IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada domestic nonprofit corporation,

Appellant,

vs.

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

Case No. 85935

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

RESPONDENT JAMES OHRENSCHALL'S ANSWERING BRIEF

RESPONDENT JAMES OHRENSCHALL'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

James Ohrenschall, party

Jonathan Blum, Esq., of the law firm Wiley Petersen, is the only attorney to appear for Mr. Ohrenschall, in this court and in the district court.

DATED this 15th day of August, 2023.

WILEY PETERSEN

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ISSUE PRESENTED FOR REVIEW

1) Whether it is a violation of the separation-of-powers clause of the Nevada Constitution, Nevada Const. art. 3, § 1(1), for an individual to be employed by a local government while simultaneously serving in the Nevada Legislature.

STATEMENT OF THE CASE[1]

This is an appeal from a grant by the district court of two motions to dismiss brought and/or joined by Legislative Respondents below, and the denial of a motion to strike those motions and joinders by Appellant NPRI, and collateral issues. *See* AA2:000352-00413.[2]

In the face of incessant demands by NPRI to issue a broad decision on Respondents Neal and Ohrenschall's motions—which were joined by their fellow legislative defendants—that would establish the type of bright-line legal pronouncements it sought, the district court determined that NPRI had not stated claims upon which relief can be granted, under NRCP 12(b)(5). "Article 3, Section 1 of the Nevada Constitution," the court wrote, "does not apply to local political subdivisions, [and] as long as an individual employed by a local political subdivision does not hold an incompatible dual position, their dual employment is not prohibited by the separation-of-powers clause of the Nevada Constitution." *See* AA2:000401. Respondents Ohrenschall, Miller, and Torres, therefore, were "not in violation of the separation-of-powers clause by operation of their dual employment." *Id.* As to Respondent Neal, the court determined that an adjunct professor at Nevada State

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[1] For brevity, this Statement of the Case will incorporate as if fully set forth the posture and history of this action prior to the remand by this Court following its decision in *Nev. Policy Research Inst. v. Cannizzaro*, 507 P.3d 1203 (Nev. 2022), on the presumption the Court is already fully aware of the circumstances.

[2] Citations to "AA" are to volume and page numbers of Appellant's Appendix.

University "is a public employee and not a public officer [and] does not exercise a sovereign function of the executive branch.... *See* AA2:000410-000411.[3]

For its part, NPRI argued, and continues to maintain, the absolutist view that any and all public employees—of any type, in any department and of all job descriptions—violate Nev. Const. art. 3, sec. 1(1) if they continue to serve in the Nevada Legislature. They base this on the repeated, willful misreading of that constitutional provision, in which they omit any treatment or discussion of the requirement that the functions prohibited in dual employment are those "appertaining" to a coordinate branch, preferring to insist instead that Article 3, Section 1 bars "exercising any functions *related to* the executive branch" while serving in the Legislature—an interpretation that NPRI asserts means any public employment whatsoever, at any state, county, or municipal level, and without nuance between the functions performed by a prosecuting attorney, for example, and a public school nurse.

The district court rightly found NPRI's interpretation inapplicable and textually unsupportable, and located grounds for applying Article 3, Section 1 while respecting both the separation of powers and Nevada's tradition of a citizen

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[3] The district court also applied this conclusion to the other Respondents: "This Court also finds that public school teachers and public defenders employed by local political subdivisions are public employees ... do not violate the separation-of-powers clause of the Constitution because they do not exercise sovereign functions of the executive branch." *See* AA2:000411.

Legislature. NPRI appeals because, although it sought quick and sweeping resolution of its claims as matters of law easily resolved by courts, it did not mean a quick and sweeping resolution of its claims which did not establish its "all public employees" theory of its case.

STATEMENT OF RELEVANT FACTS

The salient facts here are few: Senator James Ohrenschall serves as a Clark County public defender (AA1:00004 at Par. 15); Senator Dina Neal serves as an adjunct professor at Nevada State College, in the Nevada System of Higher Education ("NSHE") (AA1:00004 at Par. 14); Assemblywoman Brittney Miller is employed as a Clark County public school teacher (AA1:00004 at Par. 13); and Assemblywoman Selena Torres holds the position of teacher in a Nevada public charter school (AA1:00004 at Par. 13).

NPRI has developed no further facts about any Respondent, or their duties and functions, beyond the bare allegations of their employment by public-sector employers. NPRI has made no averments regarding any aspect of any of Respondents' jobs, and has neither alleged nor identified any functions any of them perform in their work that appertain to alternate branches of government sufficient to establish a violation of the separation of powers in the Nevada Constitution. The district court below neither found nor resolved any contested facts, because it was

considering multiple motions to dismiss which required acceptance of Appellant's facts as pled in its Complaint. *See* AA2:000352-00413.

I. INTRODUCTION

After many years, and numerous attempts, this Court is finally tasked with determining the bounds and application of the Nevada Constitution's Separation of Powers provision, which states as follows:

> Section 1. Three separate departments; separation of powers; legislative review of administrative regulations.
>
> 1. The powers of the Government of the State of Nevada shall be divided into **three separate departments**, — the Legislative, — the Executive and the Judicial; and no **persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others**, except in the cases expressly directed or permitted in this constitution.
> Nev. Const. Art. 3, §1. (emphasis added).

Respondent Ohrenschall is a Nevada State Senator and employed by Clark County as a deputy public defender. He has great reverence for our system of government, loves his job, and loves serving his constituents in the state legislature as he has done for the past 17 years. He does not seek to downplay the importance of this provision. Indeed, it is a cornerstone of our democratic form of government. However, the interpretation of this provision advanced by Appellant is inconsistent with the plain language thereof, ignores this Court's precedent, and would result in absurd results. The district court's ruling recognizes these facts and adopts a logical (though novel) test to chart a reasonable and practical interpretation and application of the provision.

Said another way, the district court's January 4, 2023 Order Granting Respondent Ohrenschall's Motion to Dismiss, and otherwise dispositively ruling on the case (the "Order"[4]), reached the correct result.

The law and argument set forth in Respondent Ohrenschall's Motion to Dismiss, and expounded upon below, reaches the same result, and is consistent with Nevada precedent in several key (and Respondent believes, determinative) issues. That said, it is clear that this Court has not previously squarely and clearly ruled upon the precise issue presented in this appeal. Whether this Court affirms the Order, adopts the reasoning set forth below (much of which is contained therein), or charts a new course, it is clear that Appellant's position is inconsistent with Nevada precedent, overbroad, and unnecessarily punitive. That is, Appellant seeks an interpretation of the separation of powers doctrine that would preclude a janitor employed by the City of Sparks or Nye County from serving in the Nevada Legislature. This logical result of its position was addressed at the hearing.

> I think in Defendant Ohrenschall's motion, he suggested that, you know, a janitor shouldn't be precluded from serving in the Legislature because how could the functions, you know, he's a minor player. **Well, it doesn't matter.** The Nevada Supreme Court in Truesdell has already said it's the most minor, what appear to be most insignificant things that violate the separation of powers. Those are the encroachments we have to look at. **It's not just the person who holds a high position of power in a particular institution. It's across the board.**
> AA2:000281-000282 (emphasis added).

[4] *See* AA2:000352-00413.

Contrary to Appellant's position, a janitor is clearly not, "charged with the exercise of powers properly belonging to one of these departments." Neither is a deputy public defender, or a public school teacher. As such, the Order should be affirmed. In the alternative, this Court should adopt an interpretation of the separation of powers provision as set forth in Respondent Ohrenschall's Motion to Dismiss[5], and as set forth below.

II. ARGUMENT

The basis of the Amended Complaint, and of the appeal, relates to the following provision from the Nevada Constitution:

> Section 1. **Three separate departments; separation of powers**; legislative review of administrative regulations.
>
> 1. The powers of the **Government of the State of Nevada** shall be divided into **three separate departments**, — the Legislative, — the Executive and the Judicial; and no persons charged with the exercise of **powers properly belonging to one of these departments** shall exercise any functions, **appertaining to either of the others**, except in the cases expressly directed or permitted in this constitution.
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> Nev. Const. Art. 3, §1. (emphasis added).

Whether or not the district court's three-part test is affirmed, modified, or replaced, it is clear that this Court must interpret and then apply the above language to the particular respondents' positions. Appellant's position is that even the proverbial janitor employed by a Nevada city or county is, "exercising functions appertaining

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[5] *See* Motion at AA1:00040-0054, Reply at AA1:00166-00175.

to" the Executive Department of the State of Nevada. This bright line may be an "easy" line to draw, certainly easier than a three-part test, but it is not consistent with the constitution's language, not consistent with longstanding Nevada law, and leads to absurd results that have nothing to do with preserving and protecting Nevada's political structure.

While this Court has not squarely and directly addressed the issue raised in this appeal, it has issued many opinions that clearly orient the jurisprudence in line with the district court's conclusions. Appellant essentially cites to *Heller*[6] for the proposition that this Court's procedural advice for the approved *method* of bringing a separation of powers challenge somehow pre-judged such theoretical future challenge is unavailing. *See* Opening Brief, p. 17. This Court's use of the words "executive branch employees" in that case is clearly not to be construed as a ruling on such future (at the time theoretical) challenges to such employees, much less all such employees as Appellant states. As in the district court, Appellant fails to address the ample case law cited in Ohrenschall's Motion to Dismiss and the district court's conclusions in applying those cases.

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[6] *Heller v. Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004).

A. Local Political Subdivisions Are Not Part of State Government

The district court properly found that the Separation of Powers prohibition does not apply to local political subdivisions. This Court should affirm that finding based on Nevada law.

The government of the State of Nevada is separate and distinct from the government of Clark County, as well as any local government in the state. By using "Government of the State of Nevada", and not any of the more inclusive terms it could have chosen, the framers of the Constitution expressed a clear intent that this provision applies only to the three departments of the state government it lists thereafter. Neither Clark County, nor any of its departments, are part of these three state government departments (or branches). This constitutional language is deliberate and important.

This Court recently stated, "[T]he language of the separation of powers provision in the Constitution does not extend any protection to political subdivisions." *City of Fernley v. State*, 132 Nev. 32, 43 n.6, 366 P.3d 699, 707 (2016). Prior cases are consistent with this finding. The Nevada Supreme Court in *DR Partners* states, "Neither state-owned institutions, **nor state departments**, nor public corporations are synonymous with political subdivisions of the state. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117 Nev. 195, 203-04 (2001) (emphasis added).

As such, these distinct bodies must not be conflated. This Court has expressed this distinction on numerous occasions applied to various subdivisions.

> [M]unicipal courts are primarily city, not state entities. Although municipal courts are created by the legislature pursuant to authority vested in that body by the Nevada Constitution, these courts are separate branches of their respective city governments. ... the municipal courts of this state are separate branches of their respective municipal governments. ... they are not state governmental entities *Nunez v. City of N. Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000).

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

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

Appellant spends a significant amount of time addressing other states' positions on the separation of powers issue. As discussed in more detail below in

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[7] As addressed below, a deputy public defender is not a public officer.

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

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

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

After examining the history and purpose of the separation of powers provision, the court concluded that, "the Third Article of the Constitution means that **the powers of the State Government, not the local governments** thereafter to be created by the Legislature, shall be divided into three departments." *Id.* at 534 (emphasis

added). Thus, the court held that the separation of powers provision had no application to the functions performed by a person at the local governmental level. *Id.* at 523-40.

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

Additionally, the 9th Circuit has repeatedly distinguished between a State and its departments and its political subdivisions. It is well settled that, "a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a 'State.'" *United States ex rel. Norton Sound Health Corp. v. Bering Strait Sch. Dist.*, 138 F.3d 1281, 1284 (9th Cir. 1998). It appears clear then that employees of such

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[8] California amended its constitution in 1916 to disallow such employment. The substance of the 1916 constitutional amendment is now found in Cal. Const. art. 4, § 13, which provides: "A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office."

local government units are not employees of the State. Furthermore, "a local government with authority over a limited area, is a different type of government unit than a state-wide agency that is part of the organized government of the state itself." *Wash. State Dep't of Transp. v. Wash. Natural Gas Co.*, 59 F.3d 793, 800 n.5 (9th Cir. 1995).

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

Thus, because local political subdivisions in this state are not included within one of the three departments of state government, their officers and employees also are not part of one of the three departments of state government. Therefore,

legislators, such as Respondent Ohrenschall, who hold positions of public employment with local governments do not hold such positions within one of the three departments of state government. Thus, the separation of powers provision does not prohibit legislators from holding positions of public employment with local governments because local governments, such as Clark County, are not part of one of the three departments of state government. This should end the inquiry with regard to Respondent Ohrenschall and supports affirmance.

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

While not binding on Nevada's courts, it is notable that on March 1, 2004, Attorney General Brian Sandoval issued AGO 2004-03.[9] That Opinion, which spans 27 pages, states in relevant part:

> In light of the absence of Nevada authority on the subject of the applicability of the separation of powers to local governments and Nevada's adoption of the California separation of powers provision into the Nevada Constitution, the findings in *Provines* provide strong support for the contention that Article 3, Section 1 of the Nevada Constitution **does not apply to local governments**.
>
> Based upon the foregoing legal precedent, historical practice of this state, and the relevant Nevada Attorney General opinions, this office concludes that the constitutional requirement of separation of powers **does not prohibit a local government employee from also serving in the Nevada Legislature**.

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9 https://ag.nv.gov/uploadedFiles/agnvgov/Content/Publications/opinions/2004_AGO.pdf
Attorney General Opinions are not binding legal authority.

Id. at p. 36 (emphasis added).

The Attorney General reaches this conclusion after reviewing numerous prior AG opinions and case law, including but not limited to *Provines*, and after noting that the Nevada constitution was modeled after California's constitution, and that the provisions in question were identical.[10] The Attorney General goes on to state,

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

The conclusion of the Nevada Attorney General, based on the cited law and historical precedent, was also cited and adopted by the district court, but modified to address incompatible dual positions. ("Therefore, as long as an individual employed by a local political subdivision does not hold an incompatible dual position, their dual employment is not prohibited by the separation-of-powers clause of the Nevada Constitution." *See* AA2:00401) Whether applied across the board, or modified in the rule adopted by the district court, it is clear that local government employees should be distinguished from employees of the State itself.

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

The district court also analyzed AG 71-4[11], which reached the same conclusion in the context of whether employees of local school districts who also served in the legislature did not violate the separation-of-powers clause.[12] *See* AA2:00366-367. While not binding, the district court makes the appropriate point that,

> The Nevada Legislature has known of the Attorney General's Opinion No. 71-4, which stated that the separation-of-powers clause of the Nevada Constitution did not apply to local government employees, for over fifty years. With this knowledge, it has chosen not to act on the issue by enacting a statute that would ban dual employment as addressed in the Opinion. Therefore, this Court views this inaction as the intent of the Legislature to not enact such a law.
> *See* Order, AA2:00411.

It goes on to state,

> [I]f it was the intent of the Nevada Legislature to ban dual employment and override common law, it is in their power to do so. ... Likewise, it is in the power of the voters of Nevada to amend the Constitution if they desire to ban dual public employment. Or, Nevada voters may follow the lead of Oregon voters and amend the constitution to allow for various types of dual public employment.
> *Id.* AA2:00411-412.

These are important points in that for many decades local government employees have relied on this interpretation and have served in our citizen legislature. There is

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11 https://ag.nv.gov/uploadedFiles/agnvgov/Content/Publications/opinions/1971_AGO.pdf

12 Judge Peterson notes, "Op. Nev. Att'y Gen. No. 71-4 effectively overruled Op. Nev. Att'y Gen. No. 59 (May 9, 1955), which concluded that local school districts were part of the executive branch of government and therefore could not employ a member of the legislative branch under NEV. CONST. art. 3 § 1." *See* AA2:000367, fn 13.

no reason to abruptly re-interpret the constitution to make it such that public defenders and public teachers, not to mention thousands of other rank and file local government employees, cannot serve as citizen legislators. There are any number of common-sense lines that can be drawn to give teeth and meaning to the separation of power provision, apply the plain text of the constitution, while not reaching an absurd result as advocated by Appellant. The local government line is one such appropriate line, which happens to be consistent with this Court's precedent. *See State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953), infra.

B. Appellant Ignores the "Powers Appertaining To" Language of the Provision

Appellant argues that, "the use of the word "any" to qualify "functions" is mutually exclusive to placing a limit on its application, as the Court has held the word "any" means "any and all" and "indiscriminately of whatever kind." *See* Opening Brief, p. 12. The clear language of the constitutional provision resists this interpretation, as the powers proscribed are only those, "appertaining to either of the others." It is those such powers, as opposed other tasks or duties, that the framers logically were concerned with. As set forth in Ohrenschall's Motion to Dismiss, and as recognized by the district court, Nevada law does not support the proposition that janitorial work (or teaching public school or serving as a deputy public defender) are powers appertaining to the Executive Department.

The District Court got this entirely correct, when applied to the functions of public defenders (and teachers).

> [I]t is clear to this Court that the powers 'appertaining to' each branch of the Nevada government are the inherent or primary powers as outlined in the Constitution and *Halverson*[13]. **It is clear that the function of a public school teacher is not to administrate the laws nor is it the function of a public defender to administrate the laws. Rather the function of a teacher is to teach and the function of a public defender is to defend someone charged with a crime.** As such, neither is enacting, amending, or repealing laws in their roles as educators or public defenders."
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> *See* AA2:000403-000404 (emphasis added).

The language of the constitutional provision, "powers appertaining to", should not simply be ignored.

Appellant relies heavily on this Court's 1967 decision in *Galloway*. *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). However, that case is not instructive on the issue presented. The district court's analysis of *Galloway* in the Order is apt.

> [T]his Court recognizes the importance of the separation-of-powers clause raised by the *Galloway* and *Whitehead*[14] Courts; however, it distinguishes *Galloway* as the issue at hand is not whether one branch is being required to perform powers constitutionally granted to another branch and *Whitehead* is dealing with an elected officer of the executive branch encroaching upon the powers of the judicial branch. While these cases provide valuable insight into the importance of the separation-of-powers clause, they do not directly inform the concern of dual employment at issue in this case.
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> *See* Order, AA2:00365.

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[13] *Halverson v. Hardcastle,* 123 Nev. 245, 163 P.3d 428 (2007)

[14] *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 874, 879, 878 P.2d 913 (1994).

Galloway properly recognized the limitation on exercising dual functions. In *Galloway*, the limitation was met – the persons exercising the functions belonging to another department of government (the legislative department) were public officers (of the judicial department). *Galloway*, 83 Nev. at 20. (District court judges are constitutionally established judicial officers, i.e., public officers). Additionally, *Galloway* has no relevance to factual circumstances of what Appellant terms as "dual service." The Court in *Galloway* discussed ministerial functions only because the functions were carried out by persons charged with the exercise powers under the Judicial Department, to wit, constitutionally established judicial (public) officers. Respondent Ohrenschall does not dispute the importance and centrality of separation of powers, the question is where the line is drawn. Asked another way, does a janitor perform "ministerial" duties for the State of Nevada's Executive Branch? Respondent posits the answer to that question is negative.

C. Separation of Powers Applies Only to Public Officers, not Public Employees

Another important distinction addressed in the underlying Motion to Dismiss and the district court's ruling thereon is between public officers versus public employees. In short, Respondent Ohrenschall, as a deputy public defender employed by Clark County, is not a public official and does not exercise any sovereign powers of the state's executive branch.

Appellant takes the position that such distinction is not explicitly contained in the provision and it would be improper to read such a distinction into the language. Appellant also cites to *Heller*, for the proposition that the option to seek declaratory relief against "other executive branch employees" actually decides the entire issue presented in this appeal. *See* Opening Brief, p. 12,15. Both positions should be rejected.

Even assuming the Separation of Powers doctrine applies to local governments, only public officers, as opposed to public employees, are potentially implicated under the separation of powers provision.[15] As explained below, and as adopted by the district court, public officers are the only persons who exercise the sovereign functions of state government and, therefore, only public officers can be in violation of Article 3 and the separation of powers clause. See NEV. CONST. art. III, §1, cl. 1; *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder City*, 94 Nev. 735, 737, 587 P.2d 39,41. The statutorily controlled powers of a deputy public defender, like Respondent Ohrenschall, must be considered.

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

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

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

> 5. The office of public defender when created must be filled by appointment by the board of county commissioners.[16]
>
> 6. The public defender serves at the pleasure of the board of county commissioners.

Respondent Ohrenschall is not the appointed Public Defender for Clark County. Rather, the Clark County Public Defender is currently Darin Imlay, Esq.[17] Respondent Ohrenschall is merely a deputy public defender,[18] with less authority than his immediate supervisors, and significantly less authority than his ultimate

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

[17] https://www.clarkcountynv.gov/government/departments/public_defender/firm_profile.php The Court can take judicial notice of the current Clark County Public Defender as posted on Clark County's Website. See NEV. REV. STAT. § 47.130; NEV. REV. STAT. § 47.150; FTC v. AMG Servs., No. 2:12–cv–00536–GMN–VCF, 2014 U.S. Dist. LEXIS 10490, *45-46, n. 5 (D. Nev. Jan. 28, 2014) (allowing judicial notice of information posted on government websites as it can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-999 (9th Cir. 2010) ("It is appropriate to take judicial notice of this information, as it was made publicly available by government entities.").

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

boss, Mr. Imlay.[19] This is not merely a matter of hierarchy, but the structure pursuant to Nevada statute.

> NRS 260.040 Compensation; deputies and employees; private practice of law limited; expenses; deputies in certain counties governed by merit personnel system.
>
> 2. The public defender may appoint **as many deputies or assistant attorneys**, clerks, investigators, stenographers and other employees **as the public defender considers necessary to enable him or her to carry out his or her responsibilities**, with the approval of the board of county commissioners. An assistant attorney must be a qualified attorney licensed to practice in this State and may be placed on a part-time or full-time basis. **The appointment of a deputy**, assistant attorney or other employee pursuant to this subsection **must not be construed to confer upon that deputy, assistant attorney or other employee policymaking authority for the office of the public defender or the county or counties by which the deputy, assistant attorney or other employee is employed**.
> (emphasis added).

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

So, even assuming the separation of powers doctrine applies to local governments, it is clear that deputy public defenders such as Respondent

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

Ohrenschall are statutorily distinct from the appointed Public Defender himself, as Respondent Ohrenschall has no policymaking authority as a mere unelected public employee. This is important in connection with the interpreting case law, analyzed below.

2. Public Employees and Public Officials are Different Under Nevada Law; Respondent Ohrenschall is a Public Employee, has no Sovereign Duties, and is therefore not Subject to the Separation of Powers Doctrine

As a deputy public defender, Respondent Ohrenschall is an employee of Clark County and is subject to termination by the public defender. He is not elected. Rather, his job description and duties are entirely within the authority and control of the public defender. In short, Respondent Ohrenschall is a public employee; an employee of local government, and not a public officer. Nevada law recognizes this distinction.

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

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

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

This Court notes, "All public offices must originally have been created by the sovereign as the foundation of government." *Murray* at 121, citation omitted. It goes on to state,

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

Here, with respect to the position of the deputy public defender, there is no investment of sovereign function of government, as explicitly stated in NRS 260.040. Further, while the position itself is contemplated by statute under Title 20 of the Nevada Revised Statutes, entitled, "Counties and Townships: Formation, Government and Officers, the duties and "warrant to exercise powers", in the case of Respondent Ohrenschall, his duties are entirely within the authority and control of the public defender. Said another way, his day-to-day duties are determined by what his boss, Public Defender Imlay, who tells him his duties. Further, the fact that his employment is at the will or pleasure of another cannot be disputed.

> The fact that a public employment is held at the will or pleasure of another, as a **deputy** or servant, who holds at the will of his principal, **is held to distinguish a mere employment from a public office; for**

> **in such cases no part of the state's sovereignty is delegated to such employees.'**
> *Murray* at 121-22 (emphasis added, citations omitted).

The situation in *Murray* with regard to the defendant's subordinate position is analogous to Respondent Ohrenschall's subordinate position.

> Nowhere are duties imposed or authority granted save to the department and to its administrator. It appears clear that the position of director was created not by the act but by the administrator **and may as easily by him be discontinued or destroyed**. It appears clear that the duties of the position are fixed not by law but by the administrator and may as easily by him be modified from time to time. No tenure attaches to the position save as may be fixed from time to time by the administrator. The director, then, is wholly subordinate and responsible to the administrator. It cannot, then, be said that that position has been created by law; or that the duties which attach to it have been prescribed by law; or that, subject only to the provisions of law the holder of such position is independent in his exercise of such duties. **It cannot, then, be said that he has been invested with any portion of the sovereign functions of the government.**
> *Id.* at 123 (emphasis added).

As noted in NRS 260.040(2), the decision to appoint deputy public defender(s), along with "clerks, investigators, stenographers and other employees", and how many of each, is based on the whim and needs of the public defender. By this logic and reasoning, this Court has made clear that a deputy public defender is not a public officer and is therefore not subject to the separation of powers doctrine.[20] *See also,*

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[20] Notably, this decision was reached at the motion to dismiss stage. The Court commented on the lack of factual evidence regarding the defendant's duties but noted that such inquiry was not necessary. "The state asserts that since the record now before this court does not contain any showing as to the nature of the duties which now attach to the position, we cannot at this stage of the proceedings determine that the position is not an office. For the reasons discussed, however, **it is apparent that the specific character of those duties cannot affect our**

Univ. & Cmty. Coll. Sys. v. DR Ptnrs, 117 Nev. 195, 200, 18 P.3d 1042, 1045-46 (2001). Under this criteria, separate and apart from the local government distinction, the claims against Respondent Ohrenschall fail.

In recognizing and applying this distinction, the district court went on to analyze similar cases in New Mexico and Montana.[21] The district court's conclusion on this point is correct.

> The separation-of-powers clause in the Nevada Constitution uses the same language as New Mexico's as it refers to one branch being prohibited from the "exercise of powers" of another branch. **Public school teachers, public defenders, and professors at an NSHE institutions are not invested with sovereign powers and do not establish policy for their employers.**
> AA2:000405 (emphasis added).

The district court goes on to analyze *Murray*, and its analysis and application of that case is on point. *See* Order, AA2:000406-000407.

D. The District Court's Application of the Common Law Doctrine of Incompatible Offices Reaches the Correct Result

While the doctrine of incompatible offices was not cited or applied in the underlying briefing, the district court adopted the following three part test:

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decision. Regardless of the extent of responsibility which at any given time might be delegated by the administrator to the defendant, the functions of sovereignty which are involved continue to repose in the administrator to whom they have been assigned by sovereign act." *Id.* at 123-124 (emphasis added). The same applies here.

[21] AA2:000404-000406, analyzing *State ex rel. Stratton v. Roswell Indep. Sch.*, 1991-NMCA-013, 111 N.M. 495, 806 P.2d 1085, *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 P. 411 (1927), *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 292, 58 P.2d 1197, 1200 (1936).

> (1) no officer or employee of a state or local government may also serve as a state legislator if the roles are not compatible and it is the purview of the court to determine compatibility;
> (2) those employed by local government entities are not a part of the state executive branch and therefore may serve in the legislative branch providing the roles are compatible; and
> (3) public officers of the state executive branch may not serve in the legislature; however, those who are public employees may, providing the roles are compatible.
> *See* Order, AA2:000412.

It concludes,

> this Court finds that there is no common law incompatibility issue for an individual to be employed as a county public school teacher, a public defender, or a professor at a state college and simultaneously serve as a state legislator. ...[T]he Court finds that the integrity of the legislative and executive branches is not threatened by a public school teacher, a public defender, or a professor simultaneously serving as a legislator. And, a public school teacher, a public defender, nor a professor have the discretionary power to review the actions of a legislator and a legislator does not have the discretionary power to review the actions taken by an educator or a public defender. Therefore, the dual employment of Defendants Miller, Torres, Ohrenschall, and Neal are found not to be incompatible under the common law doctrine.
> *Id.* at AA2:000362-000363.

Whether or not this Court adopts the three-part test applied by the district court, the application of the local government and public officer distinctions are appropriate, supported by Nevada law, and reach the same, correct result.

E. The Issue of "Party Presentation" Is Inapplicable Here

Appellant argues that because none of the parties briefed the common law doctrine of incompatible offices, the Court violated the doctrine of party presentation. Appellant misapplies the doctrine, which is irrelevant and inapplicable

here. In *Smith*, the US Supreme Court noted that the Ninth Circuit, "named three amici and invited them to brief and argue **issues framed by the panel, including a question never raised** by Sineneng-Smith: Whether the statute is overbroad under the First Amendment." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1576 (2020)(emphasis added). That issue was not presented to the District Court or the Ninth Circuit by the parties. In reversing, the Supreme Court states, "A court is not hidebound by counsel's precise arguments, but the Ninth Circuit's radical transformation of this case goes well beyond the pale." *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). The case does not stand for the proposition that a court cannot rule upon a legal issue central to the case and framed by both parties in a way that uses sources, reasoning and caselaw that does not appear in the parties' briefs. The appellate court in *Smith* raised a completely new issue, not raised by the parties, and utilized amicus briefs to reach its conclusion based on the newly framed issue. That is not what occurred here.

Greenlaw[22], also cited by Appellant and quoted without analysis by this Court in *State v. Eighth Judicial District Court*, 521 P. 3d 1215, Nev. Adv. Op. 90 (Nev. 2022), simply stands for the proposition that the issues presented to the court for decision should be framed by the parties, not the court. Here, the Court granted the

[22] *Greenlaw v. U.S.*, 554 U.S. 237 (2008)

relief sought by Respondent Ohrenschall (dismissal of claims against him) and squarely addressed the issue presented by both parties: application of the Nev. Const. Art. 3, §1 to the various respondents' particular employment.

While the test fashioned (and application of the test) was not as advocated by any of the parties, Appellant cites no law for the proposition that a district court is unable to look to the common law and other jurisdictions to rule on a matter that, as Appellant suggests are, "questions of first impression". Indeed, the district adopted and applied numerous cases and arguments advanced by Respondent Ohrenschall, as noted above. The district court's decision may be affirmed on any ground supported by the record, even if not relied upon by the district court. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 598-99, 245 P.3d 1198, 1202 (2010). Thus, the decision may be affirmed, "if the district court reached the correct result, even if for the wrong reason." *Id.* at 599, 245 P.3d at 1202, *Matter of Guardianship of Jones*, 531 P.3d 1236, 1248 (Nevada 2023). Reversal and remand on the basis of the party presentation argument should be rejected.

F. Development of the Factual Record is Not Necessary

Respondent does not disagree with Appellant's position that the issues presented are solely legal. However, Appellant's basis for this statement is incorrect. Appellant states,

> [T]he controversy before this Court is solely a legal one: whether the Nevada Constitution prohibits a person charged with the exercise of

> **powers** belonging to the legislative branch from exercising **any functions** appertaining to the executive branch. There is no factual dispute that Respondents are such persons, therefore referral back to the district court for further factual development is unnecessary because only issues of law exist for the Court to answer.
> *See* Opening Brief, p. 1 (emphasis original).

This statement is incorrect as Respondent Ohrenschall disputes that, in his job as a deputy public defender, he exercises any functions appertaining to the executive branch of the State of Nevada. Respondent's position is that he does not exercise any functions appertaining to the executive branch, and that such determination, at least in the context of a non-public officer and an employee of a political subdivision of the State of Nevada, can be decided as a matter of law. Only in the event the "bright line" distinctions argued by Respondent, or as found in the Order, are not adopted by this Court, and a more detailed factual record regarding the contours of Respondent Ohrenschall's (or any Respondent's) job duties is needed to apply any test or criteria adopted by this Court, would remand for a more developed factual record be appropriate.

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III. CONCLUSION

Based on the foregoing, the district court should be affirmed.

DATED this 15th day of August, 2023.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. I further certify that this Opening Brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 8,049 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of August, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of WILEY PETERSEN, and that on the 15th day of August, 2023, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of **RESPONDENT JAMES OHRENSCHALL'S ANSWERING BRIEF**, by means of the Nevada Supreme Court's electronic filing system, directed to:

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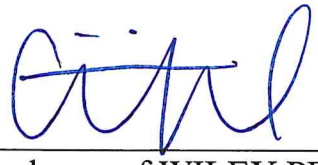

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