

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

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Elizabeth A. Brown
Clerk of Supreme Court

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
REPLY TO THE ANSWERING BRIEF OF INTERVENOR-
RESPONDENT LEGISLATURE OF THE STATE OF NEVADA**

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 23rd day of August, 2021.

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ROUTING STATEMENT IN REPLY

In its Answering Brief, Intervenor-Respondent the Legislature of the State of Nevada (“Legislature”) joined and adopted by reference its co-Respondents’ position that the instant matter is one presumptively assigned to the Court of Appeals.¹ In relevant part in its order on appeal, the district court granted the motion to intervene filed by the Legislature, which it submitted through its representative from the Legal Division of the Legislative Counsel Bureau (“LCB”). The district court found that the Legislature itself was entitled to intervention as a matter of right, and that in the event it was only entitled to permissive intervention, the court would exercise its discretion to allow it to intervene.

The Legislature identifies the relevant issues on appeal as:

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?
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)?

NPRI sought to streamline its argument on appeal, knowing the Court’s review regarding intervention will be *de novo*, by focusing the key issue it

¹ Respondents Brittney Miller, Selena Torres, Jason Frierson, Nicole Cannizzaro, and Melanie Scheible filed a joint Answering Brief, and Respondents Dina Neal and Jill Tolles filed a separate joint Answering Brief, to which NPRI submitted its joint Reply Brief contemporaneously herewith.

specified: “[w]hether the district court erred in finding the Nevada Legislature qualified for permissive intervention, pursuant to NRCP 24(b).”

Regardless of how the Court reviews the issue(s) pertaining to the Legislature’s intervention, however, NPRI respectfully asserts that the matter should be retained by this Court and not transferred to the Court of Appeals pursuant to NRAP 17(a)(11) and (12), for all of the reasons stated in its contemporaneously – filed Reply Brief, as well as the added reason that it is an issue of both first impression and statewide public importance whether the Legislature is a branch of government that carries out its duties through individual legislators acting in their official capacities regardless of who occupies those seats, such that intervention under NRCP 24 is not appropriate in a lawsuit challenging the executive branch employment of certain individual legislators.

I.

ARGUMENT

A. NPRI Incorporates By Reference All Arguments Regarding Public Importance Standing.

As a preliminary matter, the Legislature in its Statement of Issues joins in and adopts by reference, pursuant to NRAP 28(i), all arguments regarding NPRI's purported lack of public interest standing. NPRI hereby opposes these arguments in their entirety by adopting by reference and incorporating herein those relevant sections of its Reply Brief filed contemporaneously herewith, in response to the Answering Brief filed jointly by Respondents Brittney Miller, Selena Torres, Jason Frierson, Nicole Cannizzaro, and Melanie Scheible, and the separate Answering Brief filed jointly by Respondents Dina Neal and Jill Tolles.

B. NPRI Did Not Waive Any Aspect of Its Appeal Concerning the District Court's Ruling on the Legislature's Intervention.

If NPRI intended to concede any aspect of the district court's ruling concerning the Legislature permitted intervention, it would have so stated. Indeed, in all of its preliminary filings, inclusive of its Notice of Appeal, Case Appeal Statement and Docketing Statement, NPRI clearly stated its intention to appeal the district court's order in this regard in its entirety. NPRI also noted in its Opening Brief in the Standard of Review that statutory construction, which is the claimed basis for the Legislature's intervention, is reviewed by the Court *de novo*,

and the Legislature conceded this point in Section II of its Answering Brief. In the event the Court determines NPRI's efforts to streamline its argument to the key appellate issue of permissive intervention and the district court's error in this regard, NPRI respectfully asks for leave to and herein does respond fully to the Legislature's intervention arguments under both NRCP 24 (a) and (b), which arguments were made notwithstanding its assertion of waiver.

C. The Legislature's Motion to Intervene Fundamentally Misstated NPRI's Claims, and the District Court Erred in Granting Intervention in Lockstep Therewith.

In its Answering Brief, the Legislature reiterates the fundamental misstatement in its motion to intervene that NPRI is alleging the Legislature itself, by its own actions or failures to act, violated the Nevada Constitution. NPRI's amended complaint, however, contains no such allegation. Indeed the entirety of the amended complaint takes aim solely at individual legislators who are simultaneously holding their elected office and employment with a state or local government. NPRI's claims for declaratory and injunctive relief sound against these individuals, and only these individuals, in its effort to once and for all resolve this controversy and stop these violations. Further, the Legislature's statement that NPRI is seeking to challenge the meaning of the separation of powers clause itself is patently false. On the contrary, NPRI is without question seeking enforcement of the separation of powers clause as plainly written.

What should have been the Legislature's simple motion for permissive intervention under NRCP 24(b), instead sought without legal basis to achieve intervention as of right under NRCP 24(a), with permissive intervention under NRCP 24(b) only briefly argued in the alternative. This straw person argument for intervention as of right under NRCP 24(a) should have immediately failed, however, where the statute the Legislature invoked, NRS 218F.720 does not apply. And, while in theory the Court could exercise its discretion to allow permissive intervention under NRCP 24(b), this option too should have been immediately denied following application of the rule to the facts of the case.

1. The Legislature Does Not Enjoy the Right to Intervene.

NRCP 24(a) provides the mechanism by which a non-party is permitted to intervene as a matter of right. NRCP 24(a)(1) requires intervention when a state or federal statute gives a non-party the unconditional right to intervene. NRCP 24(a)(2) applies where the non-party claims an interest in the litigation that is not adequately represented by existing parties. Taking each provision in turn, it is clear the Legislature does not have the right to intervene.

a. No Right to Intervene Under NRCP 24(a)(1).

The statute the Legislature relies on to claim intervention as a matter of right is NRS 218F.720. Specifically, the Legislature asserts NRS 218F.720(2)(a) is applicable because NPRI is ostensibly alleging the Legislature itself, by its own actions or failure to act, has violated the Nevada Constitution. The argument is

based on the idea that, where NPRI alleges for standing purposes that a legislative expenditure is implicated by the Respondent Legislators' dual employment, this somehow means the Legislature itself has violated the Nevada Constitution by authorizing same. On the contrary, all statutory requirements pertaining to the compensation of legislators and public employees exist independently of which persons hold these positions, and NPRI is in no way challenging the Legislature's carrying out of or compliance with these requirements.

Where the Legislature is truly wrong-footed, however, is when it attempts to rely on NRS 218F.720(2)(b) for its argument under NRCP 24(a)(1). The Legislature selectively quotes the statute as providing it the unconditional right to intervene 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.**”

See Answering Brief at p. 99:20-23 (citation omitted) (emphasis in original). In reality, when cited in its entirety, this statutory provision would provide the Legislature the unconditional right to intervene only where 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, 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.”

NRS 281F.720(2)(b) (emphasis added). This additional language is determinative of the statute’s application, and it is never once acknowledged by the Legislature in its argument.

As any fair reading of its amended complaint makes clear, NPRI is seeking to enforce the separation of powers clause of the Nevada Constitution, not challenge it on any grounds whatsoever. Contrary to the Legislature’s argument, NPRI’s entire case is premised on the fact that it believes the separation of powers clause is unambiguous, clear, precise, definite, not vague, not preempted by federal law, and not in any way otherwise inapplicable, invalid, unenforceable, or unconstitutional. NPRI bases its case, too, not only on the plain language of the constitutional provision but also on the Court’s prior unqualified interpretation of this plain language to strike down a statute giving judges the authority to issue certificates to perform marriages, finding that “to permit even one seemingly harmless encroachment....could lead to very destructive results. *Galloway v. Truesdell*, 83 Nev. 13, 22, 422 P.2d 237, 243-44 (1967).

Thus, NPRI’s effort to enforce the Nevada Constitution in no way invokes the need for the Legislature to provide a defense to the separation of powers clause itself. Intervention as of right under NRCP 24(a)(1) is not available to the

Legislature in the instant case, and its intervention on that basis should be reversed.

b. No Right to Intervene Under NRCP 24(a)(2).

To intervene under NRCP 24(a)(2), a non-party must meet four requirements: (1) that it has a sufficient interest in the litigation's subject matter; (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene; (3) that its interest is not adequately represented by existing parties; and (4) that its application is timely. *See Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). Further, determining whether an applicant has met these four requirements is within the district court's discretion. *Id.* (citations omitted).

NPRI has addressed in the preceding section why the Legislature has no legitimate interest in the instant action, let alone an interest sufficient to meet the first two requirements stated above. But even if the Court were to find that some protectable interest is held by the Legislature in this case, the Legislature still had no right to intervene where its interest was adequately represented by the existing Respondents. *Am. Home Assurance Co.*, 122 Nev. at 1241, 147 P.3d at 1128. It was the Legislature's burden to prove its interest was not adequately represented, and although the burden is described as "minimal," it could not be met where the Legislature's interest or ultimate objective in the litigation is the same as the

existing Respondents or subsumed within the Respondents' objective. *Id.* (citation omitted).

Whether an existing party's interest adequately represents an intervenor's interest is, in fact, crucial to the analysis of a proposed intervention. *See Hairr v. First Judicial Dist. Ct.*, 132 Nev. Adv. Op. 16, 368 P.3d 1198 (2016). In *Hairr*, the State of Nevada was defending litigation regarding the constitutionality of an education grant program instituted by law. *Id.*, 368 P.3d at 1199. Parents of students seeking grants sought to intervene in the matter. *Id.* The court ultimately found the parents seeking to intervene had the same interest as the State in having the program declared constitutional. *Id.*, 368 P.3d at 1199-1200. "The most important factor is determining adequacy of representation is how the interest compares with the interests of existing parties...[and] when an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.*, 368 P.3d at 1201. The State's representation was therefore presumptively adequate in representing the interests of the parents, and the parents were not permitted to intervene as a matter of right under NRCP 24(a)(2). *Id.*

Here, there is no question the Legislature had the same interest and ultimate objective as the Respondents in this litigation, i.e., to seek dismissal of NPRI's amended complaint to avoid at all costs a ruling from the district court that the

separation of powers clause of the Nevada Constitution prohibits legislators from holding positions of public employment with the executive branch or any local government. The Legislature, in fact, presents no argument that Respondents' representation of its interests or carrying out of its objective to obtain the same desired outcome is deficient or lacking.

The Legislature's only attempt to differentiate its interests from that of the Respondents is to claim it has "independent legal interests in defending the validity of its legislative actions in exercising the constitutional power of appropriation" separate and distinct from the individual interests of the Respondents. *See Answering Brief at p. 14.* As addressed by NPRI in the preceding section, its amended complaint is devoid of any challenge to the Legislature's compliance with any of its requirements, appropriations or otherwise, which exist independent of the persons holding elected offices as its constituent members. And, even if NPRI were engaging in such a challenge, which it is not, each of the Respondents either filed or joined a total of four (4) motions to dismiss, which sought to attack from every conceivable angle NPRI's sincere efforts to obtain a definitive ruling on their dual employment. While NPRI is still bemused by Respondents' choice to proceed that way, rather than seeking to advance their position for final appellate review in the most expeditious way possible, the fact remains that their representation is entirely aligned with the

Legislature, and the Legislature's interest is more than adequately protected. Because the Legislature fails to meet this essential prong for the right to intervene under NRCP 24(a)(2), the district court should have denied its motion to intervene and the Court should reverse the order on this basis as well.

2. The Legislature Also Does Not Qualify for Permissive Intervention in the Instant Litigation Under NRCP 24(b).

A district court 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, 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).

As demonstrated above, not one of the above scenarios is present in the instant case. NPRI sought only a determination by the district court that certain Legislators are engaging in dual employment in violation of the separation of powers clause of the Nevada Constitution. The Legislature carries out its duties through individual legislators acting in their official capacities as constituent members, regardless of who holds those seats. In no way would the Legislature be directly affected by who its constituent members are, and the Legislature is not being called upon to defend the separation of powers clause of the Nevada Constitution when certain constituent members are accused of violating it by engaging in impermissible dual employment.

Indeed, the Legislature's participation in the case added nothing to the merits of Respondents' defenses because the existing Respondents more than adequately represented any interest the Legislature had in the outcome of the litigation. And, as NPRI asserted without opposition, the Legislature's intervention would needlessly multiply the litigation and undoubtedly cause delay and increase costs through additional sets of written discovery, additional schedules to accommodate, and additional attorneys conducting voir dire, opening statements, direct and cross examinations, and closing arguments at trial. Increased costs and potential for delay, which come with no measurable benefit, were appropriate reasons alone to deny permissive intervention. *See Hairr*, 368 P.3d at 1202. Here, the district court erred in granting the Legislature's intervention, which could only prolong the litigation and serve no other purpose, and the Court should reverse the district court's order granting permissive intervention.

II.

CONCLUSION

For the foregoing reasons, NPRI respectfully requests this Court find that the district court erred in granting the Legislature of the State of Nevada intervention pursuant to NRCP 24.

Dated this 23rd day of August, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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 Reply Brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)(ii) 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 2,287 words.

3. Finally, I hereby certify that I have read this Reply 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 Reply 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

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subject to sanctions in the event that the accompanying Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2021, I caused the foregoing **APPELLANT’S REPLY BRIEF TO INTERVENOR-RESPONDENT LEGISLATURE OF THE STATE OF NEVADA** to be served on all parties to this action by electronically filing it with the Court’s e-filing system, as follows:

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