

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic
nonprofit corporation,

Appellant,

v.

NICOLE J. CANNIZZARO, an
individual engaging in dual
employment with the Nevada State
Senate and Clark County District
Attorney; JASON FRIERSON, an
individual engaging in dual
employment with the Nevada State
Assembly and Clark County Public
Defender; 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
Senate and Nevada State College;
JAMES OHRENSCHALL, an
individual engaging in dual
employment with the Nevada State

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Case No. 82341

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

**Respondents Dina Neal and Jill
Tolles' Answering Brief**

Senate and Clark County Public Defender; MELANIE SCHEIBLE, an individual engaging in dual employment with the Nevada State Senate and Clark County District Attorney; JILL TOLLES, an individual engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno; SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; and THE LEGISLATURE OF THE STATE OF NEVADA,

Respondents.

Respondents Dina Neal and Jill Tolles'
Answering Brief

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NRAP 26.1 DISCLOSURE STATEMENT

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

1. Respondent Jill Tolles is an individual and is represented in this matter by Berna Rhodes-Ford, General Counsel for Nevada State College and by Gary Cardinal, Assistant General Counsel for the University of Nevada, Reno.

2. Respondent Dina Neal is an individual and is represented in this matter by Berna Rhodes-Ford, General Counsel for Nevada State College and by Gary Cardinal, Assistant General Counsel for the University of Nevada, Reno.

Dated this 22nd day of July, 2021.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under NRAP 3A(b)(1), as this is an appeal from a final judgment.

ROUTING STATEMENT

NRAP 17(b)(12) requires the Court of Appeals to decide this matter because the appeal challenges the denial of NPRI's request for injunctive relief, which the District Court dismissed on the basis that NPRI lacked standing. The two incidental issues to be considered, the Legislature's intervention and the denial of a motion to disqualify the attorneys representing Respondents Dina Neal and Jill Tolles (hereafter referred to as "NSHE Defendants"), are routine, non-dispositive matters that do not require retention by the Supreme Court.

NPRI's reliance on NRAP 17(a)(11) and (12) is improper because the merits of the dual employment issue are not properly before the Court.

ISSUES PRESENTED FOR REVIEW

The issues presented for review that pertain to NSHE Defendants are as follows:

1. Whether the District Court properly determined that NPRI failed to meet the public-interest exception to Nevada's standing doctrine in *Schwartz v. Lopez*, 132 Nev. 732, 743, 382P.3d 886, 894 (2016) such that dismissal of the Amended Complaint was required;

2. Whether the District Court properly granted the Nevada Legislature's Motion to Intervene. While this issue does not affect NSHE Defendants, NSHE Defendants support the Legislature's position and submit that intervention is appropriate.

3. Whether the District Court abused its discretion in rejecting NPRI's motion to disqualify the official attorneys defending NSHE Defendants.

4. Respondents Neal and Tolles oppose NPRI's suggestion that this Court should consider the merits of NPRI's dual employment argument, as that issue is not properly before the Court. The case was dismissed below on the basis that NPRI lacks standing. The merits of the dual-employment question were not considered below and there is no appealable final judgment on the merits. Accordingly, there is no provision in NRAP 3A that gives this Court jurisdiction to hear and decide the

merits of the dual-employment issue as identified in NPRI's statement of issues presented for review.

I. STATEMENT OF THE CASE

NPRI initiated this litigation by filing a Complaint for Declaratory and Injunctive Relief on July 9, 2020. (1 JA pp. JA000001-JA000006.) NPRI filed an Amended Complaint for Declaratory and Injunctive Relief on July 28, 2020 naming as defendants thirteen individuals, alleging that each defendant served in the Nevada Legislature and also in an executive branch position. The Amended Complaint sought to have this “dual employment” declared unconstitutional under Article 3, § 1 of the Nevada Constitution, and it requested an injunction prohibiting dual employment. The Amended Complaint originally named five defendants who were alleged to be employed by one of the institutions that comprise the Nevada System of Higher Education (“NSHE”): Osvaldo Fumo (“Fumo”), Heidi Seevers Gansert (“Gansert”), Dina Neal (“Neal”), Teresa Benitez-Thompson (“Thompson”) and Jill Tolles (“Tolles”), collectively, the “NSHE Defendants”. (1 JA pp. JA000007-JA000013.) However, due to election results and resignations, of the five who were originally named as NSHE Defendants, only Dina Neal and Jill Tolles remain parties to this litigation. See Notice of Voluntary Dismissal of Defendant Teresa Benitez-Thompson (1 JA pp. JA000026-JA000028); Notice of Voluntary Dismissal of Defendants Osvaldo Fumo and Jill Tolles (4 JA pp. JA000477-000479); Stipulation and Order to Vacate the Voluntary Dismissal of Defendant Jill Tolles Only and That the Parties Shall Be Bound By the Court’s Prior Rulings (6 JA pp. JA000681-

JA0000690. Respondent Heidi Gansert was dismissed by order of this Court dated March 10, 2021.

A. NPRI Lacks Standing

Respondent Brittney Miller (“Miller”) was the first defendant to file her motion to dismiss on September 18, 2021, alleging lack of jurisdiction and failure to state a claim based NPRI’s lack of standing. (1 JA pp. JA000029-JA000054.) The NSHE defendants who had appeared as of that date filed a joinder in Miller’s motion. (1 JA pp. JA000058-JA000061.) Other defendants who had appeared also joined in Miller’s motion. After briefing concluded, the District Court granted Miller’s motion and all joinders thereto in an Omnibus Order dated December 8, 2020, finding that NPRI had no standing to bring suit. (4 JA pp. JA000539-JA000556.)

In addition to joining in Miller’s motion, the NSHE defendants filed a separate motion to dismiss under NRCP 12(b)(5) and 12(b)(6). (1 JA pp. JA000164-JA000198.) Other defendants also filed separate motions to dismiss, and all defendants filed joinders to the other defendants’ motions. Because Miller’s motion to dismiss and the joinders were granted in the District Court’s Omnibus Order dated December 8, 2020, (4 JA pp. JA000539-JA000556.) the motions to dismiss based on other grounds were rendered moot.

In response to the Omnibus Order, NPRI filed a motion for clarification and also requested NRCP 54(b) certification, because not all defendants had appeared

and the Omnibus Order was not a final judgment. (4 JA pp. JA000485-JA000495.) The defendants who had appeared filed a joint opposition to NPRI's motion for clarification and included a countermotion to dismiss all remaining defendants based on NPRI's lack of standing. (4 JA pp. JA000501-510.) On December 28, 2020, the District Court issued its order denying NPRI's motion for clarification and granting the joint countermotion to dismiss all remaining defendants based on NPRI's lack of standing. In this order, the District Court entered final judgment in favor of all defendants based on lack of standing. (4 JA pp. JA000691-719.)

B. The Legislature Properly Intervened

On September 30, 2020, the Nevada Legislature filed its Motion to Intervene as Defendant. (1 JA PP. JA000091-JA000163.) NPRI opposed the motion, and after briefing concluded, on December 8, 2020, the District Court granted the Legislature's motion. (4 JA pp. JA000511-JA000538.)

C. Representation of Respondents Tolles and Neal by NSHE's Official Attorneys is Mandated by NRS 41.0339(1)

On September 25, 2020, NPRI moved to disqualify the official attorneys from representing the defendants who were NSHE employees. (1 JA pp. JA000062-JA000070.) NSHE Defendants opposed the motion, and at the conclusion of briefing, the district court denied NPRI's motion, allowing the official attorneys to continue defending the NSHE employees. (5 JA pp. JA000609-JA000630.)

D. The Merits of NPRI's Dual Employment Claim Are Not Before the Court

Although in its Statement of the Case NPRI attempts to induce this Court into addressing the merits of the dual-employment issue, it is not properly before the Court, and only the issues of standing, intervention and disqualification are properly presented for consideration. As the district court properly concluded, "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." (4 JA p. 000540). Accordingly, the lower court never reached the merits of the dual employment claim. (4 JA pp. JA000539-JA000556; 7 JA pp. JA000691-JA000719).

II. STATEMENT OF FACTS

NPRI describes itself in its Amended Complaint as a "public interest nonprofit, nonpartisan corporation organized under the laws of the State of Nevada whose primary missions are to conduct public policy research and advocate for policies that promote transparency, accountability, and efficiency in government." (1 JA p. JA000009, ¶ 6.) However, the Amended Complaint does not set forth any allegations to demonstrate particularized harm or an issue of public importance, namely challenging a legislative expenditure or appropriation. Simply put, NPRI does not allege any facts that would give it standing to bring suit.

The caption of the Amended Complaint identifies each and every defendant as “an individual engaging in dual employment.” (1 JA pp. JA00007-JA000008.) With regard to the NSHE Defendants, the Amended Complaint alleges that Jill Tolles is engaging in dual employment with the Nevada State Assembly and University of Nevada, Reno as an Adjunct Instructor and that Dina Neal is engaging in dual employment with the Nevada State Assembly and Nevada State College as an Adjunct Instructor. (1 JA p. JA000011, ¶ 18; 1 JA, p. JA000010, ¶ 14.) In fact, “NPRI files this Complaint for Declaratory and Injunctive Relief to address the ongoing constitutional violations by Defendants, and each of them, for engaging in dual employment by simultaneously holding elected offices in the Nevada State Legislature and paid positions with Nevada State or local governments.” (1 JA, p. JA000008, ¶ 1.) Indeed, the word “employee” or “employment” is stated eighteen times in the caption and body of the Amended Complaint. (1 JA, pp. JA000007-JA000013.) It is clear from the Amended Complaint that the NSHE Defendants are being sued because they are employed at NSHE educational institutions.

Noticeably absent from the Amended Complaint are any allegations regarding the duties of the employees. Further, the Amended Complaint does not allege that any of the positions held by NSHE Defendants are created by the Nevada Constitution or by statute, or that adjunct instructor positions are “public officer”

positions. There are no facts alleging that the NSHE Defendants are college or university presidents or members of the NSHE Board of Regents. These “missing” allegations are fatal to NPRI’s claim.

III. SUMMARY OF ARGUMENT

A. NPRI Lacks Standing

Pursuant to NRAP 28(i), NSHE Defendants adopt by reference and incorporate herein Sections II (B) and II (C) of Respondents Brittney Miller, Selena Torres, Jason Frierson, Nicole Cannizzaro and Melanie Scheible’s Joint Answering Brief as if set forth in full at this point. NPRI has failed to meet any of the prongs necessary to invoke the *Schwartz* exception to the requirement that a party must demonstrate injury to establish standing.

B. The Nevada Legislature Properly Intervened

This issue is not briefed here, as it does not affect NSHE Defendants. However, NSHE Defendants support the Legislature’s intervention and submit that permitting the intervention was proper.

C. Representation of NSHE Defendants by NSHE’s Official Attorneys is Mandated by NRS 41.0339(1)

But for their employment at NSHE institutions, Neal and Tolles would not have been named as defendants in this litigation. It is only by the exercise of their official NSHE employment duties that Neal and Tolles are allegedly subject to the

arguments NPRI advances on the dual employment issue. Because Neal and Tolles are employees and are sued as a result of the exercise of their official duties, NRS 41.0338 and NRS 41.0339(1) require the official attorneys to defend them. The district court properly denied NPRI's motion to disqualify the official attorneys.

D. The Merits of NPRI's Dual Employment Issue Are Not Before the Court.

NSHE Defendants oppose NPRI's efforts to bring the underlying dual employment claim before this Court for a decision on the merits. The District Court granted a motion to dismiss NPRI's claim for lack of standing and never considered the merits of the dual employment issue. There was no discovery conducted, and the dual employment issue was never fully briefed. No record was created in the court below, and the final judgment did not address the merits. There is no appealable final judgment on the merits, and that issue cannot be treated in this appeal, as nothing in NRAP 3A provides this Court with authority to review issues that are outside the scope of the final judgment. This Court's jurisdiction is limited by the provisions of NRAP 3A, and jurisdictional rules must be strictly construed. *See generally Rust v. Clark County School District*, 103 Nev 686, 688, 747 P.2d 1380, 1382 (1987).

The Nevada Constitution does not authorize this Court to issue advisory opinions, and NPRI's invitation to consider the merits of the dual employment issue must be rejected to the extent NPRI is seeking an advisory opinion. NEV. CONST.

art. 6, §4; *City of North Las Vegas v. Cluff*, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969); *Capanna v. Orth*, 134 Nev. 888, 896, 432 P.3d 726, 735 (2018).

IV. ARGUMENT

A. Standard of Review

Standing is a question of law to be reviewed *de novo*. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011).

Interpretations of statute are reviewed *de novo*. *New Horizon Kids Quest III, Inc. v. Eighth Judicial District Court*, 133 Nev. 86, 89, 392 P.3d 166, 168 (2017) (citation omitted); *see also Cannizzaro v. First Judicial District Court*, 136 Nev. 315, 466 P.3d 529 (2020). When a statute is clear on its face, the Court will not look beyond a statute’s plain language. *New Horizon*, 392 P.3d at 89. To the extent this Court determines that the district court’s decision on the Motion to Disqualify was based on a factual finding, the district court’s decision should not be overturned absent abuse of its broad discretion. *New Horizon*, 133 Nev. at 89, 392 P.3d at 168 (2017) (acknowledging deference to district court’s familiarity with the facts of the case). “A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” *State v. Eighth Judicial Dist. Court. (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011).

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B. NPRI Lacks Standing

Pursuant to NRAP 28(i), NSHE Defendants adopt by reference and incorporate herein Section II (B) and II (C) of Respondents Brittney Miller and Selena Torres' Answering Brief as if set forth in full at this point. NSHE Defendants concur with the arguments set forth therein and join in the argument that NPRI lacks standing such that dismissal of the Amended Complaint was proper.

C. Intervention by the Nevada Legislature

This issue does not involve NSHE Defendants so that no argument is submitted. NSHE Defendants support the Legislature's position and submit that intervention is appropriate.

D. Representation of Respondents Tolles and Neal by NSHE's Official

Attorneys is Mandated by NRS 41.0339(1).

At the outset, it is important that note that NPRI's claim that "the district court failed to analyze" *Cannizzaro* is without merit. NPRI argued *Cannizzaro* in its motion to disqualify. 1 JA p. JA000068. After the motion was fully briefed, the district court "decided [the matter] on the briefs and pleadings", found NPRI's arguments unpersuasive and ruled to the contrary. 4 JA p. 000480

1. *Cannizzaro* does not render the district court's decision erroneous

NPRI's reliance on *Cannizzaro* is misplaced and its arguments unsound. *Cannizzaro* is a conflict of interest case. In such cases, only a current or former

client has standing to bring a motion to disqualify counsel. In rendering the *Cannizzaro* decision, this Court was faced with different factual and legal scenarios. The only similarity between *Cannizzaro* and this case is that neither of the entities bringing the motion to disqualify had standing to do so.

Here, there is a statute clearly on point. That statute makes clear that any employee who is sued has a right to representation by the official attorney. NEV. REV. STAT. § 41.0338. Additionally, the statute has language that both requires and permissively allows representation by the official attorney. NEV. REV. STAT. § 41.0339.

Were the Court to determine that *Cannizzaro* is somehow applicable, nothing therein makes the district court's decision erroneous. Although *Cannizzaro* determined that certain legislators lacked standing to bring a motion to disqualify, it also determined that certain other legislators were entitled to representation by counsel "solely in their official roles as legislators." *Cannizzaro*, 466 P.3d at 533. That is precisely the argument NSHE Defendants are making. They are entitled to representation by the official attorneys solely because of their roles as employees of NSHE institutions.

2. The statutory definition of “official attorney” requires that the district court decision be affirmed

As it did at the district court, NPRI continues to argue that “the statutory definition of an ‘official attorney’ who may provide a defense to a State employee **limits that representation** to cases where the employee ‘is named as a defendant solely because of an alleged act or omission relating to the public duties or employment’...” (Compare Appellant’s Opening Brief p. 25 to Motion to Disqualify 1 JA, p. JA00068 (emphasis added).) The district court did not accept this argument, and NSHE Defendants urge this Court to uphold the district court’s decision.

Throughout all stages of the litigation, NPRI has continually omitted the portion of the definition of “official attorney” that relates simply to an action involving an employee. It reads:

NRS 41.0338 “Official attorney” defined. **“Official attorney” means:**

...

2. The chief legal officer or other authorized legal representative of a political subdivision, in an action which involves:

(a) A present or former local judicial officer of that political subdivision, **a present or former officer or employee of that political subdivision** or a present or former member of a local board or commission; **or**

(b) A person who is named as a defendant in the action solely because of an alleged act or omission relating to the public duties or employment of a person listed in paragraph (a).

NEV. REV. STAT. § 41.0338 (emphasis added).

By the plain language of the statute, the official attorney designation is established by the mere fact that the NSHE Defendants are present employees who are involved in an action. Therefore, while NPRI's recitation of the statutory definition is correct, it is only partially correct. When reviewing the statute in its entirety, it is clear that NSHE Defendants' current attorneys are well within statutory parameters to act as official attorneys for the defendants and the court need not look beyond the plain language of the statute to conclude that NPRI's claims to the contrary are without merit.

3. The statute is clear on its face and district court's broad discretion should not be overturned absent clearly erroneous interpretation or application of the law

Whether reviewing under a *de novo* or abuse of discretion standard, the district court's decision should be upheld. First, the statute is clear on its face and the court should not and did not, in this instance, look beyond its plain language. *New Horizon*, 392 P.3d at 89. Second, a district court only abuses its discretion when it sets forth "a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State*, 127 Nev. at 931-32. By looking at the plain words of the statute as well as the arguments and case law presented by the parties, the district court did not err.

a. The district court ruled appropriately when reviewing the statutory definition of “official attorney”

As set forth above, the statutory definition of “official attorney” clearly provides for representation of current employees who are involved in an action. NEV. REV. STAT. § 41.0338(2)(a).

b. The district court properly determined that employment is sufficient to trigger “official attorney” representation

NPRI seems to argue that a state employee can only be represented by official counsel for matters involving the performance of duties. The statute, however, expressly allows for representation for matters related to the public duties or employment. The pertinent statutory language follows:

The official attorney shall provide for the defense, including the defense of cross-claims and counterclaims, or any present or former local judicial officer, state judicial officer, officer or employee of the State or a political subdivision, immune contractor or State Legislator in any civil action brought against that person based on any alleged act or omission relating to the person’s public duties **or employment**, or any other person who is named as a defendant in a civil action solely because of an alleged act or omission related to the public duties **or employment** of a local judicial officer, state judicial officer or employee of the State or a political subdivision, immune contractor or State Legislator ...

NEV. REV. STAT. § 41.0339(1) (emphasis added).

The plain reading of the statute requires that official counsel represent its employees if they are sued because of their employment. Any other reading would

nullify the words “or employment” in the statute. The fact that Respondents Neal and Tolles are employed by NSHE is the basis for NPRI’s lawsuit. (Motion to Disqualify 1 JA, p. JA00068.) (“the instant litigation seeks only to challenge the fact of Defendants’ State employment...”) Employment with NSHE is the very essence of NPRI’s argument. In fact, NPRI references the fact of employment or dual employment repeatedly both in the Amended Complaint and the Motion to Disqualify. The fact of employment is as pure an act related to employment as could be. Because being employed is related to employment, the NSHE Defendants are entitled to representation under Nevada law, and NPRI’s Motion to Disqualify should be denied.

c. “Official attorneys” are not prohibited by statute from representing NSHE Defendants

NRS 41.0339 sets forth the criteria when official counsel MUST represent its employees. NEV. REV. STAT. § 41.0339. It does not address circumstances when official counsel MAY represent its employees. The United States District Court for the District of Nevada has clarified that NRS 41.0339 “does not purport to limit the conditions under which [the official attorney] may provide for such individuals’ defense.” *Kenmore v. Toco*, No. 2:06CV00673JCM-PAL, 2007 WL 556923, at *5 (D. Nev. Feb. 13, 2007).

As the statute indicates and as *Kenmore* confirms, NRS 41.0339 addresses only required representation, not permissive representation. Therefore, even assuming current counsel is not required to represent NSHE Defendants, it is permitted to do so. As such, NPRI's Motion to Disqualify was properly denied.

E. The Merits of NPRI's Underlying Claim Are Not Before the Court

NPRI presents this matter under the authority of NRAP 3A(b)(1), as an appeal from a final judgment. The judgment NPRI is appealing encompasses just three issues for review by this Court: NPRI's lack of standing, intervention by the Legislature, and the Official Attorneys' representation of NSHE Defendants. The merits of the dual employment issue raised by NPRI's Amended Complaint were never reached because the court below properly found that NPRI lacked standing to bring suit. The final judgment does not include a decision on the merits of the dual employment issue, and therefore, that issue is not before this Court. Contrary to its own Jurisdictional Statement, and in tacit recognition of the jurisdictional void caused by its lack of standing, NPRI now attempts to circumvent NRAP 3A(b)(1), with arguments it hopes will induce this Court to ignore the lack of standing and render a decision on an issue that was never litigated below and which the district court never considered. This Court's jurisdiction is limited to consideration of appeals authorized by statute or court rule. *Brown v. MCH Stagecoach, LLC.*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013), citing *Valley Bank of Nevada v. Ginsburg*,

110 Nev. 440, 444, 874 P.2d 729, 732 (1994) and *Taylor Construction Company v. Hilton Hotels Corporation*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984). “Jurisdictional rules go to the very power of this court to act. They must, accordingly, be clear and absolute in order to give all fair notice of what is required to bring a matter properly before this court.” *Rust*, 103 Nev at 688. Nothing in NRAP 3A permits consideration of the underlying claim in these circumstances. Accordingly, this Court should reject NPRI’s invitation to ignore the jurisdictional deficiencies that constrain the Court from considering the merits of the dual employment issue.

To the extent NPRI seeks an advisory opinion from this Court, such a request must also be rejected. The Nevada Constitution does not authorize the Nevada Supreme Court to issue advisory opinions. NEV. CONST. art. 6, §4; *City of North Las Vegas v. Cluff*, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969). There is no constitutional authority to render an advisory opinion, particularly where standing is lacking. *Capanna v. Orth*, 134 Nev. 888, 896, 432 P.3d 726, 735 (2018).

NPRI attempts to legitimize its request for this Court to address the merits of the dual-employment issue by misapplying the holding in *Valdez-Jimenez v. Eighth Judicial District Court*, 136 Nev 155, 430 P.3d 976 (2020), which dealt with the “capable-of-repetition-yet-evading-review” exception to the mootness doctrine. However, *Valdez-Jimenez* did not extend that mootness exception to cases involving

lack of standing, and it does not constitute authority for this Court to address the merits of NPRI's underlying claim. Moreover, *Valdez-Jimenez* is factually distinct because it involved the issue of bail in the criminal context, typically an issue of very short duration that would otherwise escape review. The dual-employment issue does not suffer from the same time constraints as bail issues, so that extension of the mootness exception to the present standing case would be improper for that reason as well.

NPRI also cites *Archon Corporation v. the Eighth Judicial District Court*, 133 Nev. 816, 407 P.3d 702 (2017) for the proposition that treatment of the merits of the underlying claim would be appropriate here. An initial distinction with NPRI's position is that *Archon* was before the Court on a writ of mandamus, and not an appeal.

Next, NPRI fails to note that the *Archon* decision rejected the request for advisory mandamus, holding that the case was not an extraordinary one for which extraordinary relief should issue. *Id.* at 825. Moreover, NPRI fails to set forth any of the grounds recognized by *Archon* as a basis to justify what *Archon* described as "an extraordinary remedy reserved for extraordinary cases." *Id.* at 819 (internal citations omitted). The suggestion that *Archon* is authority for this Court to ignore NPRI's lack of standing and proper appellate procedure should be soundly rejected.

It is important to note that in its urging that this Court take up the dual employment issue, NPRI argues for a universal rule that would apply across the board to all executive branch employees who hold legislative office, without any distinction among the various employment positions and their respective job functions.

In this regard, NPRI misrepresents *Heller v. Legislature of the State of Nevada*, 120 Nev. 456, 93 P.3d 746 (2004), claiming that this Court “has interpreted the reach of separation-of-powers to extend to all public employees”. Appellant’s Opening Brief, p. 10. However, *Heller*’s petition for writ of mandamus failed for lack of standing and multiple other procedural defects, and the Court never reached the merits of the issue of dual employment or the scope of any constitutional limitations. Significantly, NPRI fails to cite a page number in the *Heller* decision to support its exaggerated description of the holding.

Assuming that a plaintiff with legitimate standing were to bring the dual employment issue to this Court through proper procedure, there should first be a full development of the facts through the discovery process and the creation of a complete record below so that an informed decision could be reached as to whether constitutional restrictions, if any, apply equally to groundskeepers and to agency directors. Specifically, as it relates to the NSHE Defendants, neither Neal nor Tolles is a college or university president or board regent. *See Univ. & Cmty. Coll. Sys. v.*

DR Partners, 117 Nev. 195, 200, 18 P.3d 1042, 1046 (2001) (determining that the board of regents are established by the Constitution); *see also* NEV. REV. STAT. § 281A.182 (establishing that university and college presidents are considered public officers). Both the case law and the facts would need to be developed before this Court could rule on such an issue. The lack of a fully developed record is yet another reason this Court should reject NPRI's efforts to bypass proper appellate procedure.

V. CONCLUSION

It is clear from the Amended Complaint that NPRI failed to allege any particularized harm or any basis to apply the public-interest exception to the standing doctrine. Because NPRI cannot establish standing to bring this suit, the district court properly dismissed the case and entered final judgment in favor of all defendants. Dismissal should be upheld.

The remaining issues on appeal are rendered moot by a finding that the district court was correct to determine that NPRI lacks standing. However, the district court ruled correctly on the remaining issues that are before this court.

The Nevada Legislature established proper basis for intervening in this litigation and the district court was correct to permit intervention. The ruling should be upheld.

Because the NSHE Defendants are being sued in their capacity as NSHE employees and for allegedly exercising their executive branch duties simultaneously

with their legislative responsibilities, NRS 41.0339(1) requires NSHE's official attorneys to defend the NSHE Defendants. The district court properly denied NPRI's motion to disqualify the official attorneys, and that decision should be affirmed.

The Court should soundly reject NPRI's efforts to circumvent proper appellate procedure to have the underlying merits ruled upon. They were not briefed below, there is no record on the merits in the district court, there is no final judgment on the merits, and no appellate jurisdiction to treat the merits.

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,028 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 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

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the matter relied on is to be found. 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 22nd day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2021, a true and correct copy of the foregoing **RESPONDENTS DINA NEAL AND JILL TOLLES' ANSWERING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: /s/ Nita Armendariz
Nita Armendariz, an Employee of the Office
of General Counsel, Nevada State College