IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE,

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 engagement 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 Defendant; MELANIE SCHEIBLE, an individual engagement 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;

Supreme Court Case No.: 82341

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

and SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District,

Respondents,

and Legislature of the State of Nevada,

Intervenor-Respondent.

APPELLANT NEVADA POLICY RESEARCH INSTITUTE'S OPENING BRIEF

Appeal from the Eighth Judicial District Court,
Orders Granting Motions to Dismiss and Joinders Thereto;
Order Granting Motion to Intervene; and Order Denying Motion to Disqualify
The Honorable Jim Crockett (Ret.), District Court Judge

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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 Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant Nevada Policy Research Institute ("NPRI") is a Nevada domestic non-profit corporation and has no corporate affiliations.

2. NPRI was represented in the district court, and is represented in this Court, by the undersigned attorneys of the law firm of Fox Rothschild LLP.

Dated this 8th day of June, 2021.

FOX ROTHSCHILD LLP

By: */s/ Deanna L. Forbush*

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to NRAP 3A(b)(1) because this is an appeal from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

Appellant NPRI, 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 protect individual liberties, encourage free-market solutions, and promote transparency, accountability and efficiency in government, appeals from a final order of the Eighth Judicial District Court, the Honorable Jim Crocket (Ret.) presiding (the "district court"), entered and noticed on December 28, 2020. (Joint Appendix ("JA") Vol. 7 PGS 691 - 751.) The district court issued its order dismissing NPRI's complaint for declaratory and injunctive relief and resolving all related matters in a minute order issued on November 18, 2020. (JA Vol. 4 PGS 480 - 483.) Specifically, on the day before the scheduled hearing on all pending matters, the district court: (i) denied NPRI standing under the public importance exception to challenge defendants' dual employment in violation of the separation-of-powers requirement of the Nevada Constitution; (ii) granted the request of the Legislature of the State of Nevada ("Nevada Legislature") for permissive intervention as a defendant; and (iii) denied NPRI's motion to disqualify the official attorneys from

representation of the defendants employed by the Nevada System of Higher Education ("NSHE"). (*Id.*)

On December 1, 2020, prior to the entry of formal orders by the district court, NPRI moved for clarification regarding the dismissal, intervention and disqualification outcomes and asked the district court to articulate which factor or factors permitting standing to sue under the public importance exception set forth in *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) it concluded NPRI failed to meet. (JA Vol. 4 PGS 485 - 495.) In its motion, NPRI noted that no prevailing party had submitted a proposed order for review and stated that, because the district court's retirement was imminent, the "specific articulation of its analysis of the factors set forth in *Schwartz v. Lopez*, which analysis would in turn be incorporated into the final order of the Court, is both necessary and appropriate to afford complete relief upon appellate review." (*Id*. at PG 490.)

While NPRI's motion for clarification was pending, on December 8 and December 9, 2020, respectively, the district court entered and noticed orders submitted by the prevailing parties without input from NPRI. (JA Vol. 4 PGS 511 - 577; Vol. 5 PGS 578 - 664.) On December 15, 2020, the district court denied NPRI's request for clarification by minute order on the basis that the motion was premature because no orders had yet been signed or filed. (JA Vol. 6 PGS 679 - 680.) In its final order entered and noticed on December 28, 2020, the district

court formally addressed the motion for clarification and finalized its prior orders by declining to state the legal basis for its conclusions. (JA Vol. 7 PGS 691 - 751.)

Pursuant to NRAP 4(a)(1), "a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." On January 8, 2021, NPRI filed its Notice of Appeal of the district court's December 28, 2020 final judgment of dismissal. (JA Vol. 7 PGS 752 - 754.)

ROUTING STATEMENT

NPRI respectfully asserts its appeal is presumptively retained by the Supreme Court, pursuant to NRAP 17(a)(11) and (12), as it raises as principal issues questions of both first impression and statewide public importance. Specifically, the Supreme Court has not addressed, by way of published decision or otherwise, the separation-of-powers challenge to legislators working in the executive branch, which the Supreme Court previously opined "might be well-suited for….declaratory relief action filed in the district court." *Secretary of State (Heller) v. Nevada State Legislature*, 120 Nev. 456, 472, 93 P.3d 746, 757 (2004).

If the Court is not inclined to address the ultimate underlying issue in this matter in the interests of judicial and party economy, NPRI respectfully asserts its appeal is presumptively retained by the Supreme Court, pursuant to NRAP 17(a)(12), as it raises as principal issues multiple questions of statewide public importance. Specifically, the Supreme Court has not addressed by published decision the following questions presented in the instant matter: (i) whether standing to bring a separation-of-powers challenge to a legislator working in the executive branch is available to a party invoking the public-importance exception to the standing requirement of particularized injury; (ii) whether the Nevada Legislature is a branch of government that carries out its duties through individual legislators acting in their official capacities, regardless of who occupies those

individual seats, such that intervention under NRCP 24 is not appropriate in a lawsuit challenging the dual employment of certain individual legislators; and (iii) whether an executive branch employee sued solely for his or her individual choice to engage in dual employment is entitled to representation by an official attorney, as defined by NRS 41.0338(2)(b).

ISSUES PRESENTED FOR REVIEW

NPRI's appeal presents the following issue(s) for appellate court consideration:

1) Whether Respondents' dual employment violates the separation-of-powers requirement of the Nevada Const. Art. 3, § 1, ¶ 1.

If the Court is not inclined to address the ultimate separation-of-powers issue, then the following issues are presented:

1) Whether the district court erred in denying NPRI standing to challenge Respondents' dual employment, pursuant to the public importance exception in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016) or nonfrivolous argument for extending same;

2) Whether the district court erred in finding the Nevada Legislature qualified for permissive intervention, pursuant to NRCP 24(b); and

3) Whether the district court erred in finding the NSHE parties were entitled to representation by their official attorneys, pursuant to the limited definition set forth in NRS 41.0338(2)(b).

I.

STATEMENT OF THE CASE

Dual government service in the legislative and executive branches dilutes, if not destroys, the very foundation upon which the concept of Nevada's representative government rests, i.e., that its legislature enacts the will of the people rather than the will of the executive. This explains why the Court described the "division of powers" as "probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967). Divided government is so vital to a free society, the Court explained, that "[t]here must be a fullness of conception of the principle of the separation of powers involving all of the elements of its meaning and its correlations to attain…. the maximum protection for the rights of the people." *Id*., 83 Nev. at 22, 422 P.2d at 243-44. Indeed, "[t]o permit even one seemingly harmless prohibited encroachment and adopt an indifferent attitude could lead to very destructive results." *Id*., 83 Nev. at 22, 422 P.2d at 243.

Those words written in 1967 and the "very destructive results" the Court anticipated, are no longer hypothetical but the reality of the 81st (2021) Session of the Nevada Legislature that adjourned sine die on June 1, 2021. Assembly Bill 395 would have abolished the death penalty in Nevada and passed the Assembly along party lines, but it failed to receive a hearing in the Judiciary Committee. Respondent Melanie Scheible chairs that committee and Respondent Nicole Cannizzaro leads the

Senate. Both Respondents are Democrats who engage in dual employment as Deputy District Attorneys serving at the will of Clark County District Attorney, Steve Wolfson. Wolfson testified in opposition to AB395 and is simultaneously advancing efforts to schedule the execution of Zane Floyd.[1] Notably, Respondent Scheible publicly expressed unequivocal support for abolishing capital punishment in an interview immediately prior to the start of the legislative session. But then she took no action to give the bill a hearing in the Senate after the session commenced and her executive branch employer testified in opposition to the bill. *Id*.

If the current Court still believes, like its predecessor did in 1967, that Nevadans are a free people who deserve protection from prohibited executive branch encroachments on its representative government, then the Court may use this appeal as the vehicle to settle the dual employment issue once and for all. *See, e.g.*, *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 20, *6, 460 P.3d 976, 982 (2020) (court exercised ability to consider moot bail issue that involved matter of widespread importance capable of repetition yet evading review); *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822-23, 407 P.3d 702, 708 (2017) (court recognized ability to issue advisory mandamus to address rare question "likely of significant repetition prior to effective review").

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[1] *See, e.g.*, https://thenevadaindependent.com/article/nevada-assembly-votes-to-abolish-death-penalty-in-historic-move-bills-future-uncertain-in-senate; *see also* https://thenevadaindependent.com/article/opponents-of-the-death-penalty-turn-up-the-heat-as-abolition-bills-future-remains-murky.

If the Court determines, however, that it would benefit from further development of the factual record before undertaking its separation-of-powers analysis, then it may justifiably return the matter to the district court that chose not to articulate the legal basis for its generalized holdings that NPRI "does not make persuasive arguments regarding standing," that the court "is not persuaded [NPRI] comes within the recent *Schwartz* [public-importance] exception," and that NPRI "clearly lacks standing to bring this suit and thus the Motion to Dismiss must be GRANTED." (JA Vol. 4 PGS 480 - 483.) The underlying record further shows the district court erred when it summarily decided all motions and joinders against NPRI on the basis of standing and where the final judgment does not explain how NPRI failed to sufficiently allege its standing to survive Respondents' respective motions to dismiss and related matters.

II.

STATEMENT OF RELEVANT FACTS

The district court decided all matters upon review of the parties' briefs without making factual findings or conducting an evidentiary hearing. Thus, the only facts properly at issue in this appeal are the facts set forth in NPRI's Amended Complaint for Declaratory and Injunctive Relief. (JA Vol. 1 PGS 7 - 13.) NPRI asserted the necessary factual basis to invoke the public-importance exception to the standing requirement to show particularized injury. Specifically, NPRI is the only public interest nonprofit organization, indeed the only person or entity of any kind, that has

ever: (i) sought to challenge dual employment as a matter of significant public importance, (ii) which, in turn, challenges an inappropriate legislative appropriation or expenditure, and (iii) for which NPRI is the only truly appropriate party to fully advocate for this resolution. (*Id*. at PG 9.) NPRI sought standing pursuant to the public-importance exception to challenge the dual employment of thirteen (13) individual defendants known to be simultaneously holding elected offices in the Nevada Legislature and paid positions with the State or local government. (*Id*.) This appeal is proceeding against the nine (9) defendants who remain as Respondents because they continue to engage in dual employment.[2] The remaining facts herein state the procedural developments in the case, for the Court's ease of reference.

On September 18, 2020, Respondent Brittany Miller filed the first of four (4) motions to dismiss subsequently granted by the district court. (JA Vol. 1 PGS 29 - 54.) Then-defendants Osvaldo Fumo and Heidi Seevers Gansert, along with current Respondent Dina Neal, filed their joint motion to dismiss next on September 30, 2020. (JA Vol. 1 PGS 164 - 198.) Respondents Jason Frierson and Nicole Cannizzaro filed the remaining motions to dismiss on October 5, 2020 and October 19, 2020, respectively. (JA Vol. 2 PGS 224 - 240; Vol. 3 PGS 325 - 340.) Each Respondent who moved for dismissal also filed a separate joinder to the other

[2] The caption on appeal reflects 10 individually named Respondents, but the Court ordered Respondent Heidi Seevers Gansert dismissed on March 10, 2021 at her request following her resignation from employment with the NSHE.

motions to dismiss, and Respondent Selena Torres filed separate joinders to each motion to dismiss as well. (JA Vol. 1 PGS 58 - 61; Vol. 2 PGS 244 - 258; Vol. 3 PGS 355 - 360.) Respondents Glen Leavitt, James Ohrenschall and Melanie Scheible were served by publication with the district court's permission but did not make formal appearances in the case prior to dismissal. (JA Vol. 6 PGS 667 - 669.)

In addition to the motions to dismiss and their respective joinders, the district court considered NPRI's motion to disqualify the official attorneys from their representation of the NSHE defendants and the Nevada Legislature's motion to intervene as a named defendant, which motions were filed on September 25, 2020 and September 30, 2020, respectively. (JA Vol. 1 PGS 62 - 70 and 91 - 163.) Following the full briefing of all pending matters, the district court issued a minute order on November 18, 2020 in which it: (i) denied NPRI standing under the public importance exception to challenge defendants' dual employment; (ii) granted the request of the Nevada Legislature for permissive intervention as a defendant; and (iii) denied NPRI's motion to disqualify the official attorneys from representation of the NSHE defendants. (JA Vol. 4 PGS 480 - 483.)

On December 1, 2020, prior to the entry of formal orders, NPRI filed a motion for clarification of the district court's November 28, 2020 minute order. (JA Vol. 4 PGS 485 - 495.) While NPRI's motion for clarification was pending, the district court signed off on the orders submitted by the prevailing parties without input from NPRI, which orders were entered and noticed on December 8 and December 9, 2020,

respectively. (JA Vol. 4 PGS 511 - 577; Vol. 5 PGS 578 - 664.) On December 15, 2020, the district court denied NPRI's request for clarification by minute order. (JA Vol. 6 PGS 679 - 680.) In its final judgment dated December 28, 2020, the district court formally denied NPRI's motion for clarification and entered its final judgment of dismissal in favor of all defendants based on NPRI's lack of standing. (JA Vol. 7 PGS 691 - 719.)

III.
SUMMARY OF ARGUMENT

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed."

— U.S. Supreme Court Justice John Marshall, *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

The powers of the government of the State of Nevada are divided into three distinct categories: legislative, executive, and judicial. Pursuant to the Nevada Constitution, "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." Nevada Const. Art. 3, § 1, ¶ 1 (emphasis added).

In the instant case, there is no factual dispute that the named Respondents exercise the power of the legislative branch in their capacity as State Legislators. As such, the Nevada Constitution prohibits them from exercising any functions related to either the executive or judicial branches while so serving. Further, there is no legal dispute that state and local governmental entities that belong to neither the judicial nor legislative branch, which are responsible for "carrying out and enforcing the laws enacted by the Legislature," are part of the executive branch. *Galloway v. Truesdell*, 83 Nev. at 20, 422 P.2d at 242 (1967). Thus, any employee of a state or local government entity that carries out and enforces the laws of this state necessarily exercises functions related to the executive branch, through their employment-related duties.

NPRI respectfully asserts, therefore, that all named Respondents are in plain violation of the Nevada Constitution: Respondents exercise the power of the legislative branch in their capacity as State Legislators while simultaneously performing functions related to the executive branch in their capacity as government employees. Unable to justify this arrangement under the plain text of the Nevada Constitution, Respondents asked the district court, and will surely ask this Court, to reinterpret the text of the Constitution to mean something else entirely. Specifically, Respondents asserted below "any function" means only the narrow category of "sovereign powers," that only public officials and officers, as distinct from public employees, perform. *Secretary of State (Heller)*, 120 Nev. at 472, 93 P.3d at 757

(holding quo warranto action could be used to challenge any executive branch employees invested with sovereign power). The Court will construe the text of the Constitution as written, however, and Respondents have no legal support for their claim that the Constitution should be reinterpreted in such a narrow manner. Accordingly, NPRI seeks the Court's holding that the Constitution means what it says: Nevada government employees, tasked with exercising any functions related to the executive branch, are prohibited from simultaneously exercising the power of the legislative branch as State Legislators, without qualification or exception.

In the event the Court seeks to first have the district court determine the dual employment issue, NPRI respectfully asserts that reversal and remand of the case is procedurally appropriate since the district court erred in summarily dismissing the underlying action based on standing without identifying in writing or in the record the factual and legal bases that support its dismissal order. NPRI also respectfully asserts that reversal and remand is substantively appropriate since the district court failed to properly interpret and apply the case law permitting a public-importance exception to the standing requirement, the rule permitting permissive joinder, and the statute limiting official attorney representation.

IV.

ARGUMENT

A. Standard of Review.

The Court rigorously reviews NRCP 12(b)(5) dismissals on appeal, presuming

all factual allegations in the complaint to be true and drawing all inferences in the complainant's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissal is appropriate "only if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id*., 124 Nev. at 228, 181 P.3d at 672.

Dismissals for lack of standing under NRCP 12(b)(1) also enjoy the same rigorous, de novo standard as dismissals for failure to state a claim upon which relief may be granted. *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009).

Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this Court also reviews de novo. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

Finally, a case is subject to remand where the district court enters final judgment without creating a sufficient record. *See Robinson v. Robinson*, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984) (remanding case to the lower court because the court's findings failed to indicate the factual bases for its final conclusions).

B. NPRI's Separation-of-Powers Challenge Is a Matter of Significant Public Importance, Resolution of Which Would Conclude the Case.

The two issues Respondents never disputed in the district court – discussed in greater detail in the standing argument below – are the significant public importance of the interpretation of Nevada's separation-of-powers doctrine and NPRI's efforts to

obtain the Court's determination of same. The Court has taken the opportunity in recent decisions to address unresolved matters of similar importance without an active controversy, and it has another opportunity here to resolve the dual employment dispute. *See, e.g.*, *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 20, *6, 460 P.3d 976, 982 (2020) (court exercised ability to consider moot bail issue that involved matter of widespread importance capable of repetition yet evading review); *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822-23, 407 P.3d 702, 708 (2017) (court recognized ability to issue advisory mandamus to address rare question "likely of significant repetition prior to effective review").

The gravamen of the Respondents' substantive argument for why their dual employment does not violate the separation-of-powers doctrine is the wholly untenable position that this clause of the Nevada Constitution has been interpreted to prohibit public officials or officers, as opposed to public employees, from holding positions in separate branches of government. Respondents will provide no binding authority to support this argument, however, because none exists. To the contrary, for decades the Court has interpreted the reach of separation-of-powers to extend to all public employees. *See*, *e.g.*, *Secretary of State (Heller)*, 120 Nev. at 472, 93 P.3d at 757 (holding that "declaratory relief, possibly coupled with a request for injunctive relief, could be sought against other executive branch employees") (emphasis added); *see also Galloway v. Truesdell*, 83 Nev. at 21-22, 422 P.2d at 243 (holding that even ministerial functions of each governmental branch frequently overlap, and it is in the

area of "inherent ministerial powers and functions that prohibited encroachments upon the basic powers of [a branch] most frequently occur"). Accordingly, Respondents' arguments distinguishing types of executive branch employment in the separation-of-powers context must be disregarded.

1. *The Court Approves Using Actions for Declaratory and Injunctive Relief to Bring a Separation-of-Powers Challenge Against Legislators Also Working in the Executive Branch.*

In *Secretary of State (Heller)*, then-Secretary of State Dean Heller, sought a writ of mandamus to challenge State and local government employees' service in the Legislature as violating the Nevada Constitution's separation-of-powers doctrine. In the end, the Court denied the writ after determining the Secretary of State did not have a discernable beneficial interest to confer standing to bring a writ of mandamus action and that he sued the wrong party, *i.e.*, the Legislature as a whole, to prevent service therein by executive branch employees. *Id.*, 120 Nev. at 462-63, 93 P.3d at 750. But in so doing, the Court provided a clear path for how to raise such a challenge; exactly the path taken by NPRI in the instant case.

Specifically, the Court recognized two mechanisms for challenging what it deemed the "dual service issue." *Secretary of State (Heller)*, 120 Nev. at 472, 93 P.3d at 756. It held that, "[t]he dual service issue may be raised as a separation-of-powers challenge to legislators working in the executive branch, as the qualifications of legislators employed in the executive branch are not constitutionally reserved to that branch." *Id.*, 120 Nev. at 472, 93 P.3d at 757 (citation omitted). It went on to

opine that, "[s]uch a challenge might be well suited for quo warranto or a declaratory relief action filed in the district court." *Id*. Most telling and particularly relevant to the instant case, however, is the distinction the Court draws between how each of the two types of actions might be employed, and by whom, stating clearly that:

> A quo warranto action could be used to challenge any executive branch employees invested with sovereign power, who thereby occupy public offices within quo warranto's exclusive reach. And, declaratory relief, possibly coupled with injunctive relief, could be sought against other executive branch employees.
>
> The party with the clearest standing to bring the quo warranto action would be the attorney general, and declaratory relief could be sought by someone with a "legally protectable interest," such as a person seeking the executive branch position held by the legislator. Individual legislators would need to be named as either quo warranto respondents or declaratory relief defendants.

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

In sum, this Court squarely endorses the bringing of the declaratory and injunctive relief causes of action alleged by NPRI against executive branch employees without sovereign power, like the Respondents herein. The Court imposed no restrictions concerning the functions engaged in by the executive branch employees so challenged, and rightfully so, given the Court's prior recognition that it is precisely in the area of non-sovereign, ministerial functions that separation-of-powers violations most frequently occur. *See Galloway v. Truesdell*, 83 Nev. at 22, 422 P.2d at 243.

The only condition precedent to NPRI bringing the instant case, then, is a legally protectable interest. The example of a person seeking the executive branch position held by the legislator from *Heller* is just that, an example. And, NPRI can show entitlement to assert that legally protectable interest, through standing via the public-importance exception (an issue not considered in *Heller*), as discussed in detail below. As such, any argument that NPRI's lawsuit is not properly before the Court because it is not limited to public officials and officers fails in its entirety.

2. *The Court Recognizes "Prohibited Encroachments" on the Separation of Powers Usually Occur in the Exercise of Inherent Ministerial Powers and Functions.*

In 1967, the Court used Nevada's separation-of-powers doctrine to invalidate a statute that required district courts to issue marriage certificates. The Court found this was not a judicial act and thus the Legislature could not compel the Judiciary to perform it. Before reaching that conclusion, the Court conducted an exhaustive analysis of separation-of-powers more broadly, and the role it plays in Nevada's system of government. The Court described separation-of-powers as "probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway v. Truesdell*, 83 Nev. at 20, 422 P.2d at 242. The Court explained that in addition to the constitutionally expressed powers and functions belonging to each branch of government, each branch also "possesses inherent and incidental powers that are properly termed ministerial." *Id.* The Court continued, "Ministerial functions are methods of implementation to accomplish or

put into effect the basic function of each Department. No Department could properly function without the inherent ministerial functions." *Id.*

Having identified ministerial functions as an essential and fundamental part of the exercise of power itself, the Court next cautioned against the "error" of adopting too restricted a view of Nevada's separation-of-powers doctrine:

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

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

As quoted above, the Court stressed that in order to ensure not even one "seemingly harmless prohibited encroachment" is tolerated, the separation-of-powers doctrine must be given a "fullness of conception, involving all of the elements of its meaning and its correlations," while warning that prohibited encroachments are most likely to occur in the area of ministerial functions. Thus, the Court long ago rejected

any notion that only sovereign functions are sufficient to trigger violations, having specifically warned against prohibited encroachments that occur in the non-sovereign area of functions deemed ministerial. And, while the Court's reasoning is fundamentally at odds with the arguments put forth by Respondents below, it aligns perfectly with the text of Nevada's separation-of-powers clause, which NPRI respectfully seeks to enforce.

3. *The Non-Binding Attorney General Opinion Relied On By Respondents Below Confirms the Lack of Court Precedent.*

In his opinion 2004-03, then Attorney General Brian Sandoval, undertook a thorough review of all prior cases involving separation-of-powers challenges and ultimately declared that "[t]he question of whether executive branch and local government employees can dually serve as members of the Nevada State Legislature, in conformance with Article 3, Section 1 of the Nevada Constitution, has never been reviewed by the Nevada Supreme Court." AGO 2004-03 at pg. 18 (emphasis added). This is another reason why the Court's determination is imperative to secure the necessary determination. Indeed, the AGO's conclusion that the separation-of-powers clause "bars any employee from serving in the executive branch of government and simultaneously serving as a Nevada State Legislator," while contemporaneously finding that "the constitutional requirement of separation of powers is not applicable to local governments" only perpetuates the concern that the dual employment issue remains unresolved. The Court's lack of final review of the

issue remains true as of today, sixteen (16) years after AGO 2004-03 and the decision in *Secretary of State (Heller)* were rendered, and this appeal presents a meaningful opportunity to settle the matter once and for all.

C. The District Court Erred When It Denied NPRI Standing to Challenge Respondent's Dual Employment, a Matter of Significant Public Importance.

1. *Public-Importance Exception Under Schwartz v. Lopez.*

As this Court first recognized in *Schwartz v. Lopez*, cases of significant public importance enjoy an exception to the basic standing requirement of showing a particularized injury. 132 Nev. at 743, 382 P.3d at 894. Respondents argued below, however, that the *Schwartz v. Lopez* holding creates only a "very narrow" exception to which NPRI is not entitled. On the contrary, although the exception is identified as being narrow, the Court ultimately set forth three clear criteria for the application of the exception, all of which NPRI respectfully asserts apply in the instant case.

a. Significant Public Importance.

First, for the current public-importance standing exception to apply, the case must involve an issue of significant public importance. *Schwartz v. Lopez*, 132 Nev. at 743, 382 P.3d at 894 (Alaska citation omitted). Respondents never substantially disputed the applicability of this factor, simply glossing over it by stating that, even if it is assumed to apply, NPRI fails to meet the other two factors. NPRI addresses the applicability of the other two factors below. The applicability—and significant importance—of the first factor, however, cannot be overstated.

As the Court articulated in *Commission on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009), "states are not required to structure their governments to incorporate the separation of powers doctrine (citation omitted), but Nevada has embraced this doctrine and incorporated it into its constitution." *Hardy*, 125 Nev. at 291, 212 P.3d at 1103. The Court articulated the true importance of the separation-of-powers doctrine in Nevada when it found that "[u]nlike the United States Constitution, which expresses separation of powers through the establishment of the three branches of government (citation omitted), Nevada's Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another." *Id*. (citing *Secretary of State (Heller)*, 120 Nev. at 466, 93 P.3d at 753).

As NPRI is alleging Respondents violate Nevada's separation-of-powers doctrine by engaging in dual employment with the Legislature and the executive branch, the significant public importance of confirming this violation and imposing the appropriate remedy is clear.

b. Legislative Expenditure or Appropriation.

The second requirement for the current public-importance standing exception is a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution. *Schwartz v. Lopez*, 132 Nev. at 743, 382 P.3d at 894 (Florida citation omitted). In its Amended Complaint, NPRI asserted in pertinent part as follows:

> 5. If allowed to proceed with the dual employment stated herein, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1….
> . . . .
> 28. Without this Court's intervention, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1, and irrevocable harm and irreparable harm will occur to the rights provided under this provision of the Nevada Constitution.

(JA Vol. 1 PGS 9, 12.) (emphasis added).

Specifically, Legislators are paid a minimum daily salary of $130 for the first 60 days of a regular session and for up to 20 days of a special session. NRS 218A.630(1)(a). Legislators also receive a per diem allowance, paid each day the Legislature is in session, which is intended to cover, among other things, lodging, meals and incidental expenses. NRS 218A.635, *et seq*. While is session, Legislators are also entitled to allowances for communications, postage, stationery and travel. *Id*. And, while the Legislature is not in session, each Senator and Assembly member is entitled to receive a salary and the per diem allowance and travel expenses for each day of attendance at a conference, training session, meeting, seminar, or other gathering at which the Legislator officially represents the State or its Legislature. *Id*.

Since NPRI alleged Respondents are compensated as a result of legislative expenditure or appropriation and that said compensation violates Article 3, Section 1 of the Nevada Constitution, NPRI's complaint satisfies the second factor for application of the public-importance standing exception.

c. Appropriate Party.

Finally, for NPRI to be granted standing as the public-importance exception stands today, it must show that there is no one else who will likely bring the action and that it is capable of fully advocating its position in court. *Schwartz v. Lopez*, 132 Nev. at 743, 382 P.3d at 894-95 (Utah and Alaska citations omitted). The record below should more than satisfy the Court regarding NPRI's advocacy capabilities. Respondents misplaced reliance on two prior dual employment challenges brought at the behest of NPRI, i.e. *Pojunis v. Denis*, First Judicial District Court Case No. 11 OC 00394 (filed November 30, 2011), and *French v. Gansert*, First Judicial District Court Case No. 17 OC 00231B (filed May 1, 2017) is unavailing. As these prior efforts illustrate, NPRI is the only person or entity to challenge, either directly or indirectly, individuals engaging in dual employment. Additionally, the prior indirect litigation efforts undertaken by NPRI, through individual plaintiffs alleging an interest in the government position held by a specific Legislator, never received substantive adjudication. In *Pojunis v. Denis*, the district court dismissed the matter as moot when Defendant Denis resigned from his government employment. And, in *French v. Gansert*, the district court dismissed the matter pursuant to NRCP 19, having determined that joinder of other legislators engaging in dual employment was both necessary and unable to be accomplished by the individual plaintiff, as the plaintiff could presumably assert interest in acquiring only one position. As such, there is no one else in a better position than NPRI to bring this type of action –

indeed, nobody else has – moreover, NPRI is fully capable of advocating its position in the instant case.

Respondents below relied on *Secretary of State (Heller)*, 120 Nev. at 473, 93 P.3d at 757, to advance the argument that the only appropriate parties to cases claiming dual service of legislators in violation of the State's separation-of-powers clause are those individuals seeking the government positions held by such legislators. In light of the application of NRCP 19 in *French v. Gansert*, wherein the district court mandated joinder of all parties possibly subject to application of the separation-of-powers doctrine, NPRI respectfully requests this Court employ its prudential discretion to expand the application of the public-interest exception and permit NPRI to proceed where, as here, it has named all similarly situated Respondents. It is necessary given the sheer number of Respondents named, rendering implausible if not impossible adherence to the requirement to procure individual plaintiffs capable of seeking the government positions held by each and every Respondent named herein.

Further, it is necessary where the Court speculates in *Secretary of State (Heller)*, 120 Nev. at 473, 93 P.3d at 757, that the Nevada Attorney General might pursue a quo warranto action as a means of challenging dual employment. The Attorney General, however, is a political figure unlikely to take on this bipartisan problem at the risk to members of his own party, and, in fact, no Attorney General has ever chosen to do so. The Attorney General is also an executive branch official

who would benefit from exerting control over the legislative branch, thus providing a disincentive for the person holding this elected position to ever seek such relief.

2. *Public-Importance Exception After Schwartz v. Lopez.*

The Court in *Schwartz v. Lopez* sought to address the possible diversion of public funds from public school districts to private schools and created a public-importance exception for challenges related to expenditures or appropriations. There is no legal impediment, however, to the Court maintaining the narrowness of the exception yet expanding its application to cases such as the one at issue, which go the very heart of our system of government. This is true even where a specific legislative expenditure or appropriation may not serve as the root cause of the harm.

Indeed, the principle put forth in *Schwartz v. Lopez* supports such an expansion. Nevadans being ruled by those who wield both legislative and executive powers would be no less tyrannical simply because no particular legislative expense is involved. The holding ultimately – and meaningfully – stands for the proposition that it is improper for the judiciary to deny Nevadans relief on matters of significant public importance simply because of the difficulties associated with the traditional rules of standing. Thus, in the event the Court determines NPRI does not enjoy standing pursuant to *Schwartz v. Lopez*, NPRI respectfully requests this Court find standing, or in the alternative waive the standing requirement, under a limited expansion of the public-importance exception already recognized in several other jurisdictions.

By way of non-exhaustive example, the Supreme Court of Arizona has considered the merits of an action without addressing a petitioner's standing, where the matter raises an issue of great public importance likely to recur. *See, e.g., Goodyear Farms v. City of Avondale*, 714 P.2d 386, 387 n.1 (Ariz. 1986) (holding action to determine whether Arizona statute governing procedures for municipal annexation violated equal protection clauses of federal and state constitutions directly raised issues of great public importance that were likely to recur, requiring decision regardless of standing). Additionally, the Supreme Court of Iowa has expressed a willingness to recognize an exception to the injury requirement for citizens who seek to resolve certain questions of great public importance to its system of government. *See, e.g., Godfrey v. State*, 752 N.W.2d 413, 425 (Iowa 2008) (holding standing doctrine not so rigid that it cannot recognize waiver of standing based on argument of great public importance). And, the Supreme Court of South Carolina has repeatedly conferred standing without particularized injury "when an issue is of such public importance as to require its resolution for future guidance." *Sloan v. Wilkins*, 608 S.E.2d 579, 583 (S.C. 2005) (citations omitted).

As these non-exhaustive examples make clear, the ultimate power to resolve a dispute regarding individuals engaging in dual employment in the other branches of government and to determine the constitutionality of these actions does not exist as a form of judicial superiority, nor is it itself a form of separation-of-powers violation. In fact, as noted by the Iowa Supreme Court, it is a delicate and essential judicial

responsibility found at the heart of our superior form of government. *Godfrey,* 752 N.W.2d at 425. It is compatible with the overall constitutional framework of this state, and it would properly reflect the role of the judiciary in relationship to the other two co-equal branches of government. *Id*. On this basis, NPRI respectfully requests the Court find or alternatively waive standing in the instant appeal and allow this matter to proceed to decision, as a limited expansion of the public-importance exception instituted in *Schwartz v. Lopez*.

D. The District Court Erred By Granting the Nevada Legislature Permissive Intervention as a Defendant.

Under the NRCP 24(b), district courts may grant permissive intervention to non-parties with either a conditional right to intervene or a defense in common with the primary case. Or, in the case of a non-party governmental entity, permissive intervention may be granted in lawsuits that are based on a statute administered by the entity or a regulation, order, requirement or agreement issued under such a statute. *See* NRCP 24(b)(1) and (2). It is axiomatic that permissive intervention is wholly discretionary with the court.

The district court below abused its discretion and clearly erred in this case, however, where not one of the above scenarios is present in the instant case. NPRI is purely seeking a determination that certain individual Legislators are engaging in dual employment in violation of the separation-of-powers clause of the Nevada Constitution. The Legislature is a branch of government that carries out its duties

through individual legislators acting in their official capacities as constituent members, regardless of who is sitting in those seats. And, the Legislature pays its constituent members daily salaries and per diem and other allowances as set forth in statute. In no way is the Legislature directly affected by who its constituent members are, and the Legislature is not called upon to defend the separation-of-powers clause of the Nevada Constitution when certain constituent members are accused of violating it dual employment prohibition.

Further, the Legislature's participation adds nothing to the merits of Respondents' defenses because the existing Respondents already represent any interest the Legislature may have in the outcome of the litigation. Indeed, the Legislature's intervention has needlessly multiplied this litigation. And, its involvement will also cause future delays and increase costs should this matter be remanded, through additional sets of written discovery and additional attorney schedules to accommodate and additional attorneys engaging in opening statements, direct and cross examinations, and closing arguments at trial. Increased costs and potential for delay alone are sufficient reasons for the district court to deny permissive intervention. *See Hairr v. First Judicial Dist. Ct.*, 132 Nev. Adv. Op. 16, 368 P.3d 1198, 1202 (2016). The Legislature's intervention, serving no other purpose than to prolong the litigation, required the district court to exercise its considerable discretion to maintain the status quo and deny permissive intervention.

E. The District Court Erred By Denying NPRI's Motion to Disqualify the Official Attorneys From Representation of the NSHE Defendants.

Disqualification of the NSHE counsel is imperative to avoid the appearance of impropriety and public suspicion in the instant case. First, 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" of the employee. *See* NRS 41.0338(2)(b) (emphasis added). On the contrary, in the instant case NPRI named the Respondents solely because of their individual decisions to serve in the Legislature while also being employed by a State or local government. Nothing about this action involves any act or omission relating to the carrying out of the NSHE defendants' public duties.

Second, the Court gives district courts "broad discretion to determine whether disqualification of counsel is required." *Willmes v. Reno Mun. Ct*., 118 Nev. 831, 836, 59 P.3d 1197, 1200 (2002). Specifically, district courts "are responsible for controlling the conduct of attorney's practicing before them and have broad discretion in determining whether disqualification is required in a particular case." *Brown v. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000). Such decisions involve "the delicate and sometimes difficult task of balancing competing interests," which include "the public's interest in the scrupulous administration of justice." *Id*., 116 Nev. at 1205, 14 P.3d at 1269-70. And, doubts should generally be resolved in

favor of disqualification, absent some misuse of the motion for harassment or delay. *Id*.

In denying NPRI's motion to disqualify the official attorneys, the district court failed to analyze *State of Nevada ex rel. Cannizzaro v. First Jud. Dist. Ct*., 136 Nev. Adv. Op. 34 (June 26, 2020), an analogous Supreme Court holding from just last year. In *Cannizzaro*, the Court ruled that certain State Legislators were not entitled to representation by Legislative Counsel Bureau attorneys. This, in turn, meant that there was no conflict of interest in their lawsuit against other State Legislators, as their action to challenge a piece of legislation could not be considered acting on the Legislature's behalf. Accordingly, the official attorney's client is the entity he or she represents and representation of individuals can only occur where individuals are alleged to have been acting in their official capacities. *Id*. at *3.

Applying the *Cannizzaro* Court's reasoning to the instant litigation means the NSHE attorneys represent their respective NSHE institutions. Those official attorneys may only represent an institutional employee if that employee is sued for an action taken on behalf of the institution. Plainly, that fact pattern is not present in the instant lawsuit. More importantly, the statute that authorizes an official attorney to provide a defense to a State employee does not permit representation in the instant case. Under that statute, representation is limited to a defendant named in the civil action "solely because of an alleged act or omission relating to the public duties or employment" of the employee and where the "act or omission on which the action is

based appears to be within the course and scope of public duty or employment and appears to have been performed or omitted in good faith." NRS 41.0339(1)(b). Again, the instant litigation only challenges the fact of each Respondent's executive branch employment, not any action taken because of such employment. Thus, Respondents are not properly considered NSHE clients.

V.

CONCLUSION

For the foregoing reasons, NPRI respectfully requests in the interest of judicial and party economy that this Court exercise its authority to resolve this matter in its entirety by entering a published decision that resolves whether Respondents' dual employment violates the separation-of-powers requirement of the Nevada Constitution.

If the Court is not inclined to render a final determination of this matter, NPRI respectfully requests in the alternative that the Court enter an order reversing and remanding the matter to the district court for further proceedings after finding: (i) that the district court erred in denying NPRI standing to challenge Respondents' dual employment, pursuant to the public importance exception in *Schwartz v. Lopez*, 132 Nev. at 743, 382 P.3d at 894 or limited expansion thereof, (ii) that the district court erred in granting Nevada Legislature permissive intervention, pursuant to NRCP 24(b), and (iii) that the district court erred in denying disqualification of the official representative from their representation of the NSHE employees, pursuant to NRS

41.0338(2)(b).

Dated this 8th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening 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 9,317 words.

3. Finally, I hereby certify that I have read this Opening 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. 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 8th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2021, I caused the foregoing to be served on all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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