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14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 NEVADA POLICY RESEARCH INSTITUTE, a
18 Nevada domestic nonprofit corporation,

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; 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

Case No.: A-20-817757-C

Dept. No.: XXVIII

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FILED BY
DEFENDANTS OSVALDO FUMO,
HEIDI SEEVERS GANSERT, AND
DINA NEAL AND JOINDERS
THERE TO FILED BY DEFENDANTS
JASON FRIERSON, BRITTNEY
MILLER, AND SELENA TORRES**

Date of Hearing: November 12, 2020

Time of Hearing: Chambers

1 This Opposition is made and based on the following Memorandum of Points and Authorities,
2 the papers and pleadings already on file, and any oral argument the Court may permit at the hearing
3 of this matter.

4 Dated this 8th day of October, 2020.

5 **FOX ROTHSCHILD LLP**

6
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17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I.**

19 **INTRODUCTION**

20 As with Defendant Brittney Miller, who filed the first of three motions to dismiss this
21 Honorable Court will consider, the NSHE Defendants' attempt to evade substantive review of the
22 constitutionality of their dual employment is entirely unavailing. The gravamen of the NSHE
23 Defendants' dismissal request is the wholly untenable position that the Separation of Powers clause
24 of the Nevada Constitution "has been interpreted to prohibit public officials or officers, as opposed
25 to public employees, from holding positions in separate branches of government." See Motion at
26 5:25-27. Yet there is no such case law interpretation provided by the NSHE Defendants in their
27 motion because, in fact, none exists. To the contrary, for decades the Nevada Supreme Court has
28 interpreted the reach of Separation of Powers to extend to all public employees. See, e.g., *Secretary*
of State v. Nevada State Legislature, 120 Nev. 456, 472, 93 P.3d 746, 757 (2004) (holding quo

1 warranto appropriate to challenge executive branch employees invested with sovereign power, who
2 thereby occupy public offices, “[a]nd declaratory relief, possibly coupled with a request for
3 injunctive relief, could be sought against other executive branch employees”) (emphasis added); *see*
4 *also Galloway v. Truesdell*, 83 Nev. 13, 21-22, 422 P.2d 237, 243 (1967) (holding even ministerial
5 functions of each governmental branch frequently overlap, and it is in the area of “inherent
6 ministerial powers and functions that prohibited encroachments upon the basic powers of [a branch]
7 most frequently occur”). As such, every argument made by the NSHE Defendant’s based on this
8 false premise must necessarily fail.

9 The NSHE Defendants alternatively argue that NPRI’s Amended Complaint must fail
10 because it did not seek to sue four sitting judges who also serve as adjunct professors or instructors
11 with NSHE. *See* Motion at 15:24-26. This argument misses the point entirely that the instant
12 litigation seeks to address the Separation of Powers violations of all Legislators engaging in
13 impermissible dual employment by simultaneously working for another branch of government.
14 NPRI may very well initiate future litigation against the judicial branch violators identified by the
15 NSHE Defendants, but there is no requirement that it do so now, and there is certainly no legal basis
16 for dismissal because it has not done so. The Nevada Supreme Court recognizes that “generally, a
17 party need not assert every conceivable claim against every conceivable defendant in a single
18 action.” *Weddell v. Sharp*, 131 Nev. 233, 240, 350 P.3d 80, 83 (2015) (citing *Humphries v. Eighth*
19 *Jud. Dist. Ct.*, 129 Nev. 788, 796, 312 P.3d 484, 490 (2013)). More importantly, dismissal is only
20 available when joinder of an indispensable party is not feasible, and even then, it is still well within
21 the court’s discretion whether to proceed or dismiss. *Humphries*, 129, Nev. at 792, 312 P.2d at 487
22 (citing NRCP 19(b)). The NSHE Defendants’ sole focus on NRCP 19(a) and exclusion of the
23 required analysis under NRCP 19(b) is equally fatal to their dismissal request.

24 There is no dispute that the Court must assume to be true all facts alleged in the Amended
25 Complaint when addressing the instant motion to dismiss, that NPRI has met its burden to set forth
26 cognizable legal theories based on those facts, and that the NSHE Defendants have provided no
27 legally cognizable theory to warrant dismissal of NPRI’s Amended Complaint. For all of these
28

1 reasons, the NSHE Defendants’ motion to dismiss and the Joinder Defendants’ respective joinders
2 thereto must be denied and the instant case must be allowed to proceed in the normal course.

3 **II.**

4 **FACTUAL ALLEGATIONS**

5 The facts properly at issue with regard to the motion and joinders thereto are those set forth
6 in NPRI’s Amended Complaint filed on July 28, 2020, a copy of which is on file herein and was
7 previously attached as **Exhibit 1** to the opposition to Defendant Brittney Miller’s motion to dismiss.
8 In the interest of judicial and party economy, NPRI will not reattach the Amended Complaint here
9 and will only repeat and reallege those facts herein as necessary to support of the arguments that
10 follow.

11 **III.**

12 **STANDARD OF REVIEW**

13 **A. NRCP 12(b)(5) Dismissals Are Subject to Rigorous Review.**

14 A district court’s decision to dismiss a complaint for failure to state a claim will be subject to
15 a rigorous, de novo appellate review. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224,
16 227, 181 P.3d 670, 672 (2008). A motion brought pursuant to NRCP 12(b)(5) may, in fact, only be
17 granted if the claimant would be entitled to no relief under the facts set forth in the pleading. *Morris*
18 *v. Bank of America Nevada*, 110 Nev. 1274, 1277, 886 P.2d 454, 457 (1994) (citing *Edgar v.*
19 *Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)). Nevada remains a notice-pleading
20 jurisdiction, where all that is required is for a pleading to provide fair notice to the adverse party of
21 the nature of the claims stated therein, and the basis or grounds for such claims. *Crucil v. Carson*
22 *City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Western States Constr. v. Michoff*, 108
23 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). And, “notice pleading” simply requires a claimant to
24 set forth a general recitation of facts that support a cognizable legal theory. *See Liston v. Las Vegas*
25 *Metropolitan Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995) (citing *Swartz v. Adams*,
26 93 Nev. 240, 245, 563 P.2d 74, 77 (1977)). NPRI has clearly met this pleading standard in the
27 instant case.

1 Defendants assert that the issue of whether NPRI has a legally protectable interest is connected to the
2 issue of standing and, again, without additional argument, adopt and incorporate by reference
3 Defendant Miller’s motion and their joinder thereto. *See* Motion at 12:15-17, 21-22. Both of these
4 arguments are raised as part of the NSHE Defendants’ NRCP 12(b)(5) challenge to NPRI’s
5 declaratory relief action, and NPRI opposes these arguments in their entirety by adopting by
6 reference and incorporating herein Sections IV(A) and (B) of its opposition to Defendant Miller’s
7 motion and joinder. *See* Opposition to Motion to Dismiss Filed by Defendant Brittney Miller at 6:3-
8 11:13, filed October 2, 2020.

9 **B. The Remainder of the Motion to Dismiss Pursuant to NRCP 12(b)(5) Is Legally**
10 **Unsupported and Must Fail.**

11 The remainder of the NSHE Defendants’ and Joinder Defendants’ dismissal request pursuant
12 to NRCP 12(b)(5) rests entirely on the false premise that the Separation of Powers clause in the
13 Nevada Constitution is restricted in its application solely to public officials or officers. Section
14 III(B) of the motion contains the purported legal analysis in this regard. It begins with the correct
15 citation to Article 3, Section 1 of the Nevada Constitution, which contains the express provision
16 prohibiting any one branch of government from encroaching on the functions of another. *See*
17 Motion at 5:21-25. But that is where any relevant and supported legal discussion ends. The very
18 next sentence proclaims, without any case law reference whatsoever to back it up, that “NPRI’s
19 lawsuit is fatally flawed because this provision has been interpreted to prohibit public officials or
20 officers, as opposed to mere public employees, from holding positions in separate branches of
21 government.” *See* Motion at 5:25-27. The remainder of Section III(B), then, builds on this wholly
22 unsupported assertion with page after page of discussion regarding which government employees do
23 and do not exercise sovereign functions, ostensibly with only the latter being subject to a Separation
24 of Powers challenge.

25 This wag the dog approach is completely contrary to Nevada Supreme Court precedent and
26 must be disregarded, for the reasons stated below.

1 ***1. The Nevada Supreme Court Expressly Acknowledged the Appropriateness***
2 ***of Using Declaratory and Injunctive Relief Actions to Bring a Separation of***
3 ***Powers Challenge Against Executive Branch Employees Who Are Not***
4 ***Invested With Sovereign Power.***

5 In *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), then-
6 Secretary of State Dean Heller sought by writ of mandamus to challenge state and local government
7 employees' service in the Legislature as violating the Nevada Constitution's Separation of Powers
8 doctrine. In the end, the Court denied the requested writ relief after determining, among other
9 things, that the Secretary of State did not have a discernable beneficial interest to confer standing to
10 bring a writ of mandamus action and that he sued the wrong party, i.e. the Legislature as a whole, to
11 prevent service therein by executive branch employees. *Id.*, 120 Nev. at 462-63, 93 P.3d at 750. But
12 in so doing, it provided a clear path for how to raise such a challenge, which is exactly the path
13 NPRI is traveling in the instant case.

14 Specifically, the Court recognized two mechanisms for challenging what it deemed the "dual
15 service issue. *Secretary of State*, 120 Nev. at 472, 93 P.3d at 756. It held that, "[t]he dual service
16 issue may be raised as a separation-of-powers challenge to legislators working in the executive
17 branch, as the qualifications of legislators employed in the executive branch are not constitutionally
18 reserved to that branch." *Id.*, 120 Nev. at 472, 93 P.3d at 757 (citation omitted). It went on to opine
19 that, "[s]uch a challenge might be well suited for quo warranto or a declaratory relief action filed in
20 the district court." *Id.* Most telling, and particularly relevant to the instant case, however, is the
21 distinction the Court draws between how each of the two types of actions might be employed, and by
22 whom, stating clearly that:

23 A quo warranto action could be used to challenge any executive branch
24 employees invested with sovereign power, who thereby occupy public
25 offices within quo warranto's exclusive reach. And, declaratory relief,
26 possibly coupled with injunctive relief, could be sought against other
27 executive branch employees.

28 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

1 relief defendants.

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

3 In sum, the Nevada Supreme Court in the *Secretary of State* holding squarely endorses the
4 bringing of the causes of action alleged by NPRI, i.e. declaratory and injunctive relief, against
5 executive branch employees without sovereign power, such as the NSHE Defendants and Joinder
6 Defendants named herein. There are no restrictions stated by the Court as to the functions engaged
7 in by the executive branch employees so challenged, and rightfully so, given the Court's prior
8 recognition that it is precisely in the area of non-sovereign, ministerial functions that Separation of
9 Powers violations most frequently occur. See *Galloway v. Truesdell*, 83 Nev. at 22, 422 P.2d at 243.
10 The only condition precedent to NPRI bringing the instant case, then, is a legally protectable interest.
11 The example of a person seeking the executive branch position held by the legislator is just that, an
12 example. NPRI has clearly shown its legally protectable interest, not only through its own
13 particularized injury, but also through standing via the public-importance exception. As such, any
14 argument that NPRI is not properly before this court because it did not limit its lawsuit to public
15 officials and officers fails in its entirety and dismissal on that basis is improper.

16
17 **2. *The Nevada Supreme Court Recognized "Prohibited Encroachments" on***
18 ***the Separation of Powers Are Most Likely to Occur in the Exercise of***
Inherent Ministerial Powers and Functions.

19 In 1967, the Nevada Supreme Court invalidated a statute that required district courts to issue
20 marriage certificates, finding that such activities were not judicial in nature and thus the Legislature
21 could not compel the Judiciary to perform them, in light of Nevada's Separation of Powers doctrine.
22 Before reaching that conclusion, however, the Court conducted an exhaustive analysis of the
23 Separation of Powers doctrine more broadly, and the role it plays in Nevada's system of government
24 specifically. The Court began by describing the Separation of Powers as "probably the most
25 important single principle of government declaring and guaranteeing the liberties of the people."
26 *Galloway v. Truesdell*, 83 Nev. at 20, 422 P.2d at 242. The Court then explained that in addition to
27 the constitutionally expressed powers and functions belonging to each branch of government, each
28

1 branch also “possesses inherent and incidental powers that are properly termed ministerial.” *Id.* The
2 Court continued, “Ministerial functions are methods of implementation to accomplish or put into
3 effect the basic function of each Department. No Department could properly function without the
4 inherent ministerial functions.” *Id.*

5 Having identified ministerial functions as an essential and fundamental part of the exercise of
6 power itself, the Court would then caution against the “error” of adopting too restricted a view of
7 Nevada’s Separation of Powers doctrine:

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

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

24 As quoted above, the Court stressed that, in order to ensure that not even one “seemingly
25 harmless prohibited encroachment” is tolerated, the Separation of Powers doctrine must be given a
26 “fullness of conception, involving all of the elements of its meaning and its correlations,” while
27 warning that prohibited encroachments are most likely to occur in the area of ministerial functions.
28 Thus, the Court long ago rejected the reasoning set forth by the NSHE Defendants 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 the NSHE Defendants, it

1 perfectly aligns with the text of Nevada’s Separation of Powers clause, which NPRI properly seeks
2 herein to enforce.

3 **3. *NPRI Has No Plain, Speedy and Adequate Remedy in the Ordinary Course***
4 ***of Law.***

5 As a final matter regarding the arguments for dismissal under NRCP 12(b)(5), the NSHE
6 Defendants and Joinder Defendants assert NPRI’s specific claim for injunctive relief is unsound
7 “because there is an adequate remedy at law.” *See* Motion at 14:8-9. This purported remedy is, in
8 fact, identified as deriving from the Code of Ethical Standards for government employees and its
9 enforcement thereof by the Commission on Ethics, which are authorized under NRS Chapter 281A.
10 Aside from the fact that the majority of the chapter imposes self-actuating requirements that are
11 otherwise reliant on government employees’ voluntarily compliance, the complaint process itself is
12 not a remedy at law. It is at best an administrative remedy to be rendered, if at all, by the
13 Commission on Ethics. NPRI would have no legal rights in the process, no ability to conduct any
14 discovery, and no ability to advocate for a particular outcome. Generally, when courts contemplate
15 finding an adequate remedy at law as preclusive to injunctive relief, it is because there is monetary
16 compensation available that is sufficient to redress the harm. *See, e.g. Dixon v. Thatcher*, 103 Nev.
17 414, 415, 742 P.2d 1029 (1987) (holding irreparable harm is an injury “for which compensatory
18 damage is an inadequate remedy”). NPRI has appropriately and adequately alleged in the Amended
19 Complaint all of the elements for its cause of action for injunctive relief, and any determination of
20 whether NPRI can factually meet those elements, including providing specific proof of irreparable
21 harm, must be made by the Court after a full evidentiary hearing, not upon a motion to dismiss.

22 **C. NPRI Did Not Fail to Name A Necessary Party, and Dismissal May Not Occur**
23 **Where Joinder of the Necessary Party Is Feasible Regardless.**

24 Lastly, NSHE Defendants and Joinder Defendants argue that dismissal of NPRI’s Amended
25 Complaint is mandated under NRCP 19, where NPRI failed to include members of the judicial
26 branch who simultaneously hold NSHE positions in its lawsuit. *See* Motion at 15:15-16. To reach
27 this conclusion, however, the Court must review the matter under both NRCP 19(a) and NRCP
28 19(b), the latter provision of which the NSHE Defendants neglected to address.

1 Indeed, the NSHE Defendants focus their argument solely on whether the four judicial
2 branch members in question are necessary parties and reach the summary conclusion that NRCP
3 19(a) requires their joinder because they may be interested in the outcome of the litigation. *See*
4 Motion at 15:24-26. This oversimplified analysis, however, is contrary to Nevada law. “NRCP 19
5 asks whether complete relief can be accorded to all current parties without the absent party and/or
6 whether the absent party claims an interest in the action.” *Rose, LLC*, 135 Nev. at 157, 445 P.3d
7 869. But, as the appellate court stated in *Rose, LLC*, how the court analyzes the two inquiries
8 depends on how the question of necessity came before the court, i.e. is the absent party seeking to
9 intervene, or is a party other than the absent party raising the necessity of joinder. *Id.* Where, as
10 here, the party raising the issue is already in the litigation, and the absent party presumably knows
11 about the litigation but has made no effort to intervene, the lack of interest of the absent party
12 suggests it does not fear the impairment of its rights. *Id.* Completeness, however, is ultimately
13 determined based on those persons who are already parties, and not whether relief is also available to
14 the absent party. *Id.*, 135 Nev. at 158, 445 P.3d at 870.

15 That said, even if NPRI assumes for purposes of this argument only that the judicial branch
16 employees engaging in dual employment with NSHE are necessary parties to the instant case, their
17 joinder is entirely feasible and dismissal would be improper. While NPRI did not join these parties
18 and chose to focus this lawsuit on only those legislators engaging in dual employment with the
19 executive branches, the Court could order these parties joined if it deemed it a necessity. NRCP
20 19(a)(2). But it is only if joinder of a necessary party is not feasible that a court must determine, in
21 equity and good conscience, whether the action may proceed or should be dismissed. *Humphries*,
22 129, Nev. at 792, 312 P.2d at 487 (citing NRCP 19(b)).

23 NPRI posits to the Court that complete relief may be had as between it and the members of
24 the legislative branch who are engaging in NSHE employment, and joinder of the members of the
25 judicial branch similarly situated is not necessary. Should the Court disagree, it may then exercise
26 one of two options: (1) it may either join these judicial branch employees by court order, or (2) it
27 may permit this matter to proceed without the joinder of these parties. The one option not available
28

1 at this time is the option requested by the NSHE Defendants and Joinder Defendants, and that is
2 outright dismissal.

3 **V.**

4 **CONCLUSION**

5 Respectfully, there is no legitimate dispute that NPRI has more than adequately pled its
6 claims for declaratory and injunctive relief, that the NSHE Defendants and Joinder Defendants are
7 on notice of the nature of these claims, and that NPRI should now be permitted to proceed with its
8 substantive action in the normal course. For all of the reasons stated herein, NPRI respectfully
9 requests that this Honorable Court deny the NSHE Defendants' Motion to Dismiss Pursuant to
10 NRCP 12(b)(5) and NRCP 12(b)(6), and the Joinder Defendants' Joinders thereto, on all grounds
11 asserted respectively therein.

12 Dated this 8th day of October, 2020.

13 **FOX ROTHSCHILD LLP**

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 8th day of October, 2020, I caused the foregoing document entitled **PLAINTIFF’S OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT OSVALDO FUMO, HEIDI SEEVERS GANSERT, AND DINA NEAL AND JOINDERS THERETO FILED BY DEFENDANTS JASON FRIERSON, BRITTNEY MILLER, AND SELENA TORRES** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court’s Odyssey E-File and Serve system.

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