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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY

DOUGLAS E. FRENCH,

Plaintiff,

vs.

HEIDI GANSERT in her official capacity as Executive Director,  
External Relations for the University of Nevada, Reno;  
UNIVERSITY OF NEVADA, RENO; NEVADA SYSTEM OF  
HIGHER EDUCATION; NEVADA BOARD OF REGENTS;  
and the STATE OF NEVADA on Relation to The Nevada  
System of Higher Education, The Nevada Board of Regents, and  
the University of Nevada, Reno;

Defendants.

Case No.: 17 OC 000231B

Dept. No. I

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' HEIDI GANSERT AND NEVADA SYSTEM  
OF HIGHER EDUCATION'S MOTIONS TO DISMISS FIRST AMENDED COMPLAINT**

Plaintiff, Douglas French, (hereinafter "French") by and through his counsel of record, Joseph F. Becker, of NPRI Center for Justice and Constitutional Litigation, hereby opposes the Defendants' Heidi Gansert (hereinafter "Gansert") and Nevada System of Higher Education (hereinafter "NSHE") Motions to Dismiss First Amended Complaint. Because both Oppositions filed by Defendants incorporate one another by reference, Plaintiff French hereby files one Opposition in response to both Motions to Dismiss and will generally refer to the Defendants to include all named Defendants except where otherwise necessary to clarify some point.

1 This opposition is based upon the memorandum of points and authorities and all pleadings and  
2 documents on file herein.

3 DATED this 26<sup>th</sup> day of May, 2017.

4  
5 **NPRI CENTER FOR JUSTICE**  
6 **AND CONSTITUTIONAL LITIGATION**

7 BY: 

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## I. INTRODUCTION

[T]he Constitution is not a living organism . . . it's a legal document, and like all legal documents, it says some things, and it doesn't say other things.<sup>1</sup>

— Former U.S. Supreme Court Justice Antonin Scalia

In an attempt to avoid being subject to declaratory and injunctive relief for a clear violation of the plain language of the Nevada Constitution, Defendants Gansert and NSHE file protracted Motions to Dismiss Plaintiff French's case. Given that Plaintiff's Complaint alleges and judicial notice can be taken of Defendant Gansert's employment in the Nevada state university system concurrent with her serving in the Nevada state legislature, this Court is presented with a simple, straightforward, and narrow question of law. That is, whether a sitting member of the Nevada Legislature may be simultaneously employed in the State of Nevada's executive branch.

According to Governor Sandoval's (then-Attorney General Sandoval's) 2004 Advisory Opinion directly on point, **"Article 3, Section 1 of the Nevada Constitution bars any employee from serving in the executive branch of government and simultaneously serving as a member of the Nevada State Legislature."** AGO 2004-03 (emphasis added).

## I. FACTS

On or about February 6, 2017, Defendant GANSERT, a Nevada state executive branch employee was sworn-in to the Seventy-ninth Session of the Nevada Legislature.

The Nevada Constitution reads, in relevant part: "The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial;

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<sup>1</sup> Bran C. Noonan, *The Fate of New York Public Education Is A Matter of Interpretation: A Story of Competing Methods of Constitutional Interpretation, the Nature of Law, and A Functional Approach to the New York Education Article*, 70 Alb. L. Rev. 625, 646 (2007).

1 and no persons charged with the exercise of powers properly belonging to one of these departments shall  
2 exercise *any functions*, appertaining to either of the others. . .” Nevada Const. Art. 3, §1, ¶1 (emphasis  
3 added).

4 The rationale underlying the Separation of Powers provision can be traced to the desire of the  
5 constitutional framers to encourage and preserve independence and integrity of action and decision on  
6 the part of individual members of the Nevada state government and to guard against conflicts of interest,  
7 self-aggrandizement, concentration of power, and dilution of separation of powers.

8 Defendant GANSERT’s employment in a Nevada State Executive Branch position expressly  
9 violates the Nevada Constitution and undermines the public interest and liberty by diluting the  
10 separation of powers, concentrating power, creating conflicts of interests and appearances thereof.

## 11 12 13 II. LEGAL STANDARD(S)

14 “[T]his court must construe the [non-moving party’s] pleadings liberally and accept all factual  
15 allegations in the complaint as true. *See Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967  
16 (1997). Furthermore, this court must draw every fair inference in favor of the non-moving party. *Id.* ‘A  
17 complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the  
18 plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to  
19 relief.’ *Id.*” *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275,  
20 1278 (2000).

21  
22 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim  
23 showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ...  
24 claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555  
25 (2007) “and a complaint must contain a ‘short and plain statement of the claim showing that the pleader  
26 is entitled to relief.’ ‘[D]etailed factual allegations’ are not required.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
27  
28

1 663-64 (2009) (internal citations omitted). “When there are well-pleaded factual allegations, a court  
2 should assume their veracity and then determine whether they plausibly give rise to an entitlement to  
3 relief.” *Id.*

### 4 III. ARGUMENT

#### 5 A. The First Amended Complaint (and the Complaint as Originally Written) 6 Amended Satisfies NRCP Rule 8(a).

7 In what has become every government’s first line of defense in cases against them, Defendants in  
8 the instant case reiterate and further advance this typecast by alleging Plaintiff’s Complaint is “replete  
9 with conclusory allegations that cannot be used to make out a claim for relief.” However, Plaintiff easily  
10 satisfies Nevada (and federal) notice pleading requirements.  
11

12 **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original  
13 claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain  
14 statement of the claim showing that the pleader is entitled to relief, and (2) a demand for  
judgment for the relief the pleader seeks . . .

15 NRCP Rule 8(a).

16 Of course, relying even upon the very cases habitually cited by government defendants in their  
17 now-hackneyed Motions to Dismiss, the Court is instructed that, “Federal Rule of Civil Procedure  
18 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to  
19 relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it  
20 rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) “and a complaint must contain a  
21 ‘short and plain statement of the claim showing that the pleader is entitled to relief.’ ‘[D]etailed factual  
22 allegations’ are not required.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64 (2009) (internal citations  
23 omitted). “When there are well-pleaded factual allegations, a court should assume their veracity and  
24 then determine whether they plausibly give rise to an entitlement to relief.” *Id.*  
25  
26  
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28

1 And, in Nevada, "A complaint will not be dismissed for failure to state a claim unless it appears  
2 *beyond a doubt* that the plaintiff *could prove no set of facts* which, if accepted by the trier of fact, would  
3 entitle him or her to relief." *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217,  
4 14 P.3d 1275, 1278 (2000) (emphasis added).

5 As evidenced by Defendants' own Motions to Dismiss, the Defendants have been provided "fair  
6 notice" as to why they are being sued. In fact, Defendant's own words make it quite clear that  
7 Defendant fully understands the crux of the lawsuit having written: "French brings this bare-bones  
8 complaint against Gansert . . . to justify his position that Gansert should not be allowed to work as a  
9 public employee while serving her state in the citizen-based legislature." Defendant Gansert's Motion  
10 p.2. Such serves, in part, as an admission that defies her Section A allegations that the notice pleading  
11 requirement of a complaint is somehow deficient.

12 Plaintiff was, of course, as factually specific as necessary given the straightforward question of  
13 law necessary to resolve this case and grant the relief requested and, thus, easily satisfies the liberal  
14 notice pleading requirements of NRCP Rule 8(a). As demonstrated below, the Complaint contains much  
15 more than "conclusory allegations of law" and/or facts (completely devoid of law) as Defendant would  
16 have this Court believe. Such facts include (underlined):

17 1. On or about February 6, 2017, Defendant, HEIDI GANSERT, began service in  
18 the Nevada Legislature, as a Nevada State Senator, despite concurrently holding a  
19 position in the Executive Branch of the State of Nevada, contrary to The Constitution of  
20 Nevada Art. 3, §1, ¶1.

21 4. Plaintiff (hereinafter "FRENCH") is a resident of Las Vegas, Nevada, a citizen of  
22 the United States, a Nevada taxpayer and not a debtor in bankruptcy. He is duly  
23 qualified, holds the job requirements for and earnestly seeks the position of Executive  
24 Director, External Relations at the University of Nevada, Reno, currently held by  
25 Defendant HEIDI GANSERT.

26 10. On or about February 6, 2017, Defendant GANSERT was sworn-in to the  
27 Seventy-ninth Session of the Nevada Legislature, despite holding a position as an  
28 employee of the Nevada Executive Branch.

1 11. The Nevada Constitution reads, in relevant part: "The powers of the Government  
2 of the State of Nevada shall be divided into three separate departments, the Legislative,  
3 the Executive and the Judicial; and no persons charged with the exercise of powers  
4 properly belonging to one of these departments shall exercise any functions, appertaining  
to either of the others. . ." Nevada Const. Art. 3, §1, ¶1 (emphasis added).

5 12. The rationale underlying the Separation of Powers provision can be traced to the  
6 desire of the constitutional framers to encourage and preserve independence and integrity  
7 of action and decision on the part of individual members of the Nevada state government  
8 and to guard against conflicts of interest, self-aggrandizement, concentration of power,  
9 and dilution of separation of powers.

10 13. Defendant GANSERT's employment in a Nevada State Executive Branch  
11 position expressly violates the Nevada Constitution and undermines the public interest  
12 and liberty by diluting the separation of powers, concentrating power, creating conflicts  
13 of interests and appearances thereof.

14 Plaintiff's First Amended Complaint ¶¶ 1, 4, 10-13.

15 Because the Nevada constitutional language is so clear that no one may serve any function in  
16 one branch while serving in another branch, no additional facts need be alleged to survive Defendants'  
17 Motions to Dismiss.

18 Moreover, the Court must accept as true that Plaintiff French is qualified for Gansert's position.  
19 Because the means by (and qualifications upon) which Defendant Gansert was "appointed" to her  
20 \$200,000+ per year position were less than open and public, certainly Plaintiff must also be allowed, if  
21 even necessary, to pursue additional factual discovery on this matter, however undesirable such may be  
22 for Defendants Gansert and her employer.

23 **B. "Any Function" Means "ANY" Function.**

24 In her Motion to Dismiss, Defendant Gansert accurately cites Article 3, §1 of the Nevada  
25 constitution to read, "no person charged with the exercise of powers properly belonging to the  
26 Legislative, Executive or Judicial branch, *shall exercise any functions*, appertaining to either of the  
27 others."  
28

1 Curiously, Defendants appear to be arguing that, based upon the language of Article 3, it is  
2 somehow inadequate for purposes of the notice pleading requirement for Plaintiff French to allege only  
3 that Gansert serves as a State Senator in the Nevada legislature and is employed as the Executive  
4 Director of External Relations for the University of Nevada, Reno. In other words, Defendants ask this  
5 Court to rule as “implausible” that these positions held by Gansert do not serve “any function.” This, of  
6 course, borders on ludicrous.

7  
8 As cited above, “[D]etailed factual allegations’ are not required.” *Ashcroft v. Iqbal*, 556 U.S.  
9 662, 663-64 (2009) (internal citations omitted). “When there are well-pleaded factual allegations, a  
10 court should assume their veracity and then determine whether they plausibly give rise to an entitlement  
11 to relief.” *Id.* The allegations that Gansert serves in the Nevada State Senate and concurrently holds the  
12 position of Executive Director of External Relations for the University of Nevada Reno certainly satisfy  
13 the nominal requirement that she “plausibly” serves *some* function in each role. And, given that serving  
14 “any function” triggers the separation of powers clause prohibition, Plaintiff French easily satisfies both  
15 Nevada (and federal) notice pleading requirements.  
16  
17

18 **C. Defendants’ Attempt to Unilaterally Reword the Nevada Constitution to Require**  
19 **“Public Officer” Status does not allow Defendants to escape the Constitutional**  
20 **Separation of Powers Prohibition.**

21 Defendants’ “Public Officer requirement” argument may seemingly be reduced to the following:

- 22 A. Only public officers may perform sovereign functions;  
23 B. Defendant Gansert does not meet the definition of a public officer;  
24 C. Therefore, Defendant Gansert’s concurrent service in two branches of Nevada government  
25 does not violate the separation of powers clause.

26 Of course, the above argument might be germane if the Nevada Constitution (rather than  
27 prohibiting the exercise of “any functions” in more than one branch) read instead that, “no person  
28 charged with the exercise of powers properly belonging to the Legislative, Executive or Judicial  
branch, shall exercise any sovereign functions, appertaining to either of the others.” However, the term



1 “sovereign function” appears nowhere in the Nevada Constitution and the term sovereign appears only  
2 once and, ironically, only in the following context:

3 *The corruption and appearance of corruption brought about by political careerism is*  
4 *destructive to the proper functioning of the first branch of our representative*  
5 *government.* Congress has grown increasingly distant from the People of the States. The  
6 People have the sovereign right and a compelling interest in creating a citizen Congress  
7 that will more effectively protect our freedom and prosperity.

8 Congressional Term Limits Act of 1996 as Added in 1998 (emphasis added).

9 The separation of powers clause is triggered by one actor performing any functions in more than  
10 one branch. No “sovereign function” is required under the Nevada Constitution to trigger the  
11 prohibition.

12 **D. Contrary to Defendants’ Supposition, Plaintiff French has Indeed Stated a Claim for**  
13 **Declaratory Relief Against Defendants and the Nevada Supreme Court has already so**  
14 **indicated in Plaintiff’s Favor.**

15 Defendants would lead this Court to believe that there exists a lack of (1) justiciable controversy;  
16 (2) adverse interests between the parties (3) legally protectable interest on the part of Plaintiff French;  
17 and (4) ripeness. However, none of these assertions upon which Defendants’ rely hold true.

18 The Nevada Supreme Court in *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 93 P.3d 746  
19 (2004) has already determined that Plaintiff French has properly stated a claim for relief against  
20 Defendants, given the factual allegations made in his Complaint. In fact, the Nevada Supreme Court  
21 held that the “party with the clearest standing to bring the quo warranto action would be the attorney  
22 general, and *declaratory relief could be sought by someone with a ‘legally protectible interest,’ such as*  
23 *a person seeking the executive branch position held by the legislator.”* *Id.* at 472-73, 757.

24 That said, Plaintiff further elaborates below in response to Defendants’ suppositions as to why  
25 such is necessarily the case.

26 //  
27  
28

1           **1. There exists a justiciable controversy issue in Plaintiff's favor.**

2           **a. Some opportunity is better than no opportunity.**

3           Citing *Doe v. Bryan*, Defendant concedes a justiciable controversy is one "in which a claim of  
4 right against one who has an interest in contesting it. As a Plaintiff qualified to hold the executive  
5 branch position currently held unconstitutionally by Defendant Gansert, Plaintiff French has such an  
6 interest in so contesting it. So long as Defendant Gansert occupies the position of Executive Director of  
7 External Relations, Plaintiff French has *no* possibility of assuming that role. With that role vacated by  
8 the declaratory and injunctive relief sought from this Court, Plaintiff French has *at least some* possibility  
9 of securing the employment he seeks. It is adequate, that French's position to secure the position held  
10 unconstitutionally by Gansert is improved, even if there is no guarantee that he will be "appointed" in  
11 her place.  
12

13  
14           **b. French has standing as a Nevada taxpayer.**

15           Secondly, as a Nevada taxpayer, Plaintiff French has a constitutional right to declaratory and  
16 injunctive relief to prevent unconstitutional disbursement of his tax dollars. "Taxpayer standing is  
17 central to holding state and local governments accountable to limits on spending and other activities as  
18 specified in the state constitution." *Manzara v. State*, 343 S.W. 3d, 656 665 (Mo. 2011).  
19

20           **c. French has standing under the public interest exception.**

21           Additionally, Plaintiff French has a right to secure declaratory and injunctive relief under the  
22 Public Interest exception pursuant to *Schwartz v. Lopez et al.*, *Duncan et al. v. State of Nevada, et al.*, in  
23 which the Nevada Supreme Court created a new form of standing when it held:  
24

25           We now recognize an exception to this injury requirement in certain cases involving  
26 issues of significant public importance. Under this public-importance exception, we may  
27 grant to a Nevada citizen to raise constitutional challenges to legislative expenditures or  
28 appropriations without a showing of a special or personal injury. We stress, as have other  
jurisdictions recognizing a similar exception to the general standing requirements, that  
this public-importance exception is narrow and available only if the following criteria are

1 met. First, the case must involve an issue of significant public importance. *See, e.g., Trs.*  
2 *For Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987). Second, the case must involve a  
3 challenge to a legislative expenditure or appropriation on the basis that it violates a  
4 specific provision of the Nevada Constitution. *See Dep't of Admin. v. Horne*, 269 So.2d  
5 659, 662-63 (Fla. 1972). And third, the plaintiff must be an "appropriate" party, meaning  
6 that there is no one else in a better position who will likely bring an action and that the  
7 plaintiff is capable of fully advocating his or her position in court. *See Utah Chapter of*  
8 *Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 972-73 (Utah 2006); *Trs. for Alaska*,  
9 736 P.2d at 329-30.

10 *See pp. 13-14 at 132 Nev., Advance Opinion 73 (2016).*

11 **i. The separation of powers issue is one of significant public importance and**  
12 **interest.**

13 There is little doubt that such is an issue of significant public importance. At least as recently as  
14 2004, this Court held that "separation of powers 'is probably the most important single principle of  
15 government declaring and guaranteeing the liberties of the people.' It works by preventing the  
16 accumulation of power in any one branch of government." *Heller v. Legislature of the State of Nevada*,  
17 120 Nev. 456, 466 93 P.3d 746, 753 (2004).

18 Although case law on this point of law in Nevada is relatively sparse, when confronted with this  
19 very question of whether to invoke the public interest exception to the mootness doctrine in a separation  
20 of powers matter, the New Mexico Supreme Court held "A court should continue a cause,  
21 notwithstanding a lapse of time or the particular degree of controversy, if the court discerns a likelihood  
22 of recurrence of the same issue, generally in the framework of a 'recurring' controversy and 'public  
23 interest' in maintaining the appeal. We hold that it does. The constitutional doctrine of separation of  
24 powers is at the very heart of the controversy raised in this case . . ." and . . . "[t]he parameters of the  
25 separation of powers doctrine presents a recurring problem of great public interest." *Mowrer v. Rusk*, 95  
26 N.M. 48, 51-52, 618 P.2d 886, 889-90 (1980).

27 In fact, it is difficult to imagine a case with a more fundamental and public issue. This case  
28 potentially resolves, in part, the important state constitutional question of certain qualifications as to who

1 may hold public employment and, tangentially, public office in each of the three branches of Nevada  
2 state government. It is "axiomatic that the qualifications of a declared candidate for public office is a  
3 public issue." *Matson v. Dvorak*, 40 Cal. App. 4th 539, 548, 46 Cal. Rptr.2d 880, 885-86 (1995).

4         Dating back to at least 1911, no fewer than fourteen Nevada Attorney General Advisory  
5 Opinions with conflicting conclusions and strongly relating to this point of law have been issued. As  
6 recently as 2004, such an Opinion was issued on this precise point of constitutional law concluding that,  
7 "Article 3, Section 1 of the Nevada Constitution bars any employee from serving in the executive branch  
8 of government and serving as a member of the Nevada State Legislature." Op. Nev. Att'y Gen. No. 3  
9 (2004)(emphasis added). Yet, legislators such as Defendant GANSERT remain employed when elected  
10 to and seated in the legislature despite this Attorney General Advisory Opinion precisely to the contrary.  
11

12         The aforementioned litany of Nevada Attorney General Advisory Opinions is strong empirical  
13 evidence that this question of law not only needs to be addressed but also that the question is almost  
14 certain to recur going forward. As government assumes a larger and larger role into what was formally  
15 an economy dominated by private enterprise, even more candidates and legislators are likely to be  
16 violative of the constitutional provision in question. Filing suits one after another to remove civil  
17 servants holding positions unconstitutionally is a most inefficient use of judicial resources and further  
18 justifies the invocation of the public interest exception in this case.  
19

20         Because the issue presented by this case is unquestionably of a public nature, resolution of that  
21 issue of law is most desirable to guide citizens and public officers going forward, and because more  
22 instances of the issue are occurring and most likely to recur, this case must survive dismissal under, *inter*  
23 *alia*, public interest standing.  
24

25 //

26 //

1                   **ii. Plaintiff French's claim is rooted in a constitutional provision.**

2           Plaintiff French's Complaint also satisfies the "implication of a constitutional provision" prong  
3 insofar as the narrow focus on which this case turns is Article 3, § 1 of the Nevada constitution.

4                   **iii. Plaintiff French is a proper party.**

5           Lastly, Plaintiff French who seeks the executive branch position held by Defendant Gansert and  
6 is a Nevada taxpayer, is a perfectly suited and "appropriate" party to bring this action.  
7

8                   **2. Adverse interests exist between the parties.**

9           First, Defendant Gansert holds the executive branch position sought by Plaintiff French.  
10 Secondly, Plaintiff French, as a taxpayer seeks injunctive relief to curtail the unconstitutional  
11 expenditure of \$200,000+ in pay and benefits hemorrhaging from NSHE and University of Nevada-  
12 Reno coffers. Plaintiff's interests are thus adverse to all Defendants.  
13

14                   **3. Plaintiff French has legally protectable interests.**

15           Again, the Nevada Supreme Court decided this question in *Heller v. Legislature of State of Nev.*,  
16 120 Nev. 456, 93 P.3d 746 (2004), when it held that the "party with the clearest standing to bring the  
17 quo warranto action would be the attorney general, and *declaratory relief could be sought by someone*  
18 *with a 'legally protectible interest,' such as a person seeking the executive branch position held by the*  
19 *legislator."* *Id.* at 472-73, 757.  
20

21                   **4. The case was ripe at the moment Defendant Gansert began her duties as a Nevada**  
22 **legislator having not resigned her position as an executive branch employee.**

23           Given that Defendant Gansert is and has been serving functions in two Nevada government  
24 branches simultaneously, the case is ripe.  
25

26 //

27 //

1           **E. Defendant GANSERT, her Employers, and all named Defendants are State**  
2           **Actors and May be Enjoined from Violating the State Constitution.**

3           **1. Sovereign immunity does not apply in this case against any of the named**  
4           **Defendants.**

5           For Defendants (including Defendant Gansert (named in her official capacity) and the University  
6 of Nevada Reno) to assert they may not be sued under the state's partial waiver of sovereign immunity  
7 to prevent them (as state actors) from carrying on unconstitutional actions is patently incorrect. "While  
8 governmental immunity generally bars suits for retrospective monetary relief, it does not preclude  
9 prospective injunctive remedies in official-capacity suits against government actors who violate  
10 statutory or constitutional provisions." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex.  
11 2009). "[S]tate employment is generally sufficient to render the defendant a state actor," *West v. Atkins*,  
12 487 U.S. 42, 48, 108 S. Ct. 2250 (U.S. 1988).

13           "The presumption of sovereign immunity is not absolute and may be overcome ... (2) when an  
14 action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its  
15 officers has violated the plaintiff's constitutional rights ..." *Elec. Contractors, Inc. v. Dep't of Educ.*, 303  
16 Conn. 402, 457, 35 A.3d 188, 224 (2012). *See also Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827,  
17 850 (Tenn. 2008) ("[O]fficer loses immunity when acting beyond the scope of the power of the State,  
18 and the power of the State is limited by the state and federal constitutions."); *Patel v. Texas Dep't of*  
19 *Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015) ("sovereign immunity does not prohibit suits  
20 brought to require state officials to comply with statutory or constitutional provisions); and *Anthony K.*  
21 *v. Nebraska Dep't of Health & Human Servs.*, 289 Neb. 540, 547–48, 855 N.W.2d 788, 795–96 (2014)  
22 ("State's sovereign immunity 'does not bar a claim against state officers which seeks only prospective  
23 declaratory or injunctive relief for ongoing violations of federal law.' (citing *Doe v. Board of Regents*,  
24 280 Neb. 492, 510, 788 N.W.2d 264, 281 (2010). *See, also, Green v. Mansour*, 474 U.S. 64, 106 S.Ct.  
25 423, 88 L.Ed.2d 371 (1985); *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir.2002); *Bragg v. West*  
26 *Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir.2001); *Walker v. Livingston*, 381 Fed. Appx. 477 (5th  
27 Cir.2010)).

28           //





1 3. Additionally, Defendant's interpretation of NRS 613.040 is at odds even with  
2 Defendants's own previously stated position. If the university president is prohibited from serving in  
3 legislature because, as Defendants argue, the person occupying that position *is* subject to the  
4 constitutional separation of powers provision, that person being an employee of the university would  
5 then necessarily make the university a violator of NRS 613.040.

6  
7 4. Even if, *arguendo*, Defendants's invocation of NRS 613.040 were applicable to state  
8 government, an employer is not subject to the statute once an employee candidate is elected. It applies  
9 only to "becoming a candidate" and certainly no employer would be required, under the statute, to keep  
10 someone on the payroll who is absent in the legislature for months at a time.

11  
12 5. Next, NRS §§ 281A.200(5)(b), 281A.230(5)(a), and 281A.250(5)(a) further erode  
13 Defendants' supposition that NRS 613.040 protects Gansert's actions. These are ethics statutes strictly  
14 limiting the role of certain *government* employees and would be in direct conflict with Defendant's  
15 assertion that NRS 613.040 is applicable to state employees.

16  
17 6. Lastly, as evidenced from this excerpt from the Nevada State Employee Handbook,<sup>2</sup> a  
18 state employee's political activities *are in fact* restricted, both by state and federal law:

19 **Political Activity**

20 Employees may vote as they choose and express their political opinions on any or all subjects  
21 without recourse, except that no employee may:

22 1. Directly or indirectly solicit or receive, or be in any manner concerned in soliciting or  
23 receiving, any assessment, subscription, or monetary or non-monetary contribution for a  
24 political purpose from anyone who is in the same department and who is a subordinate of the  
25 solicitor.

26 2. Engage in political activity during the hours of State employment to improve the chances  
27 of a political party or a person seeking office, or at any time engage in political activity to  
28 secure a preference for a promotion, transfer, or increase in pay. (NAC 284.770)

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<sup>2</sup> [http://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/Publications/Employee\\_Handbook.pdf](http://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/Publications/Employee_Handbook.pdf)



1 The Federal Hatch Act, as amended in Title 5 U.S.C. 1501–1508, prohibits certain types of  
2 political activity on the part of State employees whose principal employment is in a federally  
3 funded program.

4 Nevada State Employee Handbook at 37.

5 In fact, in 1940, the Hatch Act was expanded to cover *state and local employees* whose salaries  
6 are paid, in part, by federal funds or *whose duties are connected to federally funded activities*. Under  
7 the Hatch Act, *covered (state) employees may not: (1) be candidates for public office in a partisan*  
8 *election; (2) use official authority or influence to interfere with or affect the results of an election; or (3)*  
9 *directly or indirectly coerce contributions from subordinates in support of a political candidate.*<sup>3</sup> The  
10 supremacy clause as relates to the Hatch Act would thus also preclude Defendants' assertion.  
11

12 Interestingly, in addition to demonstrating that NRS 613.040 does not apply to government  
13 employees as argued by Defendants, but rather just private "firms and corporations," all indications are  
14 that given: (1) the University of Nevada-Reno is a recipient of federal funds; and (2) Defendant Gansert  
15 ran for partisan political office whilst employed at the University, her candidacy was in direct violation  
16 of federal law (as well as her now being in violation of the Nevada constitution).  
17

#### 18 IV. CONCLUSION

19 If, as Defendants argue, the Nevada constitution does not mean what it plainly says, one must  
20 ask oneself how it would ever be amended to say and mean what Plaintiff (and Attorney General  
21 Sandoval in his 2004 Attorney General Advisory opinion) assert that it means?! No; contrary to  
22 Defendants' Motion to Dismiss and however inconvenient for Defendants Gansert's and the  
23 University's hope for a windfall for higher education,<sup>4</sup> the Constitution is not a living organism . . . it's a  
24 legal document, and like all legal documents, it says some things, and it doesn't say other things.  
25

26  
27 <sup>3</sup> 5 U.S.C. §1501-02.

28 <sup>4</sup> <http://www.rgj.com/story/news/politics/2015/09/18/hagar-gansert-election-windfall-higher-ed/72419068/>

1 For these and all the aforementioned reasons, Defendants' Motions to Dismiss should be denied.  
2

3 DATED this 26<sup>th</sup> day of May, 2017.

4 **NPRI CENTER FOR JUSTICE**  
5 **AND CONSTITUTIONAL LITIGATION**

6 BY: 

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