

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic
nonprofit corporation,

Appellant,

vs.

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 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

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Case No. 82341

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

**RESPONDENT NEVADA
LEGISLATURE'S
ANSWERING BRIEF**

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.

**RESPONDENT NEVADA LEGISLATURE'S
ANSWERING BRIEF**

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ROUTING STATEMENT

Pursuant to NRAP 28(i), the Legislature joins in and adopts by reference all objections to Appellant's routing statement set forth in: (1) the Joint Answering Brief filed by Respondents Brittney Miller, Selena Torres, Jason Frierson, Nicole Cannizzaro and Melanie Scheible; and (2) the Answering Brief filed by Respondents Dina Neal and Jill Tolles.

STATEMENT OF THE ISSUES

The Legislature's answering brief addresses the following issues:

1. Did the district court correctly determine that the Legislature was entitled to intervene as a matter of right under NRCP 24(a) and NRS 218F.720?¹
2. Even if the Legislature was not otherwise entitled to intervene as a matter of right, did the district court properly exercise its discretion and grant the Legislature permissive intervention under NRCP 24(b)?

Pursuant to NRAP 28(i), the Legislature joins in and adopts by reference all arguments regarding Appellant's lack of standing set forth in: (1) the Joint Answering Brief filed by Respondents Brittney Miller, Selena Torres, Jason Frierson, Nicole Cannizzaro and Melanie Scheible; and (2) the Answering Brief filed by Respondents Dina Neal and Jill Tolles.

¹ NRCP 24 and NRS 218F.720 are reproduced in the Addendum to this Answering Brief. All references to NRS 218F.720 are to the most recent version of the statute as amended by section 23 of Assembly Bill No. 2, 2020 Nev. Stat., 32nd Spec. Sess., ch. 2, § 23, at 16 (effective Aug. 2, 2020).

INTRODUCTION

Respondent Legislature of the State of Nevada (“Legislature”), by and through its counsel the Legal Division of the Legislative Counsel Bureau (“LCB Legal”) under NRS 218F.720, hereby files its answering brief in this appeal brought by Appellant Nevada Policy Research Institute (“NPRI”) challenging the district court’s dismissal of NPRI’s separation-of-powers claims against Respondent-Legislators Nicole Cannizzaro, Jason Frierson, Heidi Seevers Gansert, Glen Leavitt, Brittney Miller, Dina Neal, James Ohrenschall, Melanie Scheible, Jill Tolles and Selena Torres.²

The Legislature asks this Court to affirm the district court’s order granting the Legislature’s motion to intervene as a defendant. (*JA4:000511.*)³ In particular, the district court correctly determined that the Legislature was entitled to intervene as a matter of right under NRCP 24(a) and NRS 218F.720. (*JA4:000512-19.*) Additionally, even if the Legislature was not otherwise entitled to intervene as a matter of right, the district court properly exercised its discretion and granted the Legislature permissive intervention under NRCP 24(b). (*JA4:000519-20.*)

² The Legislature requests a technical correction to the Court’s caption for this appeal to reflect that Respondent Jason Frierson is a member of the Nevada State Assembly, not the Nevada State Senate.

³ Citations to “JA” are to volume and page numbers of the joint appendix.

The Legislature also asks this Court to affirm the district court's orders dismissing this action based on NPRI's lack of standing to bring its separation-of-powers claims against the Respondent-Legislators. (*JA4:000539; JA7:000691.*) In particular, the district court correctly determined that NPRI did not allege any personal injury or particularized harm to establish standing to bring its separation-of-powers claims beyond a general interest that is common to all members of the public. (*JA4:000540-42.*) The district court also correctly determined that NPRI did not qualify for the public-importance exception to standing recognized by this Court in Schwartz v. Lopez, 132 Nev. 732, 743 (2016). (*JA4:000540-42.*)

STATEMENT OF THE CASE AND FACTS

On several occasions since 2002, LCB Legal has provided written legal opinions to members of the Legislature concluding that the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution does not prohibit state legislators from holding positions of public employment with the state executive branch or with local governments. (*JA1:000125-27.*) Additionally, in Heller v. Legislature, 120 Nev. 456 (2004), LCB Legal argued on behalf of the Legislature that the separation-of-powers provision does not prohibit state legislators from holding positions of public employment with the state executive branch or with local governments. Finally, on August 8, 2020, LCB Legal again provided a written legal opinion concluding that it remains the opinion of LCB Legal that the

separation-of-powers provision does not prohibit state legislators from holding positions of public employment with the state executive branch or with local governments. (*JA1:000125-57.*)

On July 28, 2020, NPRI filed an amended complaint in this action alleging that the Respondent-Legislators are persons simultaneously holding elected offices in the Legislature and paid positions with the state executive branch or with local governments in violation of the separation-of-powers provision. (*JA1:000007-13.*)

On September 30, 2020, the Legislature filed its motion to intervene as a defendant. (*JA1:000091.*) On December 8, 2020, the district court entered an order granting the Legislature's motion to intervene as a defendant, stating that:

The Court concludes that the Legislature is entitled to intervene as a matter of right. In addition, the Court concludes that, even if the Legislature was only entitled to seek permissive intervention, the Court chooses to exercise its discretion to find that the Legislature is allowed to intervene permissively. Therefore, the Court grants the Legislature's motion to intervene as a defendant.

(*JA4:000512.*)

After NPRI filed its amended complaint, several Respondent-Legislators filed motions to dismiss the amended complaint under NRCP 12. (*JA1:000029; JA1:000164; JA2:000224.*) In deciding the motions to dismiss, the district court did not reach the merits of the separation-of-powers issue because it found that NPRI lacked standing to bring its separation-of-powers claims against the Respondent-Legislators. (*JA4:000540-43; JA7:000697-700.*) As a result, the

district court dismissed this action based on NPRI's lack of standing to bring its separation-of-powers claims. (*JA4:000540-43; JA7:000697-700.*)

ARGUMENT

I. Because NPRI challenges only the district court's determination granting the Legislature permissive intervention and does not challenge the district court's determination granting the Legislature intervention as a matter of right, NPRI has conceded on appeal that the district court correctly granted the Legislature intervention as a matter of right.

In its order granting the Legislature's motion to intervene as a defendant, the district court determined that the Legislature was entitled to intervene as a matter of right under NRCP 24(a) and NRS 218F.720. (*JA4:000512-19.*) Additionally, the district court determined that, even if the Legislature was not otherwise entitled to intervene as a matter of right, the district court would exercise its discretion to allow permissive intervention, and the district court also granted the Legislature permissive intervention under NRCP 24(b). (*JA4:000519-20.*)

In its opening brief, NPRI challenges only the district court's determination granting the Legislature permissive intervention under NRCP 24(b). (*Opening Br. 23-24.*) NPRI does not challenge the district court's determination granting the Legislature intervention as a matter of right. (*Opening Br. 23-24.*)

Under the rules of appellate procedure, "[i]ssues not raised in an appellant's opening brief are deemed waived." Powell v. Liberty Mut. Fire Ins., 127 Nev. 156, 161 n.3 (2011). By failing to challenge the district court's determination granting

the Legislature intervention as a matter of right, NPRI has waived that issue on appeal and has thereby conceded that the district court correctly granted the Legislature intervention as a matter of right. Under such circumstances, NPRI's challenge to the district court's determination granting the Legislature permissive intervention is rendered moot. Therefore, this Court should affirm the district court's order granting the Legislature intervention as a matter of right.

II. The district court correctly determined that the Legislature was entitled to intervene as a matter of right under NRCP 24(a).

Appellate courts review “a district court’s decision allowing intervention as of right pursuant to Rule 24(a) de novo, except for the element of timeliness, which [appellate courts] review for an abuse of discretion.” City of Emeryville v. Robinson, 621 F.3d 1251, 1259 (9th Cir. 2010).⁴

Under NRCP 24(a), a movant qualifies for intervention as of right under two circumstances. Am. Home Assurance Co. v. Dist. Ct., 122 Nev. 1229, 1235 (2006). First, under subsection (a)(1), on timely motion, the court must permit a movant to intervene who “is given an unconditional right to intervene by a state or

⁴ When interpreting the provisions of NRCP 24 regarding intervention, this Court looks to federal cases interpreting the analogous provisions of the Federal Rules of Civil Procedure. Am. Home Assurance Co. v. Dist. Ct., 122 Nev. 1229, 1238-39 (2006); Lawler v. Ginochio, 94 Nev. 623, 626 (1978).

federal statute.” Second, under subsection (a)(2), on timely motion, the court must permit a movant to intervene who:

claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

NRCP 24(a)(2). In this case, the Legislature qualified for intervention as of right under both subsections of NRCP 24(a).

A. The district court correctly determined that the Legislature was entitled to intervene as a matter of right under NRCP 24(a)(1) and NRS 218F.720(2).

To qualify for intervention as of right under NRCP 24(a)(1), the movant must prove that: (1) a statute confers an unconditional right to intervene; and (2) the motion to intervene is timely. See EEOC v. GMRI, Inc., 221 F.R.D. 562, 563 (D. Kan. 2004); EEOC v. Taylor Elec. Co., 155 F.R.D. 180, 182 (N.D. Ill. 1994).

In determining whether a statute confers an unconditional right to intervene for purposes of NRCP 24(a)(1), the issue before the court is one of statutory construction, and the court must limit its inquiry to the terms of the statute and must not consider any of the factors listed in NRCP 24(a)(2). See Bhd. of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 525-31 (1947); Ruiz v. Estelle, 161 F.3d 814, 828 (5th Cir. 1998). Consequently, the movant is not required to prove that existing parties may be inadequately representing its interests or that its interests may be impaired if it is not allowed to intervene. Ruiz, 161 F.3d at 828.

Instead, the movant is required to prove only that it qualifies for intervention under the terms of the statute. Bhd. of R.R. Trainmen, 331 U.S. at 531. Upon meeting the statutory requirements for intervention, “there is no room for the operation of a court’s discretion” and “the right to intervene is absolute and unconditional.” Id.; see also United States v. Presidio Invs., Ltd., 4 F.3d 805, 808 n.1 (9th Cir. 1993).

Under NRS 218F.720, the Legislature may elect to intervene in any action or proceeding when a party alleges that the Legislature, by its actions or failure to act, has violated the Nevada Constitution or when a party contests or raises as an issue the meaning, intent, purpose, scope, applicability or enforceability of any constitutional measure. NRS 218F.720(2). To intervene in the action or proceeding, the Legislature must file “a motion or request to intervene in the form required by the rules, laws or regulations applicable to the action or proceeding.”

NRS 218F.720(2). If the Legislature files such a motion or request to intervene:

the Legislature has an **unconditional right and standing to intervene** in the action or proceeding and to present its arguments, claims, objections or defenses, in law or fact, whether or not the Legislature’s interests are adequately represented by existing parties and whether or not the State or any agency, officer or employee of the State is an existing party.

NRS 218F.720(3) (emphasis added).

In this case, NPRI alleged that “**legislative expenditures or appropriations and taxpayer monies** will be paid to [Respondent-Legislators] in violation of Nevada Const. Art. 3, §1, ¶1, and irrevocable and irreparable harm will occur to

the rights provided under this provision of the Nevada Constitution.” (*JA1:000012* (emphasis added).) Under the Nevada Constitution, the Legislature is given the constitutional power of appropriation, and “[n]o money shall be drawn from the treasury but in consequence of appropriations made by law.” Nev. Const. art. 4, § 19; State ex rel. Davis v. Eggers, 29 Nev. 469, 484-85 (1907) (explaining that “all appropriations must be within the legislative will.”). As a result, “it is well established that the power of controlling the public purse lies within legislative, not executive authority.” State of Nev. Employees Ass’n v. Daines, 108 Nev. 15, 21 (1992).

Thus, by alleging that legislative expenditures or appropriations and taxpayer monies will be paid to the Respondent-Legislators in violation of the separation-of-powers provision, NPRI challenged the Legislature’s constitutional power of appropriation. In other words, NPRI alleged that the Legislature has violated the Nevada Constitution by authorizing legislative expenditures or appropriations and the payment taxpayer monies to the Respondent-Legislators in violation of the separation-of-powers provision. Consequently, under NRS 218F.720(2), the Legislature had an unconditional right and standing to intervene in this action because NPRI “[a]lleges that the Legislature, by its actions or failure to act, has violated . . . the Constitution or laws of this State.” NRS 218F.720(2)(a).

Furthermore, NPRI also alleged that “[t]here is an actual controversy between [NPRI], acting in the public interest, and [Respondent-Legislators] and each of them, as to the **meaning** of the Separation of Powers requirement of Nevada Const. Art. 3, §1, ¶1 and its **application** to [Respondent-Legislators] and their conduct.” (*JAI:000011* (emphasis added).) Based on NPRI’s allegations, the Legislature had an unconditional right and standing to intervene in this action in order to defend against NPRI’s constitutional challenge because it involved allegations concerning the meaning, intent, purpose, scope, applicability and enforceability of the separation-of-powers provision with regard to members of the Legislature who hold positions of public employment with the state executive branch or with local governments. Consequently, under NRS 218F.720(2), the Legislature had an unconditional right and standing to intervene in this action because NPRI “[c]hallenges, contests or raises as an issue, either in law or in equity, in whole or in part, or facially or as applied, the **meaning, intent, purpose, scope, applicability**, validity, **enforceability** or constitutionality of any law, resolution, initiative, referendum or other legislative or **constitutional measure**.” NRS 218F.720(2)(b) (emphasis added).

Finally, the Legislature’s motion to intervene was timely. The timeliness of a motion to intervene is a determination that lies within the discretion of the district court. Lawler v. Ginochio, 94 Nev. 623, 626 (1978); Cleland v. Dist. Ct., 92 Nev.

454, 456 (1976). In determining whether a motion to intervene is timely, the court must consider the age of the lawsuit, the length of the movant's delay in seeking intervention after learning of the need to intervene, and the extent of any prejudice to the rights of existing parties resulting from the delay. Am. Home Assurance, 122 Nev. at 1244; Dangberg Holdings Nev. v. Douglas County, 115 Nev. 129, 141 (1999). If the movant's intervention would cause prejudice to the rights of existing parties, the court must weigh that prejudice against any prejudice resulting to the movant if the motion to intervene is denied. Am. Home Assurance, 122 Nev. at 1244.

In this case, NPRI filed the original complaint on July 9, 2020, but NPRI did not serve the summons and a copy of the original complaint on any of the Respondent-Legislators named in the original complaint. NPRI then filed an amended complaint on July 28, 2020, but NPRI did not start serving the summons and a copy of the amended complaint on the Respondent-Legislators until August 29, 2020. After NPRI started serving the summons and a copy of the amended complaint on the Respondent-Legislators, the Legislative Commission—at its next scheduled meeting on September 18, 2020—directed LCB Legal's attorneys to “take any and all actions on behalf of the Legislature that they deem to be necessary or advisable for the Legislature to appear in, commence, prosecute, defend or intervene in the NPRI action.” (*JAI:000123*.) On the next business day,

September 21, 2020, LCB Legal contacted NPRI's counsel by email correspondence and asked counsel whether NPRI would be agreeable to entering into a stipulation and order regarding the intervention of the Legislature as a defendant. (*JAI:000159-60.*) On September 23, 2020, NPRI's counsel responded by email and mail correspondence that NPRI was not amenable to the proposed stipulation and order. (*JAI:000162-63.*) On September 30, 2020, LCB Legal filed the Legislature's motion to intervene. At that time, NPRI had not completed serving the summons and a copy of the amended complaint on all of the Respondent-Legislators named in the amended complaint.

Thus, when the Legislature filed its motion to intervene on September 30, 2020, this case had not progressed beyond its initial and preliminary stages. Accordingly, because the Legislature sought intervention during the earliest stages of this case, the Legislature acted with appropriate haste and diligence to intervene, and the Legislature's intervention did not delay the proceedings, complicate management of the case or cause any prejudice to existing parties. Therefore, the Legislature's motion to intervene was timely. See *EEOC v. Taylor Elec. Co.*, 155 F.R.D. 180, 182 (N.D. Ill. 1994) (finding that a motion to intervene filed four months after the plaintiff commenced the action was timely where no discovery had been conducted in the case).

In sum, because the Legislature had an unconditional right to intervene under NRS 218F.720(2) and because the Legislature's motion to intervene was timely, the Legislature satisfied all requirements for intervention as of right under NRCP 24(a)(1). Therefore, the district court correctly determined that the Legislature was entitled to intervene as a matter of right under NRCP 24(a)(1) and NRS 218F.720(2), and this Court should affirm the district court's order granting the Legislature intervention as a matter of right.

B. The district court correctly determined that the Legislature was entitled to intervene as a matter of right under NRCP 24(a)(2).

As a general rule, courts give NRCP 24(a)(2) a broad and liberal construction in favor of intervention as of right. State Indus. Ins. Sys. v. Dist. Ct., 111 Nev. 28, 32 (1995), *overruled in part on other grounds by* Am. Home Assurance Co. v. Dist. Ct., 122 Nev. 1229 (2006); Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003) ("Rule 24 traditionally receives liberal construction in favor of applicants for intervention."); Scotts Valley Band of Pomo Indians v. United States, 921 F.2d 924, 926 (9th Cir. 1990) ("Rule 24(a) is construed broadly, in favor of the applicants for intervention.").

To qualify for intervention as of right under NRCP 24(a)(2), the movant must establish that: (1) the movant has sufficient interests in the subject matter of the litigation; (2) the movant's ability to protect those interests could be impaired if the movant is not permitted to intervene; (3) the movant's interests may not be

adequately represented by the existing parties; and (4) the motion to intervene is timely. Am. Home Assurance, 122 Nev. at 1238. The determination of whether the movant has met the four requirements is within the discretion of the district court. Id.

As discussed previously, the Legislature's motion to intervene was timely. Because the Legislature also satisfied the remaining requirements for intervention as of right under NRCP 24(a)(2), the district court correctly granted the Legislature's motion to intervene as a matter of right.

For purposes of intervention as of right under NRCP 24(a)(2), the movant must have significantly protectable interests in the subject matter of the action, and the movant must be situated such that the disposition of the action may impair or impede the movant's ability to protect those interests. PEST Comm. v. Miller, 648 F.Supp.2d 1202, 1211-12 (D. Nev. 2009). The movant satisfies these requirements if: (1) the movant asserts any interests that are protected under federal or state law; and (2) there is a relationship between the movant's protected interests and the plaintiffs' claims such that the movant will suffer a practical impairment of its interests if the plaintiffs succeed on their claims. Id. at 1212. When the plaintiffs seek declaratory relief that actions are unconstitutional, the movant is entitled to intervene to defend the validity of the actions if the movant's protected interests would be impaired, as a practical matter, by a declaration that the actions are

unconstitutional. Cal. ex rel. Lockyer v. United States, 450 F.3d 436, 441-45 (9th Cir. 2006). Furthermore, when the constitutionality of legislative actions are implicated, courts have recognized that a state legislature may have independent legal interests in defending the constitutionality of its actions that are separate and distinct from the interests of the public officials who are named as the defendants in the case. See Ne. Ohio Coal. for Homeless v. Blackwell, 467 F.3d 999, 1007-08 (6th Cir. 2006).

As discussed previously, because NPRI alleged that legislative expenditures or appropriations and taxpayer monies will be paid to the Respondent-Legislators in violation of the separation-of-powers provision, NPRI challenged the Legislature's constitutional power of appropriation. In other words, NPRI alleged that the Legislature has violated the Nevada Constitution by authorizing legislative expenditures or appropriations and the payment taxpayer monies to the Respondent-Legislators in violation of the separation-of-powers provision. As a result, the Legislature has independent legal interests in defending the validity of its legislative actions in exercising the constitutional power of appropriation, and the Legislature's independent legal interests are separate and distinct from the individual interests of the Respondent-Legislators. As a consequence, this case strikes at the heart of one of the most vital components of the legislative function—the constitutional power of appropriation. Because the Legislature has a

right to defend its exercise of the constitutional power of appropriation, the Legislature has substantial interests in the subject matter of this action which could be impaired if the Legislature was not permitted to intervene.

Moreover, the Legislature has substantial interests in the meaning, intent, purpose, scope, applicability and enforceability of the separation-of-powers provision because that constitutional provision governs the powers of the legislative branch and the Legislature's administration of its constitutional functions and the conduct of its members. See Heller v. Legislature, 120 Nev. 456, 466-72 (2004); Comm'n on Ethics v. Hardy, 125 Nev. 285, 291-93 (2009). The Legislature has established a public policy in this State that protects the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body. For example, as expressed in NRS 281A.020, it is the public policy of this State that:

State Legislators serve as "**citizen Legislators**" who have other occupations and business interests, who are expected to have particular philosophies and perspectives that are necessarily influenced by the life experiences of the Legislator, including, without limitation, professional, family and business experiences, and who are expected to contribute those philosophies and perspectives to the debate over issues with which the Legislature is confronted.

NRS 281A.020(2)(c) (emphasis added).

Thus, the Legislature has substantial interests in ensuring that the broadest spectrum of the citizenry is represented in the Legislature's membership in order to

protect “the constituency concept of our legislature in this state, which can accurately be described as a citizens’ legislature.” State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1093 (N.M. Ct. App. 1991). As further explained by Justice Crockett of the Utah Supreme Court:

In our democratic system, the legislature is intended to represent the people: that is, to be made up from the general public representing a wide spectrum of the citizenry. It is not to be doubted that legislators from the ranks of education are affected by the interests of that calling. But all other legislators also have interests. No one lives in a vacuum.

Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring and explaining that Utah’s separation-of-powers provision would not prohibit state legislators from serving as public school teachers).

Accordingly, because the Legislature has substantial interests in the meaning, intent, purpose, scope, applicability and enforceability of the separation-of-powers provision, the Legislature has significantly protectable interests in the subject matter of this action which could be impaired if NPRI were to succeed on its separation-of-powers claims.

When the movant has sufficient interests to support intervention as of right under NRCP 24(a)(2), the movant must be permitted to intervene unless the movant’s interests are adequately represented by existing parties. Am. Home Assurance, 122 Nev. at 1241; Lundberg v. Koontz, 82 Nev. 360, 362-63 (1966). The movant must satisfy only a minimal burden to demonstrate that existing

parties do not adequately represent its interests. Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 823 (9th Cir. 2001). The movant need only show that representation by existing parties may be inadequate, not that it will be inadequate. Id. Courts typically consider three factors when determining whether existing parties adequately represent the interests of the movant: (1) whether the interests of existing parties are such that they will undoubtedly make all of the movant's arguments; (2) whether existing parties are capable and willing to make such arguments; and (3) whether the movant would offer any necessary elements to the proceeding that existing parties would neglect. PEST Comm., 648 F.Supp.2d at 1212.

As discussed previously, the Legislature has independent legal interests in this action that are separate and distinct from the individual interests of the Respondent-Legislators because the Legislature has a right to defend its constitutional power of appropriation and the meaning, intent, purpose, scope, applicability and enforceability of the separation-of-powers provision which governs the powers of the legislative branch and the Legislature's administration of its constitutional functions and the conduct of its members. Because these separate institutional interests are unique to the Legislature as a constitutional body, the Respondent-Legislators are not in a position to adequately represent the separate institutional interests of the Legislature that are at stake in this case. Under such

circumstances, the Legislature’s interests are not adequately represented by existing parties, and the Legislature was entitled to intervention as of right under NRCP 24(a)(2).

Therefore, the district court correctly determined that the Legislature was entitled to intervene as a matter of right under NRCP 24(a)(2), and this Court should affirm the district court’s order granting the Legislature intervention as a matter of right.

III. Even if the Legislature was not otherwise entitled to intervene as a matter of right, the district court properly exercised its discretion and granted the Legislature permissive intervention under NRCP 24(b).

Appellate courts “review for abuse of discretion the district court’s decision concerning permissive intervention.” Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 836 (9th Cir. 1996). Under this standard, because permissive intervention is “wholly discretionary” with the district court, its ruling on permissive intervention is subject to “particularly deferential” review. Hairr v. Dist. Ct., 132 Nev. 180, 187 (2016) (quoting United States v. City of New York, 198 F.3d 360, 367 (2d Cir. 1999), and 7C Charles Alan Wright et al., Federal Practice and Procedure § 1913 (3d ed. 2007)).

As recently amended by this Court, effective March 1, 2019, the provisions of NRCP 24(b) were revised to conform to the federal rule. NRCP 24 Advisory

Committee Note—2019 Amendment. The provisions of NRCPP 24(b) provide that permissive intervention may be granted under the following circumstances:

(b) Permissive Intervention.

(1) **In General.** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a state or federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) **By a Government Officer or Agency.** On timely motion, the court may permit a state or federal governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

Under NRCPP 24(b), when the intervenor is a governmental agency, permissive intervention ordinarily should be granted to the agency where the legal issues in the case may have a substantial impact on “the maintenance of its statutory authority and the performance of its public duties.” SEC v. U.S. Realty & Impr. Co., 310 U.S. 434, 460 (1940). Thus, where the governmental agency's interest in the case “is a public one” and it intends to raise claims or defenses concerning questions of law involved in the case, permissive intervention should be granted, especially when the agency's intervention “might be helpful in [a] difficult and delicate area.” United States v. Local 638, Enter. Ass'n of Pipefitters, 347 F. Supp. 164, 166 (S.D.N.Y. 1972) (quoting SEC v. U.S. Realty & Impr. Co., 310 U.S. 434, 460 (1940)).

In this case, the district court properly exercised its discretion and granted the Legislature permissive intervention under NRCP 24(b), even if the Legislature was not otherwise entitled to intervene as a matter of right. As discussed previously, this case involves extremely important questions of constitutional law whose resolution will have a substantial impact on the Legislature's constitutional power of appropriation and the meaning, intent, purpose, scope, applicability and enforceability of the separation-of-powers provision which governs the powers of the legislative branch and the Legislature's administration of its constitutional functions and the conduct of its members. By permitting the Legislature to intervene, the district court was facilitating a more comprehensive and thorough presentation of the controlling law and a better understanding of the issues, and the district court was ensuring that the views of the Legislature were fairly and adequately represented and were not prejudiced by this case. Moreover, because the Legislature intervened in this case during its earliest stages in the district court, the Legislature's intervention did not unduly delay the proceedings or prejudice the rights of existing parties.

In its opening brief, NPRI contends that the Legislature's intervention has "needlessly multiplied this litigation," and NPRI speculates that the Legislature's intervention will cause "future delays and increased costs" if the district court's dismissal for lack of standing is reversed and this case is remanded for further

proceedings. (*Opening Br. at 24.*) However, the district court rejected NPRI's assertions below that the Legislature's intervention would create the potential for delay and increased costs to the parties, and the district court's determination "is precisely the type of fact-based judgment determination entitled to particular deference by a reviewing court." Hairr, 132 Nev. 187-88. Therefore, NPRI has not demonstrated that the district court clearly abused its discretion in granting permissive intervention.

Consequently, even if the Legislature did not qualify for intervention as of right under NRCP 24(a)(1) and NRCP 24(a)(2), the district court properly exercised its discretion and granted the Legislature permissive intervention under NRCP 24(b). As a result, this Court should affirm the district court's order granting the Legislature permissive intervention under NRCP 24(b).

IV. The Legislature joins in and adopts by reference all arguments regarding NPRI's lack of standing set forth in the answering briefs of Respondent-Legislators.

Pursuant to NRAP 28(i), the Legislature joins in and adopts by reference all arguments regarding NPRI's lack of standing set forth in: (1) the Joint Answering Brief filed by Respondents Brittney Miller, Selena Torres, Jason Frierson, Nicole Cannizzaro and Melanie Scheible; and (2) the Answering Brief filed by Respondents Dina Neal and Jill Tolles. Based on those arguments, the Legislature asks this Court to affirm the district court's orders dismissing this action based on

NPRI's lack of standing to bring its separation-of-powers claims against Respondent-Legislators.

CONCLUSION

Based on the foregoing, the Legislature asks this Court to affirm the district court's order granting the Legislature's motion to intervene as a defendant. The Legislature also asks this Court to affirm the district court's orders dismissing this action based on NPRI's lack of standing to bring its separation-of-powers claims against Respondent-Legislators.

DATED: This **22nd** day of July, 2021.

By: /s/ Kevin C. Powers

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ADDENDUM

NRCP 24. Intervention

(a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a state or federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) **Permissive Intervention.**

(1) **In General.** On timely motion, the court may permit anyone to intervene who:

- (A) is given a conditional right to intervene by a state or federal statute; or
- (B) has a claim or defense that shares with the main action a common question of law or fact.

(2) **By a Government Officer or Agency.** On timely motion, the court may permit a state or federal governmental officer or agency to intervene if a party's claim or defense is based on:

- (A) a statute or executive order administered by the officer or agency; or
- (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) **Delay or Prejudice.** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

[Amended; effective March 1, 2019.]

NRS 218F.720 Authority to provide legal representation in actions and proceedings; exemption from fees, costs and expenses; standards and procedures for exercising unconditional right and standing to intervene; payment of costs and expenses of representation.

1. When deemed necessary or advisable to protect the official interests of the Legislature in any action or proceeding, the Legislative Commission, or the Chair of the Legislative Commission in cases where action is required before a meeting of the Legislative Commission is scheduled to be held, may direct the Legislative Counsel or the General Counsel and the Legal Division to appear in, commence, prosecute, defend or intervene in any action or proceeding before any court, agency or officer of the United States, this State or any other jurisdiction, or any political subdivision thereof. In any such action or proceeding, the Legislature may not be assessed or held liable for:

- (a) Any filing or other court or agency fees; or
- (b) The attorney's fees or any other fees, costs or expenses of any other parties.

2. If a party to any action or proceeding before any court, agency or officer:

(a) Alleges that the Legislature, by its actions or failure to act, has violated the Constitution, treaties or laws of the United States or the Constitution or laws of this State; or

(b) Challenges, contests or raises as an issue, either in law or in equity, in whole or in part, or facially or as applied, the meaning, intent, purpose, scope, applicability, validity, enforceability or constitutionality of any law, resolution, initiative, referendum or other legislative or constitutional measure, including, without limitation, on grounds that it is ambiguous, unclear, uncertain, imprecise, indefinite or vague, is preempted by federal law or is otherwise inapplicable, invalid, unenforceable or unconstitutional,

↳ the Legislature may elect to intervene in the action or proceeding by filing a motion or request to intervene in the form required by the rules, laws or regulations applicable to the action or proceeding. The motion or request to intervene must be accompanied by an appropriate pleading, brief or dispositive motion setting forth the Legislature's arguments, claims, objections or defenses, in law or fact, or by a motion or request to file such a pleading, brief or dispositive motion at a later time.

3. Notwithstanding any other law to the contrary, upon the filing of a motion or request to intervene pursuant to subsection 2, the Legislature has an unconditional right and standing to intervene in the action or proceeding and to present its arguments, claims, objections or defenses, in law or fact, whether or not the Legislature's interests are adequately represented by existing parties and whether or not the State or any agency, officer or employee of the State is an existing party. If the Legislature intervenes in the action or proceeding, the Legislature has all the rights of a party.

4. The provisions of this section do not make the Legislature a necessary or indispensable party to any action or proceeding unless the Legislature intervenes in the action or proceeding, and no party to any action or proceeding may name the Legislature as a party or move to join the Legislature as a party based on the provisions of this section.

5. The Legislative Commission may authorize payment of the expenses and costs incurred pursuant to this section from the Legislative Fund.

6. As used in this section:

(a) “Action or proceeding” means any action, suit, matter, cause, hearing, appeal or proceeding.

(b) “Agency” means any agency, office, department, division, bureau, unit, board, commission, authority, institution, committee, subcommittee or other similar body or entity, including, without limitation, any body or entity created by an interstate, cooperative, joint or interlocal agreement or compact.

(c) “Legislature” means:

(1) The Legislature or either House; or

(2) Any current or former agency, member, officer or employee of the Legislature, the Legislative Counsel Bureau or the Legislative Department.

(Added to NRS by 1965, 1461; A 1971, 1546; 1995, 1108; 1999, 2203; 2007, 3305; 2009, 1565; 2011, 3244; 2020, 32nd Special Session, 16)

CERTIFICATE OF COMPLIANCE

1. We hereby certify that this answering 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 Office Word 2010 in 14-point font and Times New Roman type.

2. We hereby certify that this answering brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of this brief exempted by NRAP 32(a)(7)(C), this brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,951 words, which is less than the type-volume limit of 14,000 words.

3. We hereby certify that we have read this answering brief, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We 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 this 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. We understand that we may be subject to sanctions in the event that this 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 I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 22nd day of July, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Respondent Nevada Legislature’s Answering Brief, by means of the Nevada Supreme Court’s electronic filing system, directed to:

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