*, 70
12 Nev. at 120-121; *Eads*, 94 Nev. at 737. The Amended Complaint merely alleges that Defendants Neal
13 and Fumo are adjunct instructors and that Defendant Gansert is an executive director. It does not allege
14 that any NSHE Defendant is a president or member of the NSHE Board of Regents. It does not allege
15 that any NSHE Defendant serves in a position created by law or exercises sovereign duties of the
16 executive branch. The Amended Complaint contains no factual allegations from which the Court could
17 infer that any NSHE Defendant holds a position that would cause them to fall under the constitutional
prohibition NPRI seeks to enforce.

18 The definition of public officer can be found in both case and statutory law. The case law
19 establishes two guiding principles in defining a public officer. First, a public officer must serve in a
20 position created by law. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117 Nev. 195, 200, 18 P.3d 1042,
21 1046 (2001) (citing *Mathews*, 70 Nev. at 120-121). Second, the duties of a public officer must be fixed
22 by law and must involve an exercise of the sovereign functions of the state. *DR Partners*, 117 Nev. at
23 200 (citing *Kendall*, 38 Nev. at 224). Both of these principles must be satisfied before a person is
24 deemed a public officer. *See Mullen v. Clark Cnty.*, 89 Nev. 308, 310-311 (1973).

25 Nevada Revised Statutes ("NRS") 281.005(1) states that a public officer is a person elected or
26 appointed to a position which: (a) is established by the Constitution or a statute of this State, or by a
27 charter or ordinance of a political subdivision of this State; and (b) involves the continuous exercise, as
28 part of the regular and permanent administration of the government, of a public power, trust or duty.
NEV. REV. STAT. § 281.005(1). The case law and statute can be read in harmony because NRS

1 281.005(1)(a) encompasses the fundamental principle that a public officer is created by law, and NRS
2 281.005(1)(b) encompasses the fundamental principle that a public officer's duties are fixed by law and
3 involve an exercise of the state's sovereign power. *See DR Partners*, 117 Nev. at 201, 18 P.3d at 1047.

4 Plaintiff does not allege that the NSHE Defendants' positions are established by the Nevada
5 Constitution or by statute. This is because Plaintiff cannot make this allegation. In *DR Partners*, the
6 Supreme Court determined that only the Board of Regents hold positions established by the Constitution
7 or a statute of the state. *See DR Partners*, 117 Nev. at 205, 18 P.3d at 1048 ("the sovereign functions of
8 higher education repose in the Board of Regents, which has been constitutionally entrusted to control
9 and manage the University"). After *DR Partners* was decided, the legislature enacted NRS 281A.182
10 which provides that a president of a university, state college or community college within the NSHE
11 system is also considered a public officer for purpose of Chapter 281A, the Nevada Ethics in
12 Government Law chapter. NEV. REV. STAT. § 281A.182. NRS 281A.182 does not create any further
13 classifications of public officers in the NSHE system and there is nothing in NRS 281A.182 that
14 designates an adjunct professor or director as a public officer. Hence, only the Board of Regents and
the President of the college or university are considered public officers.

15 Further, Plaintiff does not allege that the NSHE Defendants are members of the Board of Regents
16 nor has it alleged that Gansert, Neal or Fumo is a college or university president. Again, this is because
17 it cannot make these allegations. The Court can take judicial notice of the current elected members of
18 the Board of Regents as posted on NSHE's website (www.nshe.nevada.edu), and see that no NSHE
19 Defendant is a current Board member. *See* NEV. REV. STAT. § 47.130; NEV. REV. STAT. § 47.150; *FTC*
20 *v. AMG Servs.*, No. 2:12-cv-00536-GMN-VCF, 2014 U.S. Dist. LEXIS 10490, *45-46, n. 5 (D. Nev.
21 Jan. 28, 2014) (allowing judicial notice of information posted on government websites as it can be
22 "accurately and readily determined from sources whose accuracy cannot reasonably be questioned");
23 *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-999 (9th Cir. 2010) ("It is appropriate to take
24 judicial notice of this information, as it was made publicly available by government entities.").
25 Additionally, the Court can take judicial notice of the current presidents of University of Nevada, Reno
26 (www.unr.edu), Nevada State College (www.nsc.edu) and University of Nevada, Las Vegas
27 (www.unlv.edu) to demonstrate that Gansert, Neal and Fumo are not president. *Id.* Hence, NPRI cannot
28 meet the first tenet of establishing Gansert, Neal or Fumo's position is one of a public officer because it
cannot prove they are a member of the Board of Regents or a university or college president.

1 The *Mathews* case further illustrates why the NSHE Defendants' position is not one of a public
2 officer. In *Mathews*, the government employee was the director of the Driver's License Division. The
3 Nevada Supreme Court determined that Mathews was not a public officer because his position was
4 created by administrative authority and not by statute, and the position was wholly subordinate and
5 responsible to the administrator of the department. *Mathews*, 70 Nev. at 122-123, 258 P.2d at 983.
6 The Nevada Supreme Court reasoned that if the position was wholly subordinate and responsible to the
7 administrator, the position was not created by law, the duties attached to the position had not been
8 prescribed by law and the person holding the position was not independent in exercising his or her duties.
9 *Mathews*, 70 Nev. at 123, 258 P.2d at 983. As such, the position had not been invested with any portion
10 of the sovereign functions of the government. *Id.*

11 All that can be inferred from the Amended Complaint is that Neal and Fumo's positions as
12 adjunct faculty are even more tenuous than the director in the *Mathews* case. There is no allegation that
13 the adjunct positions were created by law or that they have constitutional responsibilities. "Adjunct"
14 implies subordinate positions subject to modification or elimination. Nothing about the term suggests
15 permanency. Absent factual allegations to demonstrate that adjuncts are constitutional officers, the most
16 generous interpretation of the Amended Complaint is that Neal and Fumo are public employees, not
17 public officers.

18 Likewise, there are no allegations that Gansert is a regent or president or holds any other position
19 that could be characterized as a public official or officer. As in the *Mathews* case, even a director is not
20 a public officer or official. Accordingly, and as previously determined by Judge Russell in *French v.*
21 *Gansert* (see Exhibit 2), Gansert is a public employee, not a public officer, and the Amended Complaint
22 lacks factual allegations to suggest any other conclusion.

23 **b. The NSHE Defendants do not exercise sovereign functions**

24 NPRI also cannot establish that Gansert, Neal or Fumo's position is one of a public officer under
25 the second tenet, which states that duties of a public officer must be fixed by law and must involve an
26 exercise of the sovereign functions of the state. *DR Partners*, 117 Nev. at 201, 18 P.3d at 1047. NPRI
27 did not allege that the NSHE Defendants' duties were fixed by law and that they involved the exercise
28 of the sovereign functions of the state. Even if NPRI had made these allegations, they would not save
its claim as case law and statutory law make it clear that the NSHE Defendants' positions exercise no
sovereign functions. Sovereign functions can only be exercised by public officers, not public
employees. See *Kendall*, 38 Nev. at 229; *Mathews*, 70 Nev. at 120-121; *Eads*, 94 Nev. at 737. Only

1 the Board of Regents and college or university presidents are public officers for the NSHE System. *DR*
2 *Partners*, 117 Nev. at 201, 18 P.3d at 1047; NRS 281A.182.

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

16 Finding French's allegations untenable, the Court dismissed French's Complaint. A copy of
17 the full Order, dated August 4, 2017 is attached hereto as Exhibit 2 and incorporated herein by
18 reference. In the order of dismissal, Judge Russell analyzed the issue as follows:

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

24 "Not every employee in a branch is charged with these constitutional powers, duties
25 and functions. Public employees, as distinguished from public officials or officers, do
26 not exercise functions or powers of the state. See, *State ex rel. Kendall v. Cole*, 38
27 Nev. 215, 9, 148 P. 551, 553 (1915); *State ex rel. Mathews v. Murray*, 70 Nev. 116,
28 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder City*, 94 Nev. 735, 737,
587 P.2d 39, 41 (1978). Public officers are the only persons who exercise the
sovereign functions of state government. *Mathews*, 70 Nev. at 120-21, 258 P.2d at
983. This is because public employees have not been invested by the State with some
portion of the powers, duties and functions of the government. *Mathews*, 70 Nev. at

120-21, 258 P.2d at 983; *Kendall*, 38 Nev. at 229, 148 P. at 553 (“To be an officer, one must be charged by law with duties involving the exercise of some part of the sovereign power of the state”).

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

“Defendant [sic] French does not allege that Defendant Gansert’s position is established by the Nevada Constitution, by statute or is a public officer position. Defendant Gansert’s position as Executive Director, External Relations is not a public office. **There are only two groups of people in NSHE that have been determined to be public officers: members of the Board of Regents and presidents of the 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)

The same result is required here. The Amended Complaint in this matter merely alleges that NSHE Defendants Neal and Fumo are adjunct professors and that Gansert is a director. It does not allege that any of the NSHE Defendants are officers or public officials. It does not allege that they exercise constitutional or sovereign powers of the executive branch of the state. Moreover, the Amended Complaint is completely devoid of any factual allegations describing the job duties and responsibilities of any of the NSHE Defendants such that there is no factual basis from which to draw an inference that any of the NSHE Defendants fall into that category of public employee to which the constitutional prohibition stated in Article 3, §1, ¶1 would apply. And of course, the NSHE Defendants are neither presidents of their respective institutions nor members of the Board of Regents. Due to the absence of any allegations that the NSHE Defendants are public officials or that they exercise sovereign or constitutional powers, and because there are no factual allegations from which such conclusions might reasonably be drawn, the Amended Complaint is deficient and defective and must be dismissed for failure to state a claim.

2. The Amended Complaint Fails to State A Claim for Declaratory Relief

The Amended Complaint must also be dismissed because it fails to state a claim for declaratory relief against the NSHE Defendants. To state a claim for declaratory relief, the four elements of

1 declaratory relief must be met: (a) there must exist a justiciable controversy; that is to say, a controversy
2 in which a claim of right is asserted against one who has an interest in contesting it; (b) the controversy
3 must be between persons whose interests are adverse; (c) the party seeking declaratory relief must have
4 a legal interest in the controversy, that is to say, a legally protectable interest; and (d) the issue involved
5 in the controversy must be ripe for judicial determination. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d
6 443, 444 (1986) (citing *Kress v. Corey*, 65 Nev. 1, 25-26, 189 P.2d 352, 364 (1948)). Failure to set
7 forth allegations sufficient to make out the elements of a right to relief requires dismissal of the
8 complaint. *Edgar*, 101 Nev. at 227, 699 P.2d at 111.

9 **a. There is no justiciable controversy**

10 Nevada law requires an actual justiciable controversy as a predicate to judicial relief. *Bryan*,
11 102 Nev. at 525, 728 P.2d at 444. A justiciable controversy is a controversy in which a claim of right
12 is asserted against one who has an interest in contesting it. *Id.* at 525. Additionally, “litigated matters
13 must present an existing controversy, not merely the prospect of a future problem.” *Bryan*, 102 Nev. at
14 525, 728 P.2d at 444. When the rights of the plaintiff are contingent on the happening of some event
15 which cannot be forecast and which may never take place, a court cannot provide declaratory relief.
16 *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 11, 908 P.2d 724, 726 (1996) (citing *Farmers Insurance*
17 *Exchange v. District Court*, 862 P.2d 944, 948 (Colo. 1993)).

18 As demonstrated above, there is no existing controversy. Gansert, Neal and Fumo are public
19 employees who do not exercise any sovereign functions. Therefore, there is no present or existing
20 controversy regarding their collegiate employment, their service in the legislature and any alleged
21 violation of Article 3.

22 Moreover, NSHE Defendants assert that NPRI does not have standing to bring a constitutional
23 violation action and, concurrent with the filing of this Motion, has joined Defendant Brittney Miller’s
24 Motion to Dismiss for lack of standing, filed herein on September 18, 2020. Defendant Miller’s motion
25 is adopted by reference and incorporated herein as if set forth in full at this point.

26 // //

27 // //

28 // //

1 **b. NPRI cannot establish an adverse interest**

2 A justiciable controversy requires a ripe dispute between two interested and adverse parties.
3 *UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union v. Nev. Serv. Emps. Union/SEIU Local*
4 *1107, AFL-CIO*, 124 Nev. 84, 93-94, 178 P.3d 709, 715-716 (2008).

5 The interests of NPRI and the NSHE Defendants are not adverse. As demonstrated above,
6 Gansert, Neal and Fumo are allowed to work as public employees and serve in the state legislature at
7 the same time. *See also* NEV. REV. STAT. § 613.040 (stating employers in Nevada are prohibited from
8 preventing any employee from engaging in politics or becoming a candidate for any public office in this
9 state). Therefore, Gansert, Neal and Fumo's employment at their respective institutions is not in
10 violation of the Nevada Constitution or Nevada statutory law and, therefore, their employment and
11 public service are not adverse to NPRI's claimed interest. Additionally, as will be demonstrated below,
12 NPRI does not have an interest in challenging the NSHE Defendants' conduct because it has not suffered
13 any injury.

14 **c. NPRI does not have a legally protectable interest**

15 The element of a legally protectable interest is connected to the requirement of standing to
16 bring a lawsuit. To have standing to bring a lawsuit, the plaintiff must have suffered an "injury in
17 fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 1196 Ed. 2d 351, 112 S. Ct. 2130 (1992).
18 An injury in fact is an invasion of the legally protectable interest. *Id.*; *Centa. Delta Water Agency v.*
19 *United States*, 306 F.3d 938, 946-947 (9th Cir. 2002). NPRI asks the Court to declare that the NSHE
20 Defendants are violating the separation of powers clause, but has not established that it has standing.
21 Concurrent with the filing of this Motion, NSHE Defendants have joined the Motion to Dismiss filed
22 by Defendant Brittny Miller and incorporate by reference the arguments made regarding standing.

23 In short, NRPI asserts that "If allowed to proceed with the dual employment stated herein,
24 legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation
25 of Nevada Const. Art. 3, §1, ¶1." (Am. Compl. ¶5.) NPRI has not, however, made any allegations of
26 any past misconduct or improprieties resulting from dual employment. Because there is no injury in
27 fact in the Amended Complaint, it fails to state a claim for declaratory relief.

1 **d. This case is not ripe for review**

2 A case is ripe for review when “the degree to which the harm alleged by the party seeking review
3 is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a justiciable controversy.”
4 *Herbst Gaming, Inc. v. Sec’y of State*, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006) (citing *Matter*
5 *of T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279-1280 (2003)). If harm is likely to occur in the future
6 because of a deprivation of a constitutional right, then a ripe case or controversy may exist. But the
7 party must show that it is *probable* that future harm will occur. *Resnick v. Nevada Gaming Comm’n*,
8 104 Nev. 60, 66, 752 P.2d 29, 33 (1988). This element is closely aligned with the concept of justiciable
9 controversy.

10 Not only has NPRI failed to allege facts to support a finding of a concrete, justiciable
11 controversy, but it has also failed to allege any facts from which the Court could conclude that there
12 exists an issue ripe for review. NSHE Defendants are not prohibited by law from serving in the
13 legislature while being employed with their respective institutions in positions of public employment.
14 As such the harm alleged is not sufficiently concrete or rising to the level of a justiciable controversy,
15 and the absence of ripeness is yet another defect that requires dismissal of the First Cause of Action.

16 **3. The Amended Complaint Fails to State a Claim for Injunctive Relief**

17 “It is axiomatic that a court cannot provide a remedy unless it has found a wrong. “[T]he
18 existence of a right violated is a prerequisite to the granting of an injunction.” *State Farm Mut. Auto.*
19 *Ins. Co. v. Jafbro, Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993). Accordingly, an injunction will
20 not issue “to restrain an act which does not give rise to a cause of action” *Id.* at 928. Further,
21 injunctive relief is inappropriate when there is no justiciable controversy with the named defendant. *See*
22 *Lamb v. Doe*, 92 Nev. 550, 551, 554 P.2d 732, 733 (1976). Injunctive relief requires actual or threatened
23 loss, damage or injury and it must be reasonably probable that real injury will occur. *Berryman v.*
24 *International Brotherhood of Electrical Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388-389 (1962).
25 “[An injunction] should not be issued upon the bare possibility of an injury, or upon any unsubstantial
26 or unreasonable apprehension of it. The injury, too, must be real, and not merely theoretical.” *Sherman*
27 *v. Clark*, 4 Nev. 138, 142 (1868). NPRI’s Amended Complaint alleges at most, the theoretical, bare
28 possibility of some potential injury. Thus, the absence of allegations of an actual or probable threatened

1 injury is fatal NPRI's claim for injunctive relief.

2 Injunctive relief is only available if there is no adequate remedy at law. *Id.* at 141. Chapter
3 281A of the Nevada Revised Statutes establishes a comprehensive framework for dealing with ethical
4 issues in government, including a Code of Ethical Standards set out in NRS 281A.400 to NRS 281A.430.
5 NRS 281A.420 provides specific requirements for disclosing conflicts of interest and defines those
6 circumstances in which abstention from voting is necessary. Enforcement of these ethical requirements
7 is available through a complaint process and significant penalties may be imposed under NRS 281A.785
8 and NRS 281A.790. Because there is an adequate remedy at law for the speculative harm NPRI
9 identifies in its Amended Complaint, injunctive relief is unavailable.

10 Due to the absence of allegations that support or suggest that NPRI has suffered harm or will
11 most likely suffer future harm, the Second Cause of Action is defective. Moreover, because the
12 Amended Complaint does not set forth sufficient facts to show the existence of a justiciable controversy,
13 the claim for injunctive relief fails on that basis as well. Given the adequate remedies at law available
14 to address the speculative harm that NPRI alleges *might* flow from dual employment, injunctive relief
15 is unwarranted here. For all of these reasons, the Second Cause of Action must be dismissed.

16 **IV. MOTION TO DISMISS FOR FAILURE TO JOIN REQUIRED PARTIES**

17 **A. Legal Standard**

18 The absence of a necessary party may be raised either by the necessary party or by another party
19 in the litigation. *Rose, LLC, v. Treasure Island, LLC*, 135 Nev. 145, 150, 445 P.3d 860, 865 (2019).
20 When raised by another party already in the suit, it is done by either a motion for judgment on the
21 pleadings under NRCP 12(h)(2) or by a motion to dismiss under NRCP 12(b)(6). *Id.* Whether a missing
22 party is necessary is governed by NRCP 19(a), which states as follows:

23 **Rule 19. Required Joinder of Parties**

24 (a) *Persons Required to Be Joined if Feasible.*

25 (1) *Required Party.* A person who is subject to service of process and whose joinder
26 will not deprive the court of subject-matter jurisdiction must be joined as a party if:

27 (A) in that person's absence, the court cannot accord complete relief among
28 existing parties; or

(B) that person claims an interest relating to the subject of the action and is so
situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the

1 interest; or

2 (ii) leave an existing party subject to a substantial risk of incurring double,
3 multiple, or otherwise inconsistent obligations because of the interest.

4 “Whether a party is necessary does not depend upon broad labels or general
5 classifications, but rather comprises a highly fact-specific inquiry. Rule 19 ‘calls for
6 courts to make pragmatic, practical judgments that are heavily influenced by the facts
7 of each case.’” *Rose*, 135 Nev. 153, 445 P.3d 867 (internal citations omitted).

8 **B. Analysis**

9 The constitutional provision upon which NPRI bases its case applies to all three branches of
10 state government.

11 The powers of the Government of the State of Nevada shall be divided to three separate
12 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.

13 Nev. Const. art. III, § 1, cl. 1. (emphasis added).

14 NPRI, however, has limited the litigation only to legislators who are also employed in the
15 executive branch. NPRI has failed to include those members of the judicial branch who also hold
16 employment positions in the executive branch. Any decision granting the relief NPRI seeks here would
17 necessarily impact the rights of members of the judicial branch. *Cf. French v. Gansert*. Unless members
18 of the judiciary who also serve as adjunct professors are included as parties to this litigation, employment
19 at NSHE institutions would be denied to them without allowing them an opportunity to participate in
20 the litigation to protect their interests. Under NRCP 19(a)(1)(B)(i), members of the judiciary who also
21 teach at NSHE institutions are therefore required parties and should have been joined in the litigation.
22 If NPRI is granted the relief it seeks in this litigation, judges would be required to resign their teaching
23 positions or their benches. One interest or the other would be impaired or impeded if this litigation
24 proceeds in their absence. Judicial branch employees who will be affected by this litigation are “required
25 parties” as defined by NRCP 19 (a), and NPRI’s failure to include these required parties warrants
26 dismissal of this action.

27 // //

28 // //

IV. CONCLUSION

NPRI's Amended Complaint may be dismissed on any one of multiple grounds. The initial defect in the Amended Complaint is that it is devoid of any allegations that NSHE Defendants Gansert, Neal and Fumo are public employees to whom the constitutional provision in question would apply. The law is clear that the separation of powers doctrine applies only to public officials or officers, or those who are entrusted by law to exercise sovereign powers. The Amended Complaint merely alleges that Defendants Neal and Fumo are adjunct instructors and that Gansert is a director without any further factual allegation that would bring these defendants within the purview of Article 3 of the Nevada Constitution. Absent such factual allegations, the Amended Complaint fails and must be dismissed.

Even were the allegations of the Amended Complaint sufficient to allow the Court to infer that Defendants Gansert, Neal and Fumo fall into the category of public employee to which Article 3 applies, the Amended Complaint is otherwise defective and insufficient to state a claim for declaratory relief or injunctive relief. The Amended Complaint lacks any factual allegations to show the existence of a justiciable controversy. It fails to allege sufficient facts to show that NRPI has a legally protectable interest or that its alleged interest is adverse to the interests of the defendants. The Amended Complaint fails to include any allegations to support a finding that there is a controversy ripe for review. The Amended Complaint attempts to state a claim for declaratory relief with bare conclusory allegations, falling far short of the legal standard NPRI must meet to state a viable claim for relief.

The attempted claim for injunctive relief is equally deficient. Not only are the allegations in the Amended Complaint insufficient to demonstrate a justiciable controversy, they also fail to show any actual or probable threatened harm. The theoretical speculation that conflicts of ethics may occur, that power may be "concentrated" or that separation of powers will be "diluted" is unsupported by any allegation of past wrongdoing or any factual allegations to demonstrate the real and probable threat of future harm. Moreover, the claim for injunctive relief must fail because there are adequate legal remedies available through Nevada's ethics statutes.

With respect to both causes of action, and as set forth in Defendant Brittney Miller's Motion to Dismiss, NPRI has not alleged any facts that would give it standing to bring this action. The lack of standing is yet another reason the Amended Complaint must be dismissed.

1 Finally, the Amended Complaint must be dismissed because NPRI has failed to join required
2 parties necessary to the resolution of the dispute. Because members of the judiciary who also hold
3 teaching positions will be affected by any ruling in this matter, they must be joined so that their interests
4 are protected. Because they were not joined, it is appropriate to dismiss the Amended Complaint on this
5 basis as well.

6
7 Respectfully submitted this 24th day of September, 2020

8
9 /s/ Berna L. Rhodes-Ford

10 BERNAL. RHODES-FORD

11 Nevada Bar No. 7879

12 General Counsel

13 Nevada State College

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Attorneys for Defendants

Osvaldo Fumo, Heidi Seevers Gansert,

and 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 September 24, 2020, I caused the
5 following document, **DEFENDANTS OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND**
6 **DINA NEAL'S MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5) and NRCP 12(b)(6)**, to
7 be 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
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.
14 **FOX ROTHSCHILD LLP**
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Attorneys for Plaintiff

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Daniel Bravo, Esq.
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Attorneys for Defendant Brittney Miller



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

23
24
25 *Nita Armendariz*
26 An employee of the Office of General Counsel
27 Nevada State College
28

EXHIBIT 1

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2 Nevada State Bar No.12178
3 NPRI CENTER FOR JUSTICE AND
4 CONSTITUTIONAL LITIGATION
5 75 Caliente Street
6 Reno, Nevada 89509-2807
7 Tel: (775) 636-7703
8 Fax: (775) 201-0225
9 cjcl@npri.org

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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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

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Attorney for Plaintiff

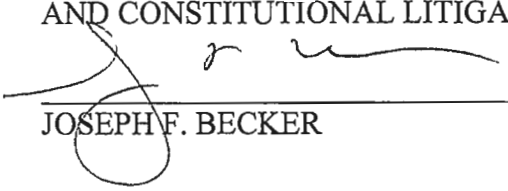
CERTIFICATE OF SERVICE

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

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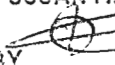
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University of Nevada, Reno
General Counsel

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SUSAN HERRIWEATHER

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.

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

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

1 **CERTIFICATE OF MAILING**

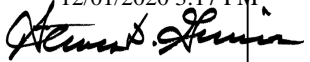
2 Pursuant to NRCp 5(b), I certify that I am an employee of the First Judicial District
3 Court, and that on this 3rd day of August, 2017, I deposited for mailing, postage paid, at Carson
4 City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

5 Joseph F. Becker, Esq.
6 NPRI Center for Justice
7 75 Caliente Street
8 Reno, NV 89509

9 Melissa P. Barnard, Esq.
10 University of Nevada, Reno
11 1664 N. Virginia Street/MS 0550
12 Reno, NV 89557



Angela Jeffries
Judicial Assistant, Dept. 1


CLERK OF THE COURT

MCLA

DEANNA L. FORBUSH, ESQ.

Nevada Bar No. 6646

dforbush@foxrothschild.com

COLLEEN E. MCCARTY, ESQ.

Nevada Bar No. 13186

cmccarty@foxrothschild.com

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Telephone: (702) 262-6899

Facsimile: (702) 597-5503

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.: XXIV

**PLAINTIFF'S MOTION FOR THE
COURT'S CLARIFICATION OF ITS
DECISION TO GRANT
DEFENDANTS' MOTIONS TO
DISMISS BASED ON PLAINTIFF'S
LACK OF STANDING**

ON ORDER SHORTENING TIME

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.

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 for the Court’s Clarification of Its Decision to Grant Defendants’ Motions to Dismiss Based on Plaintiff’s Lack of Standing (“Motion for Clarification”), on Order Shortening Time.

The instant Motion is made and based on the following Memorandum of Points and Authorities; the Declaration of Deanna L. Forbush, Esq. included therein; all pleadings and papers already on file; and any oral argument the Court may permit at a hearing of this matter.

Dated this 1st day of December, 2020.

FOX ROTHSCHILD LLP

By: /s/ Deanna L. Forbush

DEANNA L. FORBUSH

Nevada Bar No. 6646

COLLEEN E. MCCARTY

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Attorneys for Plaintiff

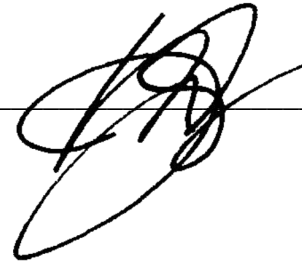
Nevada Policy Research Institute

ORDER SHORTENING TIME

GOOD CAUSE APPEARING, it is hereby ORDERED that the time for hearing the above-captioned **PLAINTIFF'S MOTION FOR CLARIFICATION OF DECISION TO GRANT DEFENDANTS' MOTIONS TO DISMISS BASED ON LACK OF STANDING** will be shortened and heard on the 17th day of December, 2020 at 9:00 am a.m./p.m., or as soon thereafter as the matter may be heard.

Opposition by Defendants must be filed and served by December 7, 2020.

Reply by Plaintiff must be filed and served by December 14, 2020.
Dated this 1st day of December, 2020



Respectfully submitted by:

FOX ROTHSCHILD LLP

918 558 0AED EC64
Jim Crockett
District Court Judge

By: /s/ Deanna L. Forbush
DEANNA L. FORBUSH
Nevada Bar No. 6646
COLLEEN E. MCCARTY
Nevada Bar No. 13186
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 862-8300
Attorneys for Plaintiff
Nevada Policy Research Institute

DECLARATION OF COUNSEL IN SUPPORT OF MOTION FOR CLARIFICATION
ON ORDER SHORTENING TIME

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

1. I am an attorney licensed to practice law in the State of Nevada, and I am a partner with Fox Rothschild LLP, attorneys for Plaintiff, Nevada Policy Research Institute (“NPRI”).

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

3. In the instant litigation, NPRI asserted standing pursuant to the public importance exception to the standing requirement to show particularized injury in order to seek injunctive and declaratory relief in the public interest. The extraordinary relief was specifically sought to address the alleged ongoing constitutional violations of the Separation of Powers requirement of the Nevada Constitution by 13 individually named Defendants, each of whom are engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local government.

4. On November 18, 2020, the day prior to the scheduled hearings thereon, the Court issued its ruling via minute order on all pending motions, including the 4 pending motions to dismiss and 8 joinders thereto.¹ Therein, the Court specifically granted all motions to dismiss, and although not referenced, presumably all joinders thereto, based on a finding that, “Nevada Policy Research Institute clearly lacks standing to bring this suit and thus the Motion[s] to Dismiss must be GRANTED.”

5. The Court further found that “Nevada Policy Research Institute....does not make persuasive arguments regarding standing,” and that the Court “is not persuaded that Nevada Policy Research Institute comes within the recent Schwartz [public importance] exception.” The Court, however, did not indicate which factor or factors permitting standing to sue under the public importance exception set forth in *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016)

¹ The Court also denied NPRI’s motion to disqualify the official attorneys and granted the Nevada Legislature’s motion to intervene, but these decisions do not appear to be based on a finding regarding Plaintiff’s standing. To the extent the issue of standing was considered by the Court in rendering its decisions on these additional matters, NPRI respectfully requests the Court indicate same in any clarification given in response to the instant motion.

1 that NPRI failed to meet.

2 6. In light of the significant importance, for purposes of appeal, of knowing the Court's
3 basis for denying application of the public importance standing exception in the instant case, NPRI
4 brings its Motion for Clarification now, in the interest of both judicial and party economy. No
5 prevailing party has submitted a proposed order for review by NPRI, and no future hearings are
6 currently pending before the Court, so while time is of the essence, no prejudice will result if the
7 Court hears and ultimately grants NPRI's clarification request.

8 7. Further, as insufficient time exists for the Court to hear the instant motions and grant
9 the relief requested therein in the normal course, where the Court's retirement is imminent, NPRI
10 respectfully requests the Court provide its clarification on Order Shortening Time at the earliest
11 convenient opportunity, whether at the time of hearing of this matter or by additional minute order
12 issued in advance thereof.

13 8. Concurrently with submitting this Motion for Clarification to chambers, I caused a
14 copy to be served via email to counsel for Defendants. I will also ensure a copy of the signed Order
15 Shortening Time is served on all counsel immediately upon receipt, to provide Defendants the
16 appropriate time to file their oppositions, if any, to Plaintiff's request.

17 9. This Order Shortening Time is made in good faith and without dilatory motive.

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

20 Dated this 1st day of December, 2020.

21 /s/ Deanna L. Forbush
22 DEANNA L. FORBUSH

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 NPRI's request herein is both a simple and a respectful one. While NPRI had hoped the
5 Court would apply the public importance exception recognized by the Nevada Supreme Court in the
6 recent case *Schwartz v. Lopez*, to permit NPRI to pursue the instant litigation and ultimately obtain
7 the elusive determination of whether Defendants' dual employment violates Separation of Powers
8 clause of the Nevada Constitution, the Court did not agree with NPRI's analysis. NPRI fully
9 respects, and in no way seeks herein to challenge, that decision. NPRI does, however, wish to
10 appeal that decision at the first available opportunity and believes the Court's specific articulation of
11 its analysis of the factors set forth in *Schwartz v. Lopez*, which analysis would in turn be
12 incorporated into the final order of the Court, is both necessary and appropriate to afford complete
13 relief upon appellate review.

14 **II.**

15 **ARGUMENT**

16 **A. Standard for Relief.**

17 The Nevada Supreme Court explicitly recognizes motions for clarification as a procedurally
18 proper vehicle to seek explanation of a Court's prior order. *See, e.g. Bronneke v. Martin Rutherford*,
19 120 Nev. 230, 234, 89 P.3d 40, 43 (2004); *see also State v. Eighth Judicial District Court*, 116 Nev.
20 374, 377, 997 P.2d 126, 129 (2000). Clarification may also be sought under Rule 60 of the Nevada
21 Rules of Civil Procedure ("NRCPP"). The Ninth Circuit Court of Appeals has affirmed a party's
22 ability to seek clarification under Rule 60.³ *See Earth Island Inst. v. Ruthenback*, 459 F.3d 954, 966
23 (9th Cir. 2006) (recognizing a party's ability to file a motion for clarification pursuant to Rule 60 in
24 order to determine the scope of an injunction). NRCPP 60 also specifically provides that the Court
25 may correct its record on motion or on its own, with or without notice. NRCPP 60(a).

26
27
28 ³ The Nevada Supreme Court has repeatedly stated that decisions involving the Federal Rules of Civil Procedure provide persuasive authority for interpreting the NRCPP. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

1 At this juncture, therefore, this Court has considerable discretion to revisit its November 18,
2 2020 minute order and to clarify the basis for its ruling stated therein to ensure the record is clear for
3 appellate purposes, in the interest of both judicial and party economy.

4 **B. The Court's Decision Requires Clarification Regarding the Basis for Finding**
5 **Plaintiff Lacked Standing to File the Instant Litigation.**

6 As all motions were summarily decided against NPRI in the Court's November 18, 2020
7 minute order, and the opposing parties had argued against NPRI's standing in varying ways, the
8 record as it currently stands is not clear as to which factor or factors for the application of the public
9 importance exception set forth in *Schwartz v. Lopez* the Court believes NPRI failed to sufficiently
10 allege in order to survive Defendants' motions to dismiss.

11 As the Supreme Court held in *Schwartz v. Lopez*, cases of significant public importance such
12 as the instant matter enjoy an exception to the basic standing requirement of showing a particularized
13 injury. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. Although the exception is identified as being
14 narrow, the Supreme Court ultimately set forth three clear criteria for the application of the
15 exception, each of which NPRI argued applied in the instant case.

16 First, for the public importance standing exception to apply, the case must involve an issue of
17 significant public importance. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (citation omitted). Each
18 motion to dismiss appears to concede the application of this first factor. Second, the public
19 importance standing exception requires that a case involve a challenge to a legislative expenditure or
20 appropriation on the basis that it violates a specific provision of the Nevada Constitution. *Schwartz*,
21 132 Nev. at 743, 382 P.3d at 894 (citation omitted). NPRI argued it made the necessary allegation
22 and asked the Court to take judicial notice of the fact that Legislators are compensated by Legislative
23 Department expenditure. Some Defendants directly opposed NPRI's standing on this point, and
24 others did not. Finally, for a party to be granted standing under the public importance exception, it
25 must show that there is no one better positioned to bring the instant action and that it is fully capable
26 of advocating its position in court. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894-95 (citation omitted).
27 NPRI argued it is the only entity to date to challenge Legislators engaging in dual employment as a
28

1 violation of Separation of Powers. Again, some Defendants directly opposed NPRI's standing on
2 this point, and others did not.

3 Accordingly, to avoid any protracted delay resulting from the likelihood of disputed and
4 possibly even conflicting orders resulting from the Court's November 18, 2020 decision, NPRI
5 respectfully requests the Court clarify its determination regarding Plaintiff's standing at the earliest
6 available opportunity. Further, to facilitate timely and meaningful appellate review, NPRI requests
7 the Court find there is no just reason to delay and direct entry of final judgment as to the Defendants,
8 pursuant to NPCR 54(b).

9 **III.**

10 **CONCLUSION**

11 Based on the foregoing, NPRI hereby moves this Honorable Court to clarify its decision to
12 grant Defendants' motions to dismiss based on Plaintiff's lack of standing. Specifically, NPRI seeks
13 for appellate purposes, in the interest of both judicial and party economy, the Court's clear
14 articulation of why it found NPRI had not alleged facts in its Amended Complaint that conferred
15 standing to sue under the public importance exception set forth in *Schwartz v. Lopez*, 132 Nev. 732,
16 743, 382 P.3d 886, 894 (2016).

17 Additionally, NPRI requests the Court direct entry of final judgment as to all motions to
18 dismiss heard by the Court, pursuant to NRCP 54(b).

19 Dated this 1st day of December, 2020.

20 **FOX ROTHSCHILD LLP**

21 By: /s/ Deanna L. Forbush

22 DEANNA L. FORBUSH, ESQ.

23 Nevada Bar No. 6646

24 COLLEEN E. MCCARTY, ESQ.

25 Nevada Bar No. 13186

26 1980 Festival Plaza Dr., Suite 700

27 Las Vegas, Nevada 89135

28 Telephone: (702) 262-6899

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 1st day of December, 2020, I caused the foregoing document entitled **PLAINTIFF'S MOTION FOR THE COURT'S CLARIFICATION OF ITS DECISION TO GRANT DEFENDANTS' MOTIONS TO DISMISS BASED ON PLAINTIFF'S LACK OF STANDING** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

Berna L. Rhodes-Ford, General Counsel
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1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

Gary A. Cardinal, Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street/MS 0550
Reno, Nevada 89557-0550
Email: gcardinal@unr.edu
*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert and Dina Neal*

Bradley Schrager, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
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Las Vegas, Nevada 89120
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*Attorneys for Defendants Brittney Miller and
Selena Torres*

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Attorneys for Defendant Jason Frierson

Kevin C. Powers, General Counsel
Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, Nevada 89701
Email: kpowers@lcb.state.nv.us
Attorneys for Nevada Legislature

/s/ Natasha Martinez
An Employee of Fox Rothschild LLP

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Nevada Policy Research
Institute, Plaintiff(s)

CASE NO: A-20-817757-C

7 vs.

DEPT. NO. Department 24

8
9 Nicole Cannizzaro, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Motion for Clarification was served via the court's electronic eFile
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/1/2020

15 Bradley Schrager bschrager@wrslawyers.com

16 Dannielle Fresquez dfresquez@wrslawyers.com

17 Daniel Bravo dbravo@wrslawyers.com

18 Christie Rehfeld crehfeld@wrslawyers.com

19 Kevin Powers kpowers@lcb.state.nv.us

20 Deanna Forbush dforbush@foxrothschild.com

21 Colleen McCarty cmccarty@foxrothschild.com

22 Natasha Martinez nmartinez@foxrothschild.com

23 Ivette Bautista ibautista@wileypetersenlaw.com

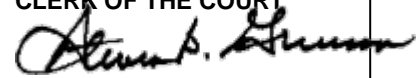
24 Jonathan Blum jblum@wileypetersenlaw.com

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OPPC

KEVIN C. POWERS, General Counsel

Nevada Bar No. 6781

LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

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Email: kpowers@lcb.state.nv.us

Attorneys for Intervenor-Defendant Legislature of the State of Nevada

**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 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-

**Case No. A-20-817757-C
Dept. No. 24**

**JOINT OPPOSITION TO PLAINTIFF'S
MOTION FOR THE COURT'S
CLARIFICATION OF ITS DECISION TO
GRANT DEFENDANTS' MOTIONS TO
DISMISS BASED ON PLAINTIFF'S
LACK OF STANDING AND
COUNTERMOTION TO DISMISS ALL
REMAINING DEFENDANTS BASED ON
PLAINTIFF'S LACK OF STANDING**

Date of Hearing: December 17, 2020

Time of Hearing: 9:00 a.m.

1 THOMPSON, an individual engaging in dual
2 employment with the Nevada State Assembly and
3 University of Nevada, Reno; JILL TOLLES, an
4 individual engaging in dual employment with the
5 Nevada State Assembly and University of Nevada,
6 Reno; and SELENA TORRES, an individual
engaging in dual employment with the Nevada State
Assembly and Clark County School District,
Defendants.

7 **JOINT OPPOSITION AND COUNTERMOTION**

8 **Defendants Brittney Miller and Selena Torres**, by and through their counsel Bradley Schrager,
9 Esq., and Daniel Bravo, Esq., of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP; **Defendants Jason**
10 **Frierson and Nicole Cannizzaro**, by and through their counsel Jonathan D. Blum, Esq., of Wiley
11 Petersen; **Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal**, by and through their
12 counsel Berna L. Rhodes-Ford, General Counsel, Nevada State College, and Gary A. Cardinal, Assistant
13 General Counsel, University of Nevada, Reno; and **Intervenor-Defendant Legislature of the State of**
14 **Nevada** (“Legislature”), by and through its counsel Kevin C. Powers, General Counsel, Legislative
15 Counsel Bureau, Legal Division (“LCB Legal”), under NRS 218F.720, hereby file this Joint Opposition
16 to Plaintiff’s Motion for the Court’s Clarification of its Decision to Grant Defendants’ Motions to
17 Dismiss based on Plaintiff’s Lack of Standing and Joint Countermotion to Dismiss all Remaining
18 Defendants based on Plaintiff’s Lack of Standing. This Joint Opposition and Countermotion is made
19 under EDCR 2.20 and is based upon the attached Memorandum of Points and Authorities, all pleadings,
20 documents and exhibits on file in this case and any oral arguments the Court may allow.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. Background.**

23 In this action, Plaintiff Nevada Policy Research Institute (“NPRI”) has alleged that the individual
24 Defendants are persons simultaneously holding elected offices in the Legislature and paid positions with

1 the executive branch of the Nevada State Government or with local governments in violation of the
2 separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution. During the course of
3 this action: (1) NPRI filed a Motion to Disqualify the Official Attorneys from Representing Defendants
4 Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal (the “NSHE Defendants”); (2) NPRI filed a
5 Motion for an Order Allowing Service by Publication of Defendants Glen Leavitt, James Ohrenschall,
6 and Melanie Scheible; (3) the Legislature filed a Motion to Intervene as a Defendant under NRCP 24
7 and NRS 218F.720; and (4) Defendants Brittney Miller and Selena Torres, Defendants Jason Frierson
8 and Nicole Cannizzaro, and Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal, filed
9 their respective Motions to Dismiss and respective Joinders to each other’s Motions to Dismiss.

10 While this action was pending, NPRI filed: (1) a Notice of Voluntary Dismissal of Defendant
11 Teresa Benitz-Thompson on September 17, 2020; (2) a Notice of Voluntary Dismissal of Defendant
12 Kasina Douglass-Boone on September 28, 2020; and (3) a Notice of Voluntary Dismissal of Defendants
13 Osvaldo Fumo and Jill Tolles on November 16, 2020. NPRI filed its Notice of Voluntary Dismissal
14 prematurely and now seeks a stipulation to correct its error of dismissing Defendant Jill Tolles.

15 On November 18, 2020, the Court entered an Order in the Court Minutes (“November 18 Minute
16 Order”), which directed counsel for the prevailing parties to prepare proposed orders for the Court’s
17 review as follows: (1) a proposed Order Denying NPRI’s Motion to Disqualify the Official Attorneys
18 from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal; (2) a proposed
19 Order Granting Defendants’ Motions to Dismiss based on Plaintiff’s Lack of Standing; and (3) a
20 proposed Order Granting the Legislature’s Motion to Intervene as a Defendant.

21 On December 1, 2020, NPRI filed its Motion for the Court’s Clarification of its Decision to Grant
22 Defendants’ Motions to Dismiss based on Plaintiff’s Lack of Standing (“Motion for Clarification”). In
23 its Motion for Clarification, NPRI asks the Court to clarify its determination regarding Plaintiff’s lack of
24 standing under the public-interest exception to standing recognized in *Schwartz v. Lopez*, 132 Nev. 732,

743, 382 P.3d 886, 894 (2016) (recognizing “an exception to [the] injury requirement in certain cases involving issues of public importance.”). NPRI also states that it wants to appeal the Court’s decision based on lack of standing “at the first available opportunity and believes the Court’s specific articulation of its analysis of the factors set forth in *Schwartz v. Lopez*, which analysis would in turn be incorporated into the final order of the Court, is both necessary and appropriate to afford complete relief upon appellate review.” (*NPRI’s Mtn. at 6.*) Additionally, although not framed as a motion as required by NRCP 7(b) and supported by a memorandum of points and authorities as required by EDCR 2.20, NPRI also states that “to facilitate timely and meaningful appellate review, NPRI requests the Court find there is no just reason to delay and direct entry of final judgment as to the Defendants, pursuant to NRCP 54(b).” (*NPRI’s Mtn. at 8.*) On December 4, 2020, NPRI sent a letter by email to the Court’s Law Clerk, Mr. Marvin Simeon. In its letter, NPRI requested that the Court hold off processing of the proposed orders until the Court resolves NPRI’s pending Motion for Clarification.

Finally, on November 4, 2020, the Court entered an Order Granting NPRI’s Motion for an Order Allowing Service by Publication of Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible. Those Defendants and Defendant Jill Tolles—if the parties are able to reach an agreement—are the only remaining Defendants who were not included within the Court’s disposition in the November 18 Minute Order.

II. Argument.

A. NPRI’s Motion for Clarification should be denied as procedurally improper because the Court has not entered a final order and judgment yet that can be clarified.

NRCP 58(b)(1) provides that “all judgments must be approved and signed by the court and filed with the clerk.” Moreover, NRCP 58(c) provides that “[t]he filing with the clerk of a judgment signed by the court . . . constitutes the entry of the judgment, and *no judgment is effective for any purpose until it is entered.*” *Id.* (emphasis added). Thus, when the district court has entered a minute order but has not

1 signed a final order and judgment and filed it with the clerk, the district court has not made a decision
2 that is subject to clarification because the minute order is not the district court's final order and
3 judgment regarding the matter. *See Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380,
4 1382 (1987). As further explained by the Nevada Supreme Court:

5 An oral pronouncement of judgment is not valid for any purpose, NRCP 58(c); therefore,
6 only a written judgment has any effect, and only a written judgment may be appealed. The
7 district court's oral pronouncement from the bench, *the clerk's minute order*, and even an
unfiled written order are ineffective for any purpose and cannot be appealed.

8 *Id.* (emphasis added).

9 In the Court's November 18 Minute Order, the Court directed the prevailing parties to prepare
10 proposed orders for the Court's review. Under the Court's Department 24 Guidelines:

11 *All orders must bear original signatures by all counsel.* Counsel designated to prepare the
12 order will be advised if the Court requires the non-drafting counsel to review the order prior
13 to submission. Disputes may be resolved by submission to Chambers of a proposed order
14 copied on all parties, with or without a draft of a competing order. *A hearing shall only be
set if counsel files a Motion for Reconsideration or Clarification, and counsel is unsatisfied
with the proposed order the Court elected to sign.*

15 <http://www.clarkcountycourts.us/departments/judicial/civil-criminal-divison/departments-xxiv/>

16 (emphasis added).

17 Based on the Court's Department 24 Guidelines, the prevailing parties in this case have prepared
18 proposed orders and submitted them to NPRI's counsel for review. If NPRI's counsel has objections to
19 the proposed orders or wants clarification, NPRI's counsel should prepare competing proposed orders
20 and submit them to the Court for consideration. If, thereafter, NPRI's counsel is unsatisfied with the
21 proposed orders that the Court elects to sign, NPRI's counsel can file a Motion for Reconsideration or
22 Clarification after the Court has signed a final order and judgment and filed it with the clerk. Therefore,
23 NPRI's Motion for Clarification should be denied as procedurally improper because the Court has not
24 entered a final order and judgment yet that can be clarified.

1 **B. NPRI’s request for NRCP 54(b) certification should be denied as procedurally improper**
2 **because NPRI has not a filed a Motion for NRCP 54(b) Certification supported by a**
3 **memorandum of points and authorities which details the facts and reasoning that make**
4 **interlocutory appellate review appropriate.**

5 NRCP 7(b) provides that “[a] request for a court order must be made by motion.” Moreover,
6 EDCR 2.20(c) provides that “[a] party filing a motion must also serve and file with it *a memorandum of*
7 *points and authorities in support of each ground thereof.*” *Id.* (emphasis added). EDCR 2.20(c) also
8 provides that “[t]he absence of such memorandum may be construed as an admission that the motion is
9 not meritorious, as cause for its denial or as a waiver of all grounds not so supported.” Finally, the
10 Advisory Committee Note to the 2019 Amendment to NRCP 54(b) states that the district court “has
11 discretion in deciding whether to grant Rule 54(b) certification.” However, it also explains that “given
12 the strong policy against piecemeal review, an order granting Rule 54(b) certification *should detail the*
13 *facts and reasoning that make interlocutory review appropriate.* An appellate court may review whether
14 a judgment was properly certified under this rule.” *Id.* (emphasis added).

15 Even though NPRI has filed a Motion for Clarification, it has not included in that document a
16 separate and distinct Motion for NRCP 54(b) Certification that is supported by a memorandum of points
17 and authorities in support of each ground thereof, and NPRI does not detail the facts and reasoning that
18 make interlocutory appellate review appropriate. Therefore, NPRI’s request for NRCP 54(b)
19 certification should be denied as procedurally improper because NPRI has not a filed a Motion for
20 NRCP 54(b) Certification supported by a memorandum of points and authorities which details the facts
21 and reasoning that make interlocutory appellate review appropriate.

22 //

23 //

24 //

1 **C. The Joint Countermotion to Dismiss all Remaining Defendants based on NPRI's Lack**
2 **of Standing should be granted because NPRI lacks standing to bring its constitutional claims**
3 **against all Defendants named in the Amended Complaint, regardless of whether they have**
4 **appeared in this action.**

5 NRCP 12(h)(3) provides that “[i]f the court determines at any time that it lacks subject-matter
6 jurisdiction, the court must dismiss the action.” When a plaintiff files a complaint for declaratory and
7 injunctive relief, the district court may not exercise subject-matter jurisdiction over the plaintiff’s claims
8 unless the plaintiff has standing to bring the claims. *Doe v. Bryan*, 102 Nev. 523, 524-26, 728 P.2d 443,
9 444-45 (1986). When the plaintiff lacks standing to bring its claims, the defendant is entitled to
10 dismissal for lack of subject-matter jurisdiction as a matter of law. *Id.*

11 Furthermore, when the plaintiff pleads a claim against multiple defendants and one of the
12 defendants proves that the claim fails as a matter of law, the natural consequence is that the claim fails
13 as a matter of law as to all defendants named in the claim, even if some of the defendants do not answer
14 or defend against the claim. *See In re Forsyth’s Estate*, 45 Nev. 385, 392, 204 P. 887, 889-90 (1922)
15 (explaining the “well-known and general rule to the effect that, where several persons are joined as
16 defendants, one or more of whom made default, and the others defend successfully upon a ground not
17 personal to themselves, but which goes to destroy the very basis of the action, their success in
18 maintaining such defense inures to the benefit of all.”). The reason for this rule is that when a claim
19 fails as a matter of law, it is legally unsustainable, and the plaintiff cannot prosecute the claim against
20 any defendant, regardless of whether the defendant has appeared in the action. *See Sutherland v. Gross*,
21 105 Nev. 192, 198, 772 P.2d 1287, 1291 (1989) (stating that “when the defenses interposed by the
22 answering co-defendant call into question the validity of plaintiff’s entire cause of action and when such
23 defenses prove successful, the defenses inure to the benefit of the defaulting co-defendant.
24 Consequently, the plaintiff cannot take judgment against the defendant in default.” (citations omitted));
Paul v. Pool, 96 Nev. 130, 132, 605 P.2d 635, 636 (1980) (“The answer of a co-defendant inures to the

benefit of a defaulting defendant where there exists, as here, a common defense as to both of them.”).

In this case, NPRI lacks standing to bring its constitutional claims against all Defendants named in the Amended Complaint, regardless of whether they have appeared in this action. As a result, all Defendants named in the Amended Complaint are entitled to dismissal for lack of subject-matter jurisdiction as a matter of law. Consequently, under NRCP 12(h)(3), the Court must dismiss this action against all Defendants named in the Amended Complaint because the Court lacks subject-matter jurisdiction. Therefore, the Joint Countermotion to Dismiss all Remaining Defendants based on NPRI’s Lack of Standing should be granted because NPRI lacks standing to bring its constitutional claims against all Defendants named in the Amended Complaint, regardless of whether they have appeared in this action.

CONCLUSION AND AFFIRMATION

Based upon the foregoing, Defendants and Intervenor-Defendant Legislature respectfully request that the Court enter an order: (1) denying Plaintiff’s Motion for the Court’s Clarification of its Decision to Grant Defendants’ Motions to Dismiss based on Plaintiff’s Lack of Standing; and (2) granting the Joint Countermotion to Dismiss all Remaining Defendants based on Plaintiff’s Lack of Standing.

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

DATED: This 7th day of December, 2020.

Respectfully submitted by:

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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 7th day of December, 2020, pursuant to NRCP 5(b) and NEFCR 9, I served a true and correct copy of the Joint Opposition to Plaintiff's Motion for the Court's Clarification of its Decision to Grant Defendants' Motions to Dismiss Based on Plaintiff's Lack of Standing and Joint Countermotion to Dismiss all Remaining Defendants Based on Plaintiff's Lack of Standing, by means of the Eighth Judicial District Court's electronic filing system, directed to:

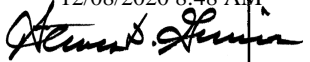
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CLERK OF THE COURT

ORDR

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*Attorney for Defendants,
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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 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

Case No.: A-20-817757-C

Dept. No.: 24

**OMNIBUS ORDER GRANTING
MOTIONS TO DISMISS**

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.

In this action, Plaintiff Nevada Policy Research Institute (“NPRI”) has alleged that the individual Defendants are persons simultaneously holding elected offices in the Nevada Legislature and paid positions with the executive branch of the Nevada State Government or with local governments in violation of the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution. Defendants filed Motions to Dismiss as follows: Motion to Dismiss filed by Defendant Brittney Miller on September 18, 2020; Motion to Dismiss filed by Defendants Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal on September 28, 2020; Motion to Dismiss filed by Defendant Jason Frierson on October 5, 2020; and, Motion to Dismiss filed by Defendant Nicole Cannizzaro on October 19, 2020 (collectively, the “Motions to Dismiss”). Each of the defendants that filed a motion to dismiss also filed a joinder to the other Motions to Dismiss.

The Court having read and considered the pleadings and briefs filed by the parties, and for good cause appearing finds as follows:

Pursuant to EDCR 2.23 (c) and (d), this matter was decided on the briefs and pleadings filed by the parties without oral argument because the Court deems oral argument unnecessary.

Standing is the controlling issue here and while other issues are discussed, standing is the determinative issue above all else. Here, NPRI simply lacks standing to bring this suit. It is an organization rather than a particularly-aggrieved individual harmed by any alleged dual employment by any defendant. It is quite clear that NPRI does not allege any particularized harm beyond that of any

1 ordinary taxpayer, and that is not enough to give standing sufficient for NPRI to maintain this suit. *See*
2 *Katz v. Incline Village General Improvement District*, 414 P.3d 300, 2018 WL 1129140 (unpublished
3 decision), Nev. S. Ct. Case No. 70440 (Feb. 26, 2018) (“This court recently reaffirmed the general rule
4 that a taxpayer lacks standing when he or she has not suffered a special or peculiar injury different
5 from that sustained by the general public.”).

6 NPRI’s Opposition does not make persuasive arguments regarding standing, suggesting that an
7 evidentiary hearing would need to be conducted but not offering any theory as to how such a hearing
8 would demonstrate particularized harm or otherwise lead to a finding that it has standing to pursue this
9 case against Defendants.

10 Neither is the Court persuaded that NPRI comes within the recent *Schwartz* public-interest
11 exception to Nevada’s standing doctrine. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894
12 (2016) (recognizing “an exception to [the] injury requirement in certain cases involving issues of public
13 importance.”). To establish standing under the public-interest exception: (1) the case must involve an
14 issue of significant public importance; (2) the case must involve a challenge to a legislative expenditure
15 or appropriation on the basis that it violates a specific provision of the Nevada Constitution; and (3)
16 the plaintiff must be an “appropriate” party, meaning that there is no one else in a better position who
17 will likely bring an action and that the plaintiff is capable of fully advocating his or her position in
18 court. *Id.*

19 Even granting, *arguendo*, that this matter is one of public importance, NPRI is not directly
20 challenging a legislative appropriation or expenditure that can be enjoined in this action. In *Schwartz*,
21 the challenged legislative expenditure at issue involved multi-million dollar educational expenditures
22 projected over decades, alleged to be unconstitutionally diverted from appropriate state education
23 funds, which persuaded the Nevada Supreme Court that parents of children in Nevada’s public school
24 system had standing to maintain suit under the public-interest exception without meeting the
25 particularized-injury requirement. It was the legislative expenditure, and the entirety of the
26 circumstances, that established the public-interest exception in *Schwartz* and exempted the parents
27 from meeting the particularized-injury requirement.

28 Here, at least in response to Defendant Miller’s motion, NPRI avers that her *per diem* or

1 legislative salary is the challenged “legislative appropriation” satisfying that prong of a *Schwartz*
2 analysis. But the present suit is about “dual employment” as a violation of Nevada’s separation-of-
3 powers provision, not about legislative pay; NPRI is not suing the paymasters of legislators to enjoin
4 such payments for the services of legislators; and NPRI blows hot and cold on whether or not it is suing
5 the Defendants as legislators at all, appearing to prefer to cast this action as against executive branch
6 and local government employees when convenient, and against legislators when not. Indeed, NPRI
7 seeks, unsuccessfully, to create a wholly-new and separate category of defendant here, sued neither in
8 his or her official capacity as legislator nor as public employee, in an attempt to disqualify institutional
9 attorneys from representing Defendants, a maneuver that the Court rejected in its order denying NPRI’s
10 motion to disqualify the attorneys for the Nevada State Higher Education System.

11 Further, NPRI cannot demonstrate that it is the “appropriate” party here, beyond its general
12 policy disagreement with legislators holding positions of public employment with the state executive
13 branch or with local governments. Historically, in the numerous suits NPRI has either brought or
14 assisted in bringing on this subject, it has demonstrated that it has been able to enlist individuals who
15 might provide a more colorable claim of particularized harm, but NPRI has simply opted not to do so
16 in this case to enhance the possibility of finding that counsel represents someone with actual standing.
17 NPRI even states in its papers that it has individual members ready and willing to seek the employment
18 positions of Defendants, demonstrating that it is not the sole and appropriate party to bring this suit,
19 especially given the direction provided by the Nevada Supreme Court in *Heller v. Legislature*, 120
20 Nev. 456, 472-473, 93 P.3d 746, 757 (2004), that an appropriate action raising the “dual service issue”
21 under Nevada’s separation-of-powers provision “could be sought by someone with a legally protectible
22 interest, such as a person seeking the executive branch position held by the legislator.” *Id.* (internal
23 quotation and citation omitted).

24 Meeting neither the basic elements of standing in Nevada nor at least two of the three prongs
25 of the analysis in *Schwartz*, NPRI clearly lacks standing to bring this suit.

26 ///

27 ///

28 ///

ORDER

IT IS HEREBY ORDERED that the Motions to Dismiss are **GRANTED**.

IT IS FURTHER ORDERED that the Joinders of the other Defendants are also **GRANTED**.

IT IS HEREBY FURTHER ORDERED that the hearing on this matter set for November 19,
Dated this 8th day of December, 2020
2020 is hereby **VACATED**.

Approved as to form and content by:

FOX ROTHSCHILD LLP

Refused to Sign Order
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**GENERAL COUNSEL NEVADA STATE
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District Court Judge**

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8 *Attorneys for Intervenor-Defendant*
9 *Legislature of the State of Nevada*

10 *Respectfully submitted by:*

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19 *Attorneys for Defendants,*
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Cc: ibautista@wileypetersenlaw.com
Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Jon,
You have permission to attach my signature.
Thank you,
Gary

GARY A. CARDINAL

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Counsel,
I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

Deanna and Colleen, I understand you will not be signing, but if you can respond confirming the same, that would be helpful.

I plan to submit this today.

Thanks,

Jon

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Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Please affix ours.

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Subject: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

CAUTION:EXTERNAL EMAIL

Counsel,
I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

Deanna and Colleen, I understand you will not be signing, but if you can respond confirming the same, that would be helpful.

I plan to submit this today.

Thanks,
Jon

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From: Powers, Kevin <kpowers@lcb.state.nv.us>

Sent: Monday, December 7, 2020 11:24 AM

To: jblum@wileypetersenlaw.com; 'Bradley Schrager' <BSchrager@wrslawyers.com>; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>

Cc: ibautista@wileypetersenlaw.com

Subject: RE: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

LCB Legal has reviewed the proposed Omnibus Order Granting Motions to Dismiss, and I agree to the use of the my electronic signature for the proposed order.

Thanks.

Kevin C. Powers

General Counsel

Nevada Legislative Counsel Bureau, Legal Division

401 S. Carson Street

Carson City, NV 89701-4747

(775) 684-6830

(775) 684-6761-Fax

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From: jblum@wileypetersenlaw.com <jblum@wileypetersenlaw.com>

Sent: Monday, December 07, 2020 9:37 AM

To: 'Bradley Schrager' <BSchrager@wrslawyers.com>; Powers, Kevin <kpowers@lcb.state.nv.us>; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>

Cc: ibautista@wileypetersenlaw.com

Subject: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Counsel,

I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

Deanna and Colleen, I understand you will not be signing, but if you can respond confirming the same, that would be helpful.

I plan to submit this today.

Thanks,
Jon

Jonathan D. Blum, Esq.



1050 Indigo Drive, Suite 200B
Las Vegas, Nevada 89145
Office 702.910.3329 | Mobile 702.443.0677
jblum@wileypetersenlaw.com
www.wileypetersenlaw.com



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From: Berna Rhodes-Ford <Berna.Rhodes-Ford@nsc.edu>
Sent: Monday, December 7, 2020 2:41 PM
To: jblum@wileypetersenlaw.com
Cc: Bradley Schrage; Powers, Kevin; dforbush@foxrothschild.com; cmccarty@foxrothschild.com; Daniel Bravo; Nita Armendariz; gcardinal@unr.edu; ibautista@wileypetersenlaw.com
Subject: Re: A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

You may affix my e-signature.

Berna L. Rhodes-Ford
office [702.992.2378](tel:702.992.2378)
Berna.Rhodes-Ford@nsc.edu

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On Dec 7, 2020, at 9:37 AM, jblum@wileypetersenlaw.com wrote:

Counsel,
I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

Deanna and Colleen, I understand you will not be signing, but if you can respond confirming the same, that would be helpful.

I plan to submit this today.

Thanks,
Jon

Jonathan D. Blum, Esq.

<image001.jpg>
1050 Indigo Drive, Suite 200B
Las Vegas, Nevada 89145
Office 702.910.3329 | Mobile 702.443.0677

jblum@wileypetersenlaw.com
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<201203 DRAFT_NPRI v. Cannizzaro et al._Proposed Order Granting MTD 12.7.20.docx>

From: McCarty, Colleen E. <CMcCarty@foxrothschild.com>
Sent: Monday, December 7, 2020 11:43 AM
To: jblum@wileypetersenlaw.com; 'Bradley Schrager'; 'Powers, Kevin'; Forbush, Deanna L.; 'Daniel Bravo'; 'Nita Armendariz'; gcardinal@unr.edu; 'Berna Rhodes-Ford'
Cc: ibautista@wileypetersenlaw.com; Martinez, Natasha
Subject: RE: [EXT] A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Jon,

As set forth in our communications to you and in the letter to chambers, dated December 4, 2020, we have respectfully requested that the Court hold all proposed orders in this matter until the Court resolves the pending Motion for Clarification on or before December 17, 2020 and NPRI has the opportunity thereafter to provide input to complete the necessary orders. NPRI seeks to include the Court's clarifications in each order ultimately entered by the Court as a result of its November 18, 2020 Minute Order.

Colleen McCarty

From: jblum@wileypetersenlaw.com <jblum@wileypetersenlaw.com>
Sent: Monday, December 7, 2020 9:37 AM
To: 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Powers, Kevin' <kpowers@lcb.state.nv.us>; Forbush, Deanna L. <DForbush@foxrothschild.com>; McCarty, Colleen E. <CMcCarty@foxrothschild.com>; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'Nita Armendariz' <Nita.Armendariz@nsc.edu>; gcardinal@unr.edu; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>
Cc: ibautista@wileypetersenlaw.com
Subject: [EXT] A-20-817757-C Nevada Policy Research Institute vs. Nicole Cannizzaro, et al. 00618- Order on Motions to Dismiss

Counsel,

I have incorporated the requested changes in the attached order. Please let me know if I can affix your e-signatures.

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Thanks,
Jon

Jonathan D. Blum, Esq.



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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Nevada Policy Research
Institute, Plaintiff(s)

CASE NO: A-20-817757-C

7 vs.

DEPT. NO. Department 24

8
9 Nicole Cannizzaro, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/8/2020

15 Bradley Schrager bschrager@wrslawyers.com

16 Dannielle Fresquez dfresquez@wrslawyers.com

17 Daniel Bravo dbravo@wrslawyers.com

18 Christie Rehfeld crehfeld@wrslawyers.com

19 Kevin Powers kpowers@lcb.state.nv.us

20 Deanna Forbush dforbush@foxrothschild.com

21 Colleen McCarty cmccarty@foxrothschild.com

22 Natasha Martinez nmartinez@foxrothschild.com

23 Ivette Bautista ibautista@wileypetersenlaw.com

24 Jonathan Blum jblum@wileypetersenlaw.com

25 Chastity Dugenia cdugenia@wileypetersenlaw.com

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Berna Rhodes-Ford	Berna.Rhodes-Ford@nsc.edu
Gary Cardinal	gcardinal@unr.edu

ORDR

KEVIN C. POWERS, General Counsel
Nevada Bar No. 6781
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401 S. Carson St.
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Email: kpowers@lcb.state.nv.us
Attorneys for Intervenor-Defendant Legislature of the State of Nevada

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA POLICY RESEARCH INSTITUTE, a
Nevada domestic nonprofit corporation,

Plaintiff,

vs.

**Case No. A-20-817757-C
Dept. No. 24**

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-

**ORDER DENYING PLAINTIFF'S
MOTION FOR CLARIFICATION,
GRANTING JOINT COUNTERMOTION
TO DISMISS ALL REMAINING
DEFENDANTS BASED ON PLAINTIFF'S
LACK OF STANDING, AND ENTERING
FINAL JUDGMENT IN FAVOR OF ALL
DEFENDANTS BASED ON PLAINTIFF'S
LACK OF STANDING**

1 THOMPSON, an individual engaging in dual
2 employment with the Nevada State Assembly and
3 University of Nevada, Reno; JILL TOLLES, an
4 individual engaging in dual employment with the
5 Nevada State Assembly and University of Nevada,
6 Reno; and SELENA TORRES, an individual
7 engaging in dual employment with the Nevada State
8 Assembly and Clark County School District,

9
10 Defendants, and

11 THE LEGISLATURE OF THE STATE OF
12 NEVADA,

13 Intervenor-Defendant.
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BACKGROUND

1 In this action, Plaintiff Nevada Policy Research Institute (“NPRI”) has alleged that the individual
2 Defendants are persons simultaneously holding elected offices in the Nevada Legislature and paid
3 positions with the executive branch of the Nevada State Government or with local governments in
4 violation of the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution.
5 NPRI is represented by Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP.

6 On December 8, 2020, the Court entered an Order Granting Nevada Legislature’s Motion to
7 Intervene as an Intervenor-Defendant (the “Legislature”). The Legislature is represented by Kevin C.
8 Powers, General Counsel, Legislative Counsel Bureau, Legal Division, under NRS 218F.720.
9 Additionally, on December 8, 2020, the Court entered an Omnibus Order Granting Motions to Dismiss
10 in favor of the following individual Defendants based on NPRI’s lack of standing: (1) Defendants
11 Brittney Miller and Selena Torres,¹ who are represented by Bradley Schrager, Esq., and Daniel Bravo,
12 Esq., of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP; (2) Defendants Jason Frierson and Nicole
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¹ Although Defendant Selena Torres did not file a separate Motion to Dismiss, she filed Joinders to the
other Defendants’ Motions to Dismiss. In the Court’s Omnibus Order Granting Motions to Dismiss,
the Court granted all Joinders to the other Defendants’ Motions to Dismiss.

1 Cannizzaro, who are represented by Jonathan D. Blum, Esq., of Wiley Petersen; and (3) Defendants
2 Osvaldo Fumo, Heidi Seevers Gansert, and Dina Neal (the Nevada System of Higher Education or
3 “NSHE” Defendants), who are represented by Berna L. Rhodes-Ford, General Counsel, Nevada State
4 College, and Gary A. Cardinal, Assistant General Counsel, University of Nevada, Reno. On
5 December 9, 2020, the Court entered an Order Denying NPRI’s Motion to Disqualify Official Attorneys
6 from representing the NSHE Defendants.

7 In addition to the individual Defendants dismissed by the Court’s Omnibus Order Granting
8 Motions to Dismiss, the following individual Defendants were voluntarily dismissed by NPRI, without
9 prejudice, pursuant to NRCP 41(a)(1) during the course of this litigation: (1) Defendant Teresa Benitz-
10 Thompson on September 17, 2020; (2) Defendant Kasina Douglass-Boone on September 28, 2020; and
11 (3) Defendants Osvaldo Fumo and Jill Tolles on November 16, 2020. NPRI voluntarily dismissed these
12 Defendants based on representations from their respective counsel that they were no longer engaging in
13 the dual employment as alleged by NPRI in its Amended Complaint.

14 However, with regard to Defendant Jill Tolles, upon notification from her counsel that she would
15 be entering into a new contract with her state employer, NPRI and all other parties entered into, and the
16 Court approved, a Stipulation and Order on December 16, 2020, which: (1) vacated the voluntary
17 dismissal of Defendant Jill Tolles and reinstated her as a Defendant with all defenses reserved, including
18 her right to argue that she is not an employee of NSHE or the University of Nevada, Reno; and
19 (2) provided that the Court’s Omnibus Order Granting Motions to Dismiss and the Court’s Order
20 Denying NPRI’s Motion to Disqualify Official Attorneys from representing the NSHE Defendants shall
21 apply equally to Defendant Jill Tolles, such that all parties are bound thereby without the need to re-
22 litigate the motions decided therein. Defendant Jill Tolles is represented by counsel for the NSHE
23 Defendants.

24 //

1 The remaining individual Defendants are Glen Leavitt, James Ohrenschall, and Melanie Scheible.
2 On November 4, 2020, the Court entered: (1) an Order Granting NPRI's Motion for Enlargement of
3 Time to Serve the Amended Complaint on Defendants Glen Leavitt, James Ohrenschall, and Melanie
4 Scheible; and (2) an Order to Serve by Publication Defendants Glen Leavitt, James Ohrenschall, and
5 Melanie Scheible. On December 9, 2020, NPRI filed an Acceptance of Service in which Jonathan D.
6 Blum, Esq., of Wiley Petersen, accepted service of the Summons and Amended Complaint on behalf of
7 Defendant Melanie Scheible. On December 14, 2020, NPRI stated in its Limited Reply in Support of its
8 Motion for Clarification that Defendants Glen Leavitt and James Ohrenschall were officially served by
9 publication effective December 10, 2020.

10 **PENDING MOTION AND COUNTERMOTION**

11 Presently pending before the Court are the following motion and countermotion and their
12 supporting documents: (1) NPRI's Motion for the Court's Clarification of its Decision to Grant
13 Defendants' Motions to Dismiss Based on NPRI's Lack of Standing ("NPRI's Motion for
14 Clarification"), which includes a request for the Court to grant NRCP 54(b) certification whereby the
15 Court finds that there is no just reason for delay and directs entry of a final judgment in order to
16 facilitate timely and meaningful appellate review; (2) Defendants' and Legislature's Joint Opposition to
17 NPRI's Motion for the Court's Clarification of its Decision to Grant Defendants' Motions to Dismiss
18 Based on NPRI's Lack of Standing and Joint Countermotion to Dismiss All Remaining Defendants
19 Based on NPRI's Lack of Standing ("Joint Countermotion to Dismiss"); and (3) NPRI's Notice of Non-
20 Opposition to Joint Countermotion to Dismiss and Limited Reply in Support of its Motion for
21 Clarification.

22 Pursuant to EDCR 2.23(c) and (d), the Court decided the pending motion and countermotion on
23 the written submissions filed by the parties without oral argument because the Court deems oral
24 argument unnecessary. Having considered the written submissions filed by the parties, and for good

1 cause shown, the Court: (1) denies NPRI's Motion for Clarification; (2) grants the Joint Countermotion
2 to Dismiss and hereby dismisses all remaining Defendants based on NPRI's lack of standing; and
3 (3) denies NPRI's request for NRCP 54(b) certification as moot because, by dismissing all Defendants
4 based on NPRI's lack of standing, the Court is entering a final judgment which adjudicates all the claims
5 against all the parties based on NPRI's lack of standing and which thereby renders NRCP 54(b)
6 certification unnecessary. Consequently, having dismissed all Defendants based on NPRI's lack of
7 standing, the Court enters a final judgment in favor of all Defendants based on NPRI's lack of standing,
8 and the Court does not address the merits of NPRI's constitutional claims.

9 **DISCUSSION**

10 **1. NPRI's Motion for Clarification.**

11 On November 18, 2020, the Court entered a Minute Order which directed counsel for the
12 prevailing parties to prepare for the Court's review and approval a proposed order granting Defendants'
13 Motions to Dismiss based on NPRI's lack of standing. On December 1, 2020, before counsel for the
14 prevailing parties had submitted a proposed order for the Court's review and approval, NPRI filed its
15 Motion for Clarification of the Court's decision granting Defendants' Motions to Dismiss based on
16 NPRI's lack of standing. When NPRI filed its Motion for Clarification on December 1, 2020, there was
17 no written order that the Court had signed and filed yet. Thus, at that time, NPRI's Motion for
18 Clarification was premature because the Court could not clarify an order that did not exist yet.

19 On December 2, 2020, counsel for Defendants Jason Frierson and Nicole Cannizzaro submitted a
20 proposed Omnibus Order Granting Motions to Dismiss, without commentary from NPRI. NPRI instead
21 emailed a Letter to the Court on December 4, 2020, which NPRI also copied to counsel for all other
22 parties, requesting that the Court hold off processing the proposed order until the hearing on the Motion
23 for Clarification ("NPRI's December 4 Letter"). NPRI's December 4 Letter has been "Left Side" filed
24 into this case.

1 On December 8, 2020, the Court signed and filed Defendants' proposed Omnibus Order Granting
2 Motions to Dismiss based on NPRI's lack of standing. On December 14, 2020, NPRI filed its Limited
3 Reply in Support of its Motion for Clarification. In NPRI's Reply, NPRI asks for the Court to provide
4 clarification of precisely why NPRI lacks standing to bring this lawsuit, arguing that the record remains
5 unclear as to how NPRI either: (1) lacks its own particularized harm to establish standing; or (2) fails to
6 meet the public-importance exception to standing under *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d
7 886, 894 (2016).

8 On December 15, 2020, the Court entered a Minute Order denying NPRI's Motion for
9 Clarification, stating that:

10 Although Plaintiff styles this motion as a Motion for Clarification of the Court's Decision,
11 there is no order that has been signed and filed yet and thus the motion is premature since
12 one cannot clarify what does not exist. Plaintiff's Reply brief does not provide any
additional justification or authority for clarification. Motion for Clarification must be
DENIED.

13 Based on the Court's December 15 Minute Order, NPRI believed that the Court denied its Motion
14 for Clarification on the basis that no order from the November 18, 2020, hearing had yet been signed
15 and filed yet, even though all orders had been signed and filed on either December 8 or December 9,
16 2020. Accordingly, on December 16, 2020, NPRI emailed a Letter to the Court ("NPRI's December 16
17 Letter"), which NPRI also copied to counsel for all other parties, requesting that the record be corrected
18 and that the Court either place the Motion for Clarification back on calendar or provide the basis for the
19 denial of NPRI's Motion for Clarification. NPRI's December 16 Letter has been "Left Side" filed into
20 this case.

21 Having considered NPRI's Reply and NPRI's December 16 Letter, the Court finds that NPRI does
22 not provide any additional justification or authority for clarification, and the Court is of the view that the
23 issue of standing needs no further clarification and is entirely dispositive of the arguments raised by
24 NPRI. Therefore, the Court denies NPRI's Motion for Clarification.

1 **2. Joint Countermotion to Dismiss All Remaining Defendants.**

2 As discussed previously, the remaining individual Defendants are Glen Leavitt, James
3 Ohrenschall, and Melanie Scheible. In Nevada, a person named as a codefendant in a complaint is not
4 treated as a party to the case unless the person has been served with process or has entered a voluntary
5 appearance. *Rae v. All Am. Life & Cas. Co.*, 95 Nev. 920, 922, 605 P.2d 196, 197 (1979); *Valley Bank*
6 *of Nev. v. Ginsburg*, 110 Nev. 440, 447, 874 P.2d 729, 734 (1994); *Albert D. Massi, Ltd. v. Bellmyre*,
7 111 Nev. 1520, 1521, 908 P.2d 705, 706 (1995).

8 Based on the record in this case, NPRI filed an Acceptance of Service on December 9, 2020, in
9 which Jonathan D. Blum, Esq., of Wiley Petersen, accepted service of the Summons and Amended
10 Complaint on behalf of Defendant Melanie Scheible. Additionally, on December 14, 2020, NPRI stated
11 in its Limited Reply in Support of its Motion for Clarification that Defendants Glen Leavitt and James
12 Ohrenschall were officially served by publication effective December 10, 2020. Therefore, because the
13 remaining individual Defendants Glen Leavitt, James Ohrenschall, and Melanie Scheible have been
14 served with process, the Court finds that they are parties to this case, regardless of whether they have
15 appeared in this action.

16 The Joint Countermotion to Dismiss asks the Court to dismiss all remaining Defendants based on
17 NPRI's lack of standing and argues that NPRI lacks standing to bring its constitutional claims against all
18 remaining Defendants, regardless of whether they have appeared in this action. In NPRI's Non-
19 Opposition to the Joint Countermotion to Dismiss, NPRI does not oppose the Court's entry of a final
20 judgment as to all remaining Defendants based on NPRI's lack of standing in order to facilitate timely
21 and meaningful appellate review.

22 The Court finds that the Joint Countermotion to Dismiss is most persuasive. As argued in the
23 Joint Countermotion to Dismiss, when a plaintiff files a complaint for declaratory and injunctive relief,
24 the Court may not exercise subject-matter jurisdiction over the plaintiff's claims unless the plaintiff has

1 standing to bring the claims. *Doe v. Bryan*, 102 Nev. 523, 524-26, 728 P.2d 443, 444-45 (1986). When
2 the plaintiff lacks standing to bring its claims, the defendant is entitled to dismissal for lack of subject-
3 matter jurisdiction as a matter of law. *Id.* (affirming district court’s dismissal of plaintiffs’ constitutional
4 claims because plaintiffs lacked standing to bring those claims); NRCP 12(h)(3) (“If the court
5 determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

6 Furthermore, when the plaintiff pleads a claim against multiple defendants and one of the
7 defendants proves that the claim fails as a matter of law—such as for the lack of standing—the natural
8 consequence is that the claim fails as a matter of law as to all defendants named in the claim, even if
9 some of the defendants do not answer or defend against the claim. *See In re Forsyth’s Estate*, 45 Nev.
10 385, 392, 204 P. 887, 889-90 (1922) (explaining the “well-known and general rule to the effect that,
11 where several persons are joined as defendants, one or more of whom made default, and the others
12 defend successfully upon a ground not personal to themselves, but which goes to destroy the very basis
13 of the action, their success in maintaining such defense inures to the benefit of all.”). The reason for this
14 rule is that when a claim fails as a matter of law, it is legally unsustainable, and the plaintiff cannot
15 prosecute the claim against any defendant, regardless of whether the defendant has appeared in the
16 action. *See Sutherland v. Gross*, 105 Nev. 192, 198, 772 P.2d 1287, 1291 (1989) (stating that “when the
17 defenses interposed by the answering co-defendant call into question the validity of plaintiff’s entire
18 cause of action and when such defenses prove successful, the defenses inure to the benefit of the
19 defaulting co-defendant. Consequently, the plaintiff cannot take judgment against the defendant in
20 default.” (citations omitted)); *Paul v. Pool*, 96 Nev. 130, 132, 605 P.2d 635, 636 (1980) (“The answer of
21 a co-defendant inures to the benefit of a defaulting defendant where there exists, as here, a common
22 defense as to both of them.”).

23 As determined by the Court in its Omnibus Order Granting Motions to Dismiss, standing is the
24 controlling issue here, and while other issues are discussed, standing is the determinative issue above all

1 else. In its Omnibus Order, the Court concluded that NPRI clearly lacks standing to bring its
2 constitutional claims against Defendants who filed Motions to Dismiss or Joinders thereto. The Court
3 finds that its conclusion that NPRI clearly lacks standing to bring its constitutional claims applies
4 equally to all remaining Defendants as well. Therefore, the Court grants the Joint Countermotion to
5 Dismiss and hereby dismisses all remaining Defendants based on NPRI's lack of standing.
6 Consequently, having dismissed all Defendants based on NPRI's lack of standing, the Court enters a
7 final judgment in favor of all Defendants based on NPRI's lack of standing, and the Court does not
8 address the merits of NPRI's constitutional claims.

9 **3. NRCP 54(b) certification.**

10 As a general rule, a party is not entitled to appeal from any order or other decision, however
11 designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the
12 parties. NRCP 54(b); *Wilmurth v. State*, 79 Nev. 490, 491-92, 387 P.2d 251, 251 (1963). However,
13 NRCP 54(b) contains an exception to the general rule, stating that "the court may direct entry of a final
14 judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines
15 that there is no just reason for delay." NRCP 54(b); *Crescent v. White*, 91 Nev. 209, 210, 533 P.2d 159,
16 160 (1975) (explaining that "a judgment or order that fails to adjudicate all the claims and the rights and
17 liabilities of the parties is not appealable, absent the express determination that there is no just reason for
18 delay, as required by NRCP 54(b).").

19 In this case, NPRI's request for NRCP 54(b) certification is denied as moot because, by dismissing
20 all Defendants based on NPRI's lack of standing, the Court is entering a final judgment which
21 adjudicates all the claims against all the parties based on NPRI's lack of standing and which thereby
22 renders NRCP 54(b) certification unnecessary.

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2. IT IS HEREBY FURTHER ORDERED that Defendants' and Legislature's Joint Counter-motion to Dismiss All Remaining Defendants Based on NPRI's Lack of Standing is GRANTED.

3. IT IS HEREBY FURTHER ORDERED that NPRI's request for NRCP 54(b) certification is DENIED as moot because, by dismissing all Defendants based on NPRI's lack of standing, the Court is entering a final judgment which adjudicates all the claims against all the parties based on NPRI's lack of standing and which thereby renders NRCP 54(b) certification unnecessary.

4. IT IS HEREBY FURTHER ORDERED that a FINAL JUDGMENT is entered in favor of all Defendants based on NPRI's lack of standing.

Dated this 28th day of December, 2020



Order submitted by:

/s/ Kevin C. Powers
KEVIN C. POWERS, General Counsel
 Nevada Bar No. 6781
 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
 401 S. Carson St.
 Carson City, NV 89701
 Tel: (775) 684-6830; Fax: (775) 684-6761
 Email: kpowers@lcb.state.nv.us
Attorneys for Intervenor-Defendant Legislature of Nevada

D49 621 CDB2 0D29
Jim Crockett
District Court Judge

//
//
//

Order reviewed by:

/s/ Colleen E. McCarty

DEANNA L. FORBUSH, ESQ.

COLLEEN E. MCCARTY, ESQ.

FOX ROTHSCHILD LLP

dforbush@foxrothschild.com

cmccarty@foxrothschild.com

*Attorneys for Plaintiff Nevada Policy
Research Institute*

/s/ Bradley Schrager

BRADLEY SCHRAGER, ESQ.

DANIEL BRAVO, ESQ.

WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN LLP

bschrager@wrslawyers.com

dbravo@wrslawyers.com

*Attorneys for Defendants Brittney Miller
and Selena Torres*

/s/ Berna L. Rhodes-Ford

BERNA L. RHODES-FORD, ESQ.

General Counsel

NEVADA STATE COLLEGE

berna.rhodes-ford@nsc.edu

/s/ Gary A. Cardinal

GARY A. CARDINAL, ESQ.

Assistant General Counsel

UNIVERSITY OF NEVADA, RENO

gcardinal@unr.edu

*Attorneys for Defendants Osvaldo Fumo,
Heidi Seevers Gansert, Dina Neal and Jill Tolles*

/s/ Jonathan D. Blum

JONATHAN D. BLUM, ESQ.

WILEY PETERSEN

jblum@wileypetersenlaw.com

*Attorneys for Defendants Jason Frierson,
Nicole Cannizzaro and Melanie Scheible*

Powers, Kevin

From: Berna Rhodes-Ford <Berna.Rhodes-Ford@nsc.edu>
Sent: Wednesday, December 23, 2020 5:23 PM
To: Powers, Kevin
Cc: McCarty, Colleen E.; Forbush, Deanna L.; Bradley Schragger; Daniel Bravo; jblum@wileypetersenlaw.com; Gary A Cardinal
Subject: Re: A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment

I authorize use of my electronic signature on the revised proposed order.

Berna L. Rhodes-Ford
office [702.992.2378](tel:702.992.2378)
Berna.Rhodes-Ford@nsc.edu

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General Counsel

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From: McCarty, Colleen E. <CMcCarty@foxrothschild.com>**Sent:** Tuesday, December 22, 2020 12:11 PM**To:** Powers, Kevin <kpowers@lcb.state.nv.us>; Forbush, Deanna L. <DForbush@foxrothschild.com>**Cc:** 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'jblum@wileypetersenlaw.com' <jblum@wileypetersenlaw.com>; Gary A Cardinal <gcardinal@unr.edu>; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>**Subject:** RE: A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment

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From: Powers, Kevin <kpowers@lcb.state.nv.us>**Sent:** Friday, December 18, 2020 5:10 PM**To:** Forbush, Deanna L. <DForbush@foxrothschild.com>; McCarty, Colleen E.

<CMcCarty@foxrothschild.com>

Cc: 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Daniel Bravo' <DBravo@wrslawyers.com>;

'jblum@wileypetersenlaw.com' <jblum@wileypetersenlaw.com>; Gary A Cardinal <gcardinal@unr.edu>;

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<2020_12-23_01_A-20-817757-C_Proposed Order Denying Motion for Clarification, Granting Countermotion to Dismiss Remaining Defs and Entering Final Judgment.doc>

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Sent: Thursday, December 24, 2020 7:30 AM
To: Powers, Kevin
Cc: McCarty, Colleen E.; Forbush, Deanna L.; Daniel Bravo; jblum@wileypetersenlaw.com; Gary A Cardinal; Berna Rhodes-Ford
Subject: Re: A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment

Signature authorized on behalf of my clients

Bradley Schrager
Wolf Rifkin Shapiro Schulman & Rabkin

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CAUTION:EXTERNAL EMAIL

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Sent: Thursday, December 24, 2020 8:12 AM
To: Powers, Kevin; 'McCarty, Colleen E.'; 'Forbush, Deanna L.'
Cc: 'Bradley Schrager'; 'Daniel Bravo'; 'Gary A Cardinal'; 'Berna Rhodes-Ford';
ibautista@wileypetersenlaw.com
Subject: RE: A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment 00618

Thanks, Kevin.

Missing one word in caption:

**ORDER DENYING PLAINTIFF'S MOTION FOR CLARIFICATION, GRANTING JOINT
COUNTERMOTION TO DISMISS ALL REMAINING DEFENDANTS BASED ON PLAINTIFF'S
LACK OF STANDING, AND ENTERING FINAL JUDGMENT IN FAVOR **OF** ALL DEFENDANTS
BASED ON PLAINTIFF'S LACK OF STANDING**

You may affix my e-signature.

Happy Holidays to all,
Jon

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Cc: 'Bradley Schrager'; 'Daniel Bravo'; 'Berna Rhodes-Ford';
ibautista@wileypetersenlaw.com
Subject: RE: A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment 00618

You may affix my e-signature. Thank you.

GARY A. CARDINAL

Assistant General Counsel
University of Nevada, Reno
1664 North Virginia Street
Mail Stop 0550
Reno, NV 89557
Tel: (775) 784-3495
Fax: (775) 327-2202
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Subject: RE: A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment

You may affix my e-signature. Thank you.

From: Powers, Kevin <kpowers@lcb.state.nv.us>
Sent: Wednesday, December 23, 2020 5:04 PM
To: McCarty, Colleen E. <CMcCarty@foxrothschild.com>; Forbush, Deanna L. <DForbush@foxrothschild.com>
Cc: 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'jblum@wileypetersenlaw.com' <jblum@wileypetersenlaw.com>; Gary A Cardinal <gcardinal@unr.edu>; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>
Subject: [EXT] RE: A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment

Plaintiff's Counsel:

In response to NPRI's suggested revisions to the proposed order, Counsel for all Defendants have prepared and approved the attached revised proposed order and final judgment in this matter.

The revised proposed order includes most—but not all—of NPRI's suggested revisions. The revised proposed order also includes some additional revisions from Defendants in response to NPRI's suggested revisions that are included in the revised proposed order.

Counsel for all Defendants do not intend to make any additional revisions to the revised proposed order. Therefore, please review the revised proposed order, and please reply to this email as to whether you authorize the use of your electronic signature on the revised proposed order.

If you do not so authorize, then LCB Legal will submit the revised proposed order to the Court, and NPRI may submit a competing proposed order if it so desires.

Finally, in order to submit the revised proposed order with the required email verification, **Counsel for all Defendants**, please reply to this email in order to authorize the use of your electronic signature on the revised proposed order.

Thanks.

Kevin C. Powers

General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701-4747

(775) 684-6830
(775) 684-6761-Fax

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From: McCarty, Colleen E. <CMcCarty@foxrothschild.com>
Sent: Tuesday, December 22, 2020 12:11 PM
To: Powers, Kevin <kpowers@lcb.state.nv.us>; Forbush, Deanna L. <DForbush@foxrothschild.com>
Cc: 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'jblum@wileypetersenlaw.com' <jblum@wileypetersenlaw.com>; Gary A Cardinal <gcardinal@unr.edu>; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>
Subject: RE: A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment

Mr. Powers,

Attached please find NPRI's suggested revisions to the draft order. We believe they add some additional context and complete the record and also, as NPRI did not oppose the motion to dismiss, remove some superfluous language.

Should you have any questions or wish to discuss the track changes, please do not hesitate to reach out.

Colleen

From: Powers, Kevin <kpowers@lcb.state.nv.us>
Sent: Friday, December 18, 2020 5:10 PM
To: Forbush, Deanna L. <DForbush@foxrothschild.com>; McCarty, Colleen E. <CMcCarty@foxrothschild.com>
Cc: 'Bradley Schrager' <BSchrager@wrslawyers.com>; 'Daniel Bravo' <DBravo@wrslawyers.com>; 'jblum@wileypetersenlaw.com' <jblum@wileypetersenlaw.com>; Gary A Cardinal <gcardinal@unr.edu>; 'Berna Rhodes-Ford' <Berna.Rhodes-Ford@nsc.edu>
Subject: [EXT] A-20-817757-C, NPRI v Cannizzaro: Proposed Order and Final Judgment

Plaintiff's Counsel:

Counsel for all Defendants have prepared and approved the attached proposed order and final judgment in this matter based on the Court's minute orders on December 15 and 16, 2020. Please review the proposed order and final judgment and let us know whether you have any suggested revisions.

Counsel for all Defendants would like to submit the proposed order and final judgment to the Court as early as possible next week before the holiday.

Thank you for your prompt consideration of this matter.

Kevin C. Powers

General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701-4747

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Nevada Policy Research
Institute, Plaintiff(s)

CASE NO: A-20-817757-C

7 vs.

DEPT. NO. Department 24

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9 Nicole Cannizzaro, Defendant(s)

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11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/28/2020

15 Bradley Schrager	bschrager@wrslawyers.com
16 Dannielle Fresquez	dfresquez@wrslawyers.com
17 Daniel Bravo	dbravo@wrslawyers.com
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20 Deanna Forbush	dforbush@foxrothschild.com
21 Doreen Loffredo	dloffredo@foxrothschild.com
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24 Ivette Bautista	ibautista@wileypetersenlaw.com
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