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 REPLY TO THE ANSWERING BRIEFS OF RESPONDENTS MILLER, TORRES, FRIERSON CANNIZZARO, SCHEIBLE, NEAL AND TOLLES

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.

FOX ROTHSCHILD LLP

By: */s/ Deanna L. Forbush*

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ROUTING STATEMENT IN REPLY

In their Answering Briefs[1], Respondents assert the instant matter is one presumptively assigned to the Court of Appeals. No matter which issues are taken under review, however, Respondents' assertion is in error. NPRI in no way conflates merits issues with the appellate issues, as Respondents maintain. On the contrary NPRI clearly articulates its respectful ask that the Supreme Court exercise its considerable discretion to address the underlying separation of powers issue of Respondents dual employment and conclude the case in the interests of both judicial and party economy. Indeed, the briefing in this matter is closing just a few weeks prior to the date the Court scheduled oral argument in the retained cases *State v. Dist. Ct. (Plumlee)*, Case No. 82236, and *State v. Dist. Ct. (Molen)*, Case No. 82249, which raise the same separation of powers issue raised herein but only as it pertains to Respondents Melanie Scheible and Nicole Cannizzaro, both sitting members of the legislative branch engaging in the executive branch function of prosecuting criminal defendants for violations of state law. Resolution by the Court of these cases will address only a duty-specific separation of powers challenge; resolution of the instant case will provide welcome guidance on Nevada's separation of powers mandate in all such cases.

[1] Intervenor-Respondent the Legislature of the State of Nevada filed a separate Answering Brief, to which NPRI submitted its separate Reply Brief contemporaneously herewith.

NPRI understands, of course, that the Court may require further development of the record below to aid its determination of the ultimate separation of powers issue and instead choose to focus herein on the limited issues of whether the district court erred by: (1) denying NPRI public importance standing and (2) denying disqualification of the attorneys representing certain Respondents. Even in such circumstance, however, the routing outcome should be the same, i.e., the Supreme Court, not the Court of Appeals, presumptively retains the case under NRAP 17(a)(11) and (12), where all proffered issues raise questions of first impression and/or statewide public importance.

I.
ARGUMENT

A. Standing Should Not Be Any Impediment to NPRI Proceeding Before This Court or, Upon Remand, Before the District Court.

Separation of powers is the fundamental principle upon which our democracy is based. The framers of Nevada's Constitution clearly recognized this when, in 1864, they used the broadest possible language to proclaim that "no persons charged with the exercise of powers properly belonging to one of these [Legislative, Executive or Judicial] departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. 3, § 1, ¶ 1 (emphasis added). There can be no legitimate dispute, then, that resolving the matter of nine (9) State Legislators[2] violating the separation of powers clause by carrying out functions – any functions – relating to the executive branch is a matter of the utmost public importance and one that requires resolution by this Court for future guidance.

Were Respondents certain of the propriety of their executive branch employment, they could have easily stipulated to the factual basis for NPRI's challenge, allowed Judge Crocket to make the substantive call, and expedited the arrival of a final judgment on this Court's docket. Instead, in their voluminous motions below and Answering Briefs here, Respondents continue to attack NPRI,

[2] This Court dismissed the tenth named Respondent, Heidi Seevers Gansert, on March 10, 2021.

both its motives and its advocacy, in seeking public importance standing and disqualification of the official attorneys. This desire to avoid a substantive ruling likely stems from the recognition that over a half century ago this Court interpreted separation of powers in a manner which recognized that it is precisely in the area of non-sovereign, ministerial functions that separation of powers violations most frequently occur, language strongly indicative of the prohibition of the State Legislators herein simultaneously serving as public employees in any capacity. *Galloway v. Truesdell*, 83 Nev. 13, 21 – 22, 422 P.2d 237, 243 (1963). Nevertheless, and contrary to Respondents' arguments, however, public importance standing either already is or reasonably should be available to NPRI, with or without the need for further factual development below. This, in turn, will provide the Court, or the district court if the Court first requires, the opportunity to substantively and finally determine Nevada's separation of powers mandate.

1. The Court May Confer Public Importance Standing Upon the Existing Record.

Respondents take great umbrage at the fact NPRI claims to have established public importance standing or, in the alternative, claims to be entitled to the same under a reasonable expansion of the Court's existing jurisprudence. The parties have fully briefed the published factors for public interest standing set forth in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016), and NPRI will not take the Courts time to revisit them here. It will, however, take the opportunity to

challenge Respondents position that it is too soon to ask the Court to consider minimally expanding Nevada's recognition of public importance standing, should it be necessary, to allow NPRI to proceed.

Nearly five years have passed since the Court first recognized public importance standing as a doctrine distinct from taxpayer standing, in a case involving an issue of significant public importance. *Schwartz v. Lopez*, 132 Nev. at 743, 757 n.5, 382 P.3d at 894, 903 n.5. At the time, and in the particular circumstance of the constitutional challenge to the education savings account program at issue, the Court set forth three factors for a litigant to establish public importance standing: (1) that there is an issue of significant public importance, (2) that there is a challenge to a legislative expenditure or appropriation on the basis that it violates a specific constitutional provision, and (3) that there is no one better positioned who is likely to bring the action and be capable of fully advocating in court. *Id*., 132 Nev. at 743, 382 P.3d at 894-95. The Court cited other jurisdictions who had preceded it in applying public importance standing in certain circumstances, and it ultimately concluded that, "under the particular facts involved here, the plaintiffs in these cases have demonstrated standing under the public-importance exception text." *Id*., 132 Nev. at 744, 382 P.3d at 895.

NPRI has alleged facts in its amended complaint for declaratory and injunctive relief challenging all State Legislators known to be engaging in

separation of powers violations to show that it can and will meet each of these factors. In their Answering Briefs, Respondents only truly take issue with NPRI's ability to reach factor (2), claiming that their dual legislative and executive branch roles in no way implicate a legislative expenditure or appropriation. NPRI's operative pleading alleges the contrary, but even if NPRI allows for argument sake that its allegations are deficient in this regard, it is still "the judiciary's role to determine the meaning of the Constitution," as it recognized as a threshold matter in its first adoption of public importance standing. *Schwartz v. Lopez*, 132 Nev. at 738, 382 P.3d at 891. And, other states that have gone before Nevada in conferring public importance standing in worthy cases have found that where public rather than private rights are at issue, standing should be conferred for matters of significant public importance that require future guidance whether or not other standing factors are present.

By way of illustrative but no means singular example, the Supreme Court of South Carolina recently conferred public interest standing on the South Carolina Public Interest Foundation and an individual citizen who sought a declaration that the Department of Transportation's inspection of three privately owned bridges violated the South Carolina Constitution. *South Carolina Public Interest v. SCDOT*, 421 S.C. 110, 114-15, 804 S.E.2d 854, 857 (2017). The trial court granted summary judgment based in part on lack of standing, and the appellate

court's reversal included a finding of public importance standing based solely on the public importance of the issue and the need for future court guidance. *Id*., 421 S.C. at 118-19, 802 S.E.2d at 858-59. The court recognized it must balance the competing policy concerns underlying the issue of standing, which are to afford citizens access to the judicial process to address alleged injustices but not to grant standing to every individual with a grievance, so as not to subject public officials to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits. *Id*., 421 S.C. at 118, 804 S.E. 2d at 859. The court fully analyzed the concerns regarding SCDOT's actions and found that, although it was a close call, conferring public importance standing was appropriate because the matter was of obvious significant public importance, involving the conduct of a government entity and the expenditure of public funds, and because future guidance was needed where there was no judicial guidance on the issue and the conduct in question would clearly reoccur. *Id*., 421 S.C. at 119, 804 S.E.2d at 859. The court reasoned that "[a] contrary holding would essentially render a law superfluous if we deem the conduct it prohibits too insignificant to ensure the law is enforced." *Id*.

In another recent decision, the Supreme Court of Indiana in reviewing its long history of conferring public importance standing clearly articulated the distinction between taxpayer standing, which generally implicates a challenge to

the expenditure or appropriation of public funds, and public importance standing, which may involve a challenge to "virtually any government action" so long as there's a "substantial public interest, as determined by the court overseeing the lawsuit." *Horner v. Curry*, 125 N.E.3d 584, 594-95 (2019) (citations omitted). Although it stopped short of addressing whether public importance standing was appropriate in the given case, having already conferred taxpayer standing, it conceded that the doctrine of public importance standing typically "has no basis in, and cannot be traced to, a particularized injury-in-fact," and quotes two prominent law review articles that recognize the difference between a plaintiff in a taxpayer lawsuit, which is one understood to be "affected" in a sense that is distinguishable from a plaintiff in a public importance lawsuit, where that plaintiff is "the mere instrument of the public's concern." *Id*. (internal quotations and citations omitted).

NPRI respectfully asserts that when the Court reviews the jurisprudence of other jurisdictions that have previously expanded public importance standing, it will find the instant case ripe for the same consideration. Separation of powers, as implicated by Respondents' existing dual employment, is the most fundamental of public rights. As articulated by the Court more than a half century ago, separation of powers in this regard is "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 conduct of the Respondents has, and will likely, continue to repeat and future guidance on the issue is long overdue. And, NPRI, just like public interest foundations and citizens in other states simply seeks to be the voice for a paramount public concern. This is not a mere individualized grievance, likely to be beget future frivolous lawsuits, but on the contrary, it is a well-founded assertion of a public right to be free from the abuses inherent in a State Legislator also exercising any function related to the executive branch. To deny NPRI standing would be tantamount to rendering separation of powers superfluous if the violation of its plain mandate is too insignificant to enforce.

2. Should NPRI's Public Importance Standing Remain In Doubt, Remand is Necessary for Discovery to Proceed Concerning the *Schwartz v. Lopez* Factors.

As the Court knows, it must rigorously review 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 pursuant to 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).

As the record below shows, the district court had no appetite to substantively review NPRI's separation of powers challenge. Whether for retirement reasons or political reasons or other reasons known only to the judge himself, the district court summarily decided all motions against NPRI in the Court's November 18, 2020 minute order, issued one day before the scheduled oral hearing and without the benefit of argument. Because Respondents had argued against NPRI's standing in varying ways, NPRI requested clarification, which the district court also summarily denied. It was incumbent upon the district court, however, to apply the correct standard and articulate which factor or factors pertaining to public importance standing NPRI failed to sufficiently allege in order to survive Respondents' motions to dismiss.

Although public importance standing is a narrow exception to the general standing requirement of particularized injury, the Court's existing criteria for the application of the exception are clear, and NPRI alleged facts to support each in its amended complaint. Tellingly, each motion to dismiss conceded, rightfully so, the application of the first factor of significant public importance. Second, NPRI made the necessary allegation that this case involves a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the

Nevada Constitution and went so far as to seek judicial notice of the fact that Legislators are compensated by Legislative Department expenditure. Some Respondents directly opposed NPRI's standing on this point, and others did not. Finally, NPRI both alleged and demonstrated through its briefing that it is not only an appropriate party, it is in fact the only party until the recent challenge concerning Respondents also acting as criminal prosecutors to have ever challenged State Legislators engaging in dual employment as a violation of separation of powers. Again, some Defendants directly opposed NPRI's standing on this point, and others did not. The district court ultimately entered a final order based on Respondents' submission without input from NPRI, which in no way applies the correct dismissal standard and assumes facts not in evidence to bar NPRI from the courthouse.

Respondents, with no apparent sense of the obvious inconsistency, suggest in their Answering Briefs that any review of their dual employment requires further factual development, but any review of whether NPRI meets the factors for public importance standing requires no additional factual inquiry whatsoever. NPRI agrees with the latter point, for the reasons stated herein, but if the Court questions NPRI's standing in any way, it respectfully requests the Court reverse the dismissal of NPRI's amended complaint and remand the matter for further proceedings in the district court to allow NPRI to complete discovery to establish

the factual support for its claims of standing, as well as its causes of action for declaratory and injunctive relief.

B. The District Court Erred By Denying NPRI's Motion to Disqualify the Attorneys Representing Respondents Neal and Tolles.

Respondent Dina Neal and Jill Tolles specifically assert in their Answering Briefs that NPRI omits portions of the statutory definition of "official attorneys" found in NRS 41.0338 and that somehow the "permissive representation" they concede is not set forth in NRS 41.0339, the statute authorizing official attorney representation, may still be made available to them. This reading of the statutes in question is neither harmonious nor sensical and should be disregarded.

As a threshold matter to challenging these specific claims in the Answering Brief of Respondents Neal and Tolles, the Court must first determine whether the plain language of the statute is clear, and if it is, it should be enforced as written. *Peck v. Zipf*, 133 Nev. 890, 893, 407 P.3d 775, 779 (2017). Next, the Court will interpret a statute in harmony with other statutes when possible. *Williams v. State Dept. of Corrections*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017). This ensures that courts interpret a statute in light of the policy and spirit of the law, and not in a manner that is contrary to what the legislature intended. *Toll v. Wilson*, 135 Nev. 430, 433, 453 P.3d 1215, 1218 (2019). Within this framework, disqualification of the counsel for Respondents Neal and Tolles is appropriate, and the district court's ruling to the contrary should be reversed.

Pursuant to the plain language of NRS 41.0339, an official attorney's 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." *See* NRS 41.0339(1)(b). The instant litigation seeks only to challenge the fact of each Respondents' executive branch employment, not any action taken pursuant to such employment. As such, Respondents should not have been properly considered clients of an official attorney.

Further, the only ostensibly relevant definition of "official attorney" appears inapposite but nevertheless contemplates the same limitation as the enabling statute. In NRS 41.0338, an "official attorney" means "the chief legal officer or other authorized legal representative of a political subdivision in an action which involves….[a] person who is named as a defendant solely because of an alleged act or omission relating to the public duties or employment…." *See* NRS 41.0338(2)(b) (emphasis added). "Political subdivision" for purposes of the statutes in question is defined at NRS 41.0305 and would not appear to include the University of Nevada Reno or Nevada State College. But even if these institutions could be deemed political subdivisions, NRS 41.0338(2)(b) would be rendered

meaningless if Respondents' reliance on NRS 41.0338(2)(a) for the proposition that any current or former employee is entitled to representation in any case. Read in harmony, NRS 41.0339(1) and NRS 41.0338(2) would permit official attorney representation only where a party named as a defendant is being sued based on an alleged act or omission relating to his or her public duties or employment, which is simply not the case for the Respondents named herein. 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.

Tellingly, all of the other Respondents named herein retained private counsel. And, just last year, the Court ruled in an analogous situation that certain State Legislators were not entitled to official attorney representation. In *State of Nevada ex rel. Cannizzaro v. First Jud. Dist. Ct*., 136 Nev. Adv. Op. 34 (June 26, 2020), the Court found the official attorney's client to be 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 allows the Court to conclude that 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.

II.
CONCLUSION

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

In the alternative, NPRI respectfully requests the Court enter an order reversing and remanding the matter to the district court for further proceedings after finding that the district court erred by: (1) denying NPRI public importance standing and (2) denying disqualification of the attorneys representing certain Respondents at the dismissal stage of the proceedings.

Dated this 23rd day of August, 2021.

FOX ROTHSCHILD LLP

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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 3,000 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 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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