

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH
INSTITUTE, a Nevada domestic nonprofit
corporation,

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 Assembly 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
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**APPELLANT'S MOTION FOR
THE COURT TO SUSPEND THE
RULES PURSUANT TO NRAP 2
AND EXPEDITE ITS DECISION
UPON EXPEDITED BRIEFING
OR, IN THE ALTERNATIVE,
WITHOUT BRIEFING UPON
SUBMISSION OF THE RECORD**

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 (“NPRI”), by and through its counsel, Deanna L. Forbush, Esq. and Colleen E. McCarty, Esq. of Fox Rothschild LLP, hereby files its Motion for the Court to Suspend the Rules Pursuant to NRAP 2 and Expedite Its Decision Upon Expedited Briefing or, in the Alternative, Without Briefing Upon Submission of the Record. Specifically, NPRI seeks an expedited decision from this Court that it has standing, pursuant to the public-importance exception clarified by the Court in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016), to challenge Respondents’ dual government employment.

The record below will show that the Honorable Jim Crockett (Ret.) clearly erred when he dismissed NPRI’s Amended Complaint for Declaratory and Injunctive Relief on the grounds that NPRI did not meet one or more of the requirements to invoke the public-importance exception to the standing requirement of particularized injury. The record below will further show the district court clearly erred by denying NPRI’s motion for clarification as to which of these requirement(s) NPRI failed to meet and how this determination could be made under a motion to dismiss standard. Finally, the record below will show the district court clearly erred when it did not disqualify the official attorneys from representation of certain State-employee

Respondents and permitted intervention by the Nevada Legislature through the Legal Division of the Legislative Counsel Bureau.

It is purely a question of law, and one that is long overdue being settled by this Court, whether Respondents' dual employment violates Nevada's Separation of Powers doctrine, which expressly prohibits any one branch of government from encroaching on the functions of another. *See Nev. Const. Art. 3, § 1.* Judge Crockett declined to take on this question and instead dismissed NPRI's action without any legal or factual basis to do so. This Court can easily correct this wrong, as well as the other errant determinations made by Judge Crockett contemporaneously therewith and return this matter to the newly assigned judge to make the necessary determinations that will, in turn, permit this Court to make the necessary final determination. It is imperative, too, that this Court take this action during the upcoming 120-day legislative session, before Respondents resume their Executive branch employment on or after May 31, 2021.

Accordingly, for all the reasons set forth herein, good cause exists to grant the relief NPRI requests, pursuant to NRAP 2, and expedite the decision to reverse the district court's orders regarding dismissal, as well as the permitted inclusion and representation of certain Respondents, upon an expedited briefing schedule or, in the alternative, without briefing, upon submission of the record below.

POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. Authority to Suspend the Rules.

Since 2015, NRAP 2 has permitted this Court, upon motion, to expedite its decision or for other good cause suspend any provision of the Rules in a particular case and order proceedings as the Court directs. NPRI respectfully asks for such consideration in the instant case, given the critical and time-sensitive Separation of Powers issue underlying the instant appeal and the pending commencement of the 81st Session of the Nevada Legislature, after which the Respondents will immediately return to engaging in the dual employment scenarios vigorously disputed herein.

B. Expedited Decision Upon an Expedited Briefing Schedule or, in the Alternative, Without Briefing, Upon Submittal of the Record Below, Is Warranted.

1. NPRI's Lawsuit Is Necessary and Appropriate, Pursuant to *Secretary of State (Heller) v. Nevada State Legislature*.

To be clear, NPRI does not seek to challenge Respondents' ability to serve in the Nevada Legislature. As this Court made clear over a decade ago in *Secretary of State (Heller) v. Nevada State Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), any attempt through a judicial proceeding to exclude or oust executive branch employees from the Legislature is, itself, barred by the Separation of Powers doctrine. 120 Nev. at 472, 93 P.3d at 756-57. In so holding, however, the Court provided clear guidance for how to properly challenge impermissible dual employment, which is exactly the guidance NPRI followed in commencing the litigation below. Specifically, the Court endorsed two mechanisms for challenging what it deems the "dual service issue." *Id.*, 120 Nev. at 472, 93 P.3d at 757. The Court stated that, "[t]he dual service issue may be raised as a separation-of-powers challenge to legislators working in the executive branch, as the qualifications of legislators employed in the executive branch are not

constitutionally reserved to that branch.” *Id.*, (citation omitted). The Court went on to opine that, “[s]uch a challenge might be well suited for quo warranto or a declaratory relief action filed in the district court.” *Id.*

Most telling, and particularly relevant to the instant case, is the distinction the Court draws between how each of the two actions could be employed, and by whom:

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

The party with the clearest standing to bring the quo warranto action would be the attorney general, and declaratory relief could be sought by someone with a “legally protectable interest,” such as a person seeking the executive branch position held by the legislator. Individual legislators would need to be named as either quo warranto respondents or declaratory relief defendants.

Secretary of State (Heller), 120 Nev. at 472-73, 93 P.3d at 757 (citations omitted) (emphasis added). In sum, the holding of *Secretary of State (Heller)* endorses the claims of declaratory and injunctive relief brought by a legally interested party against Executive branch employees without sovereign power, such as Respondents.

Further, the Court imposed no restrictions as to the functions engaged in by the Executive branch employees so challenged. And rightfully so, given the Court’s prior recognition that it is precisely the area of non-sovereign, ministerial functions that Separation of Powers violations most frequently occur. *See Galloway v. Truesdell*, 83 Nev. 13, 22, 422 P.2d 237, 243 (1967). Indeed, the only condition precedent to NPRI’s lawsuit is the allegation of a legally protectable interest. The example given by the Court of a person seeking the Executive branch position

held by the Legislator is just that, an example. As discussed below, NPRI alleged a legally protectable interest in its Amended Complaint, and the district court's dismissal improperly barred NPRI from pursuing the proper court challenge to Respondents' actions.

2. NPRI's Standing to Sue Is Properly Alleged and Valid, Pursuant to *Schwartz v. Lopez*.

In *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016), this Court held that cases of significant public importance, such as the instant matter, enjoy an exception to the basic standing requirement of showing a particularized injury. 132 Nev. at 743, 382 P.3d at 894. Respondents argued below that this recent holding creates only a "very narrow" exception, to which NPRI is not entitled. On the contrary, although the exception is identified as being narrow, this Court ultimately set forth three requirements, which NPRI properly alleged and which establishes NPRI's right to assert a legally protectable interest herein.

(1) Significant Public Importance

First, for the public-importance standing exception to apply, the case must involve an issue of significant public importance. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (citation omitted). There is no dispute in the record below that the instant case meets this requirement. Further, as the Court articulated in *Commission on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009), "states are not required to structure their governments to incorporate the separation of powers doctrine (citation omitted), but Nevada has embraced this doctrine and incorporated it into its constitution." 125 Nev. at 291, 212 P.3d at 1103. The true importance of the doctrine in Nevada is further articulated in the finding that, "[u]nlike the United States Constitution, which expresses separation of powers through the establishment of the three

branches of government (citation omitted), Nevada’s Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another.” *Id.* (citing *Secretary of State (Heller)*, 120 Nev. at 466, 93 P.3d at 753.

Specifically, Nev. Const. Art. 3, § 1 provides in pertinent part:

Section 1. Three separate departments; separation of powers; legislative review of administrative regulations.

1. The powers of the Government of the State of Nevada shall be divided into three separate departments, — the Legislative, — the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

...

Nev. Const. Art. 3, § 1(1).

To the extent NPRI alleged in its Amended Complaint that Respondents are violating Nevada’s Separation of Powers doctrine, i.e., the express constitutional provision prohibiting any one branch of government from encroaching on the other, by engaging in dual employment with Nevada’s Legislature and the Executive branch, the significance of a factfinder making this determination is clear.

(2) Legislative Expenditure or Appropriation

Second, the public-importance standing exception requires that a case involve a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (citation omitted). In its Amended Complaint, NPRI alleged as follows:

5. If allowed to proceed with the dual employment stated herein, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1....

.....

28. Without this Court's intervention, legislative expenditures or appropriations and taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1, and irrevocable harm and irreparable harm will occur to the rights provided under this provision of the Nevada Constitution.

As NPRI made the necessary allegations, and the district court may take judicial notice of legislative expenditures and Executive Branch compensation, the second requirement of the public-importance exception is also satisfied.

(3) Appropriate Party

Finally, for standing to be granted under the public-importance exception, a party must show there is no one better positioned to bring the instant action and that it is fully capable of advocating its position in court. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894-95 (citation omitted). The record below will certainly satisfy the Court regarding NPRI's advocacy capabilities. And, as prior cases illustrate, NPRI is the only party to have ever sought to challenge Executive branch employees engaging in dual employment by also serving as Legislators. Respondents advanced the argument below that the only appropriate parties to cases raising a dual employment challenge are those individuals seeking the government positions held by such Legislators. But, as shown above, this is but one basis for asserting a Separation of Powers challenge, and NPRI's basis herein is specifically provided for in *Secretary of State (Heller)*.

C. Timing Is Everything.

The 81st Session of the Nevada Legislature begins February 1, 2021. At that time, it is expected Respondents will have taken leave from or otherwise suspended their Executive branch duties. And, while this will not stop the infringement of the latter upon the former, NPRI does not – because it may not – challenge Respondents’ participation in the Legislature. NPRI does, however, challenge Respondents’ return to their respective Executive branch positions when the Legislature recesses May 31, 2021. NPRI seeks suspension of the Rules, therefore, to allow its appeal of Judge Crockett’s dismissal and related rulings to conclude during this 120-day period.

Should Respondents oppose this request, NPRI expects they will seek to invoke NRS 1.310, which allows a Legislator who is party to a court action to request a continuance until 7 days after the conclusion of the legislative session. NRS 1.310(1) and (2). The statute, however, also allows a party to successfully object to a continuance where it has “a substantial existing right or interest that will be defeated or abridged” and will “suffer substantial and immediate irreparable harm” if the continuance is granted. NRS 1.310(3). NPRI has shown these extraordinary circumstances herein, above, where Respondents’ dual employment violates the Nevada Constitution, and the legislative session is the only time Respondents’ Executive branch employment challenged by NPRI’s lawsuit is otherwise suspended.

Further, if the Court approves NPRI’s alternative request for expedited decision upon submittal of the record below, there would be no proceeding requiring Respondents’ involvement, eliminating the need NRS 1.310 protection. If the Court prefers expedited

briefing to consider NPRI's appeal, such briefing will involve attorneys who are not Legislators, and the lead attorney – Kevin Powers with the Legislative Counsel Bureau – recently sought to file amicus briefs in two appeals from another district court's reading of the Separation of Powers doctrine that resulted in the dismissal of actions taken by one of the Respondents named herein, Clark County Deputy District Attorney, Melanie Scheible. *See* Supreme Court Case Nos. 82236 and 82249. Thus, there is no reason to apply NRS 1.310 in one case and ignore the others.

D. The Record Below Also Permits the Court's Expedited Decision on Official Attorney Disqualification and Legislature Intervention.

Respondents Gansert and Neal are currently represented by in-house counsel with the Nevada System of Higher Education (“NSHE”), who sought to serve below as “Official Attorneys,” pursuant to NRS 41.0338(2)(b). These Respondents, however, were sued solely because of their individual actions of engaging in dual employment in violation of Nevada's Separation of Powers clause, and not in any official capacity that constitutes a circumstance under which an official government attorney is permitted to provide a defense. The record below shows Judge Crockett clearly erred by not disqualifying NSHE counsel and requiring Respondents to secure representation at their own expense, which they may do when the Legislature recesses.

In addition, with regard to the Legislature's intervention below, the record clearly shows the absence of a basis for intervention as of right under NRCP 24(a). And permissive intervention under NRCP 24(b) is limited 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, to lawsuits that are based on a statute administered by the entity or a regulation, order, requirement or agreement issued under such a statute. None of these scenarios is present in the instant case. NPRI, again, simply seeks a determination by the district court, and ultimately by this Court, that certain individual Legislators are engaging in unconstitutional dual employment. The Legislature is a branch of government that carries out its duties through individual legislators acting in their official capacities as constituent members, no matter who occupies those seats, and the Legislature pays their statutory salaries and allowances regardless. Thus, in no way is the Legislature directly affected by who serves therein, and the Legislature is not called upon to administer the Constitution in this regard.

II. CONCLUSION

Based on the foregoing, NPRI asks this Court to suspend the Rules, pursuant to NRAP 2, and during the upcoming 120-day period of the 81st Session of the Nevada Legislature, issue an expedited decision on the instant appeal following and expedited briefing schedule or, in the alternative, without briefing upon submittal of the record.

Dated this 26th day of January, 2021.

FOX ROTHSCHILD LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2021, I caused the foregoing Motion to be served on all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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