IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POLICY RESEARCH INSTITUTE, a Nevada domestic nonprofit corporation, Appellant, vs. BRITTNEY MILLER, an individual engaging in dual employment with the Nevada State Assembly and Clark County School District; DINA NEAL, an individual engaging in dual employment with the Nevada State Senate and Nevada State College and College of Southern Nevada; JAMES OHRENSCHALL, an individual engaging in dual employment with the Nevada State Senate and Clark County Public Defender; SELENA TORRES, an individual engaging in dual employment with the Nevada State Assembly and a Clark County Public Charter School; and LEGISLATURE OF THE STATE OF NEVADA, Respondents.	Supreme Court Case No.: 85935 [District Court Case No.: A-20-817757-C]

Electronically Filed
Jun 12 2023 03:27 PM
Elizabeth A. Brown
Clerk of Supreme Court

Appeal from the Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Jessica K. Peterson

APPELLANT'S OPENING BRIEF

Deanna L. Forbush, Esq. (Nevada Bar No. 6646)
Email: dforbush@foxrothschild.com
Colleen E. McCarty, Esq. (Nevada Bar No. 13186)
Email: cmccarty@foxrothschild.com
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899 / Facsimile: (702) 587-5503
Attorneys for Appellant, Nevada Policy Research Institute

Docket 85935 Document 2023-18565

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 12th day of June 2023.

FOX ROTHSCHILD LLP

By: */s/ Deanna L. Forbush*____________
DEANNA L. FORBUSH
Nevada Bar No. 6646
dforbush@foxrothschild.com
COLLEEN E. MCCARTY
Nevada Bar No. 13186
cmccarty@foxrothschild.com
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Attorneys for Appellant
Nevada Policy Research Institute

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT viii

ROUTING STATEMENT ix

ISSUES PRESENTED FOR REVIEW x

I. STATEMENT OF THE CASE 1

II. STATEMENT OF RELEVANT FACTS 4

III. SUMMARY OF ARGUMENT 10

IV. ARGUMENT 13

A. Standard of Review. 13

B. Nevada's Separation-of-Powers Clause Is Ripe for Decision Prohibiting Dual Service for All Persons Exercising Legislative Powers and Executive Branch Functions. 14

1. This Court Previously Approved Declaratory and Injunctive Relief as the Vehicle for a Separation-of-Powers Challenge Against Legislators Employed in the Executive Branch. 16

2. The Court Recognizes "Prohibited Encroachments" on the Separation of Powers Usually Occur in the Exercise of Inherent Ministerial Powers and Functions. 18

3. Other State Courts Interpreting the Same or Substantially Similar Separation-of-Powers Clauses Support NPRI's Requested Interpretation. 20

C. The District Court Abused Its Discretion By Disregarding the Parties' Presentations and Applying the Common Law Doctrine of Incompatible Offices. 21

1. The District Court's Order Should Be Vacated in Its Entirety Based on the Principle of Party Presentation Alone. 21

2. The District Court's Application of the Common Law Doctrine of Incompatible Offices Constitutes Clear Error. 23

D. The District Court Erred By Denying NPRI's Motion to Strike Respondents' Successive Motions to Dismiss and Joinders. 25

V. CONCLUSION 30

CERTIFICATE OF COMPLIANCE 31
CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Page(s)

Cases

State ex rel. Black v. Burch,
226 Ind. 445, 80 N.E.2d 294 (1948) 20

Ex parte Blanchard,
9 Nev. 101 (1874) 2

Buzz Stew, LLC v. City of N. Las Vegas,
124 Nev. 224, 181 P.3d 670 (2008) 13, 14

City of Reno v. Reno Gazette-Journal,
119 Nev. 55, 63 P.3d 1147 (2003) 14

Clark Cnty. v. City of Las Vegas,
92 Nev. 323, 550 P.2d 779....................24

State ex rel. Clayton v. Board of Regents,
635 So.2d 937 (Fla. 1994)....................24

Comm'n on Ethics v. Hardy,
125 Nev. 285, 212 P.3d 1098 (2009) 11

Eldridge v. Sierra View Loc. Hosp. Dist.,
224 Cal. App. 3d 311 (1990) 25

Erwin v. State,
111 Nev. 1535, 908 P.2d 1367 (1995) 12

Galloway v. Truesdell,
83 Nev. 13, 422 P.2d 237 (1967) .... *passim*

Greenlaw v. U.S.,
554 U.S. 237 (2008)....................3, 23

Harris Assocs. v. Clark Cnty. Sch. Dist.,
119 Nev. 638, 81 P.3d 532 (2003) 11

State ex rel. Harvey v. Second Jud. Dist. Ct.,
117 Nev. 754, 32 P.3d 1263 (2001) 25

Heller v. Legislature,
120 Nev. 456, 93 P.3d 746 (2004) 15, 16, 17

Legislature of State v. Settelmeyer,
137 Nev. Adv. Op. 21, 486 P.3d 1276 (2021) 12

Monaghan v. Sch. Dist. No. 1, Clackamas Cnty,
211 Or. 360, 315 P.2d 797 (1957) 20

Nev. Policy Research Inst. v. Cannizzaro,
138 Nev. Adv. Op. 28, 507 P.3d 1203 (2022) .... *passim*

Nevada Mining Ass'n v. Erdoes,
117 Nev. 531, 26 P.3d 753 (2001) 12

Saint v. Allen,
169 La. 1046, 126 So. 548 (1930) 21

Schwartz v. Lopez,
132 Nev. 732, 382 P.3d 886 (2016) ix

State ex rel. Spire v. Conway,
238 Neb. 766, 472 N.W.2d 403 (1991) 21

State by Att'y Gen. v. Meader,
80 N.H. 292, 116 A. 433 (1922) 24

State v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark (Doane),
138 Nev. Adv. Op. 90 (Dec. 30, 2022) 3, 23

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020) 3, 22

Statutes

Nev. Rev. Stat. § 41 ....14, 29

Nev. Rev. Stat § 41.031 29

Nev. Rev. Stat § 41.039 29

Nev. Rev. Stat § 41.0337 29

Other Authorities

Black's Law Dictionary (6th ed. 1990) 12

Nev. Const. art. 3, § 1(1) .... *passim*

Nev. Const. art. 4, § 9 24

Nev. Const. art. 5, § 12 24

Nev. Const. art. 6, § 11 24

NRCP 12(g)(2)..25

NRCP 12(h)(2)..25

NRCP 19 14

U.S. Const. amend. I 22

JURISDICTIONAL STATEMENT

The Court has appellate jurisdiction pursuant to NRAP 3A(b)(1), as this is an appeal from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

NPRI files this second appeal of the district court's dismissal of its separation-of-powers challenge to legislators engaging in simultaneous employment in the executive branch. This appeal is from a final order of the Eighth Judicial District Court, the Honorable Jessica K. Peterson now presiding (the "district court"), entered on January 4, 2023 and noticed on January 5, 2023. (Appellant's Appendix ("AA") Vol. 2 PGS 352 – 381 and 382 – 415).

Pursuant to NRAP 4(a)(1), "a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." NPRI timely filed its Notice of Appeal of the district court's order entered on January 5, 2023 on January 6, 2023. (AA Vol. 2 PGS 416 – 418).

ROUTING STATEMENT

NPRI respectfully asserts the Supreme Court presumptively retains this appeal, pursuant to NRAP 17(a)(11) and (12), as it raises as its principal issues questions of first impression involving the Nevada Constitution and statewide public importance.

Further, in Case No. 82341, the Supreme Court retained NPRI's prior appeal from the same district court case. In that decision, which expanded the public-importance exception to standing articulated in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016), the Court stated its recognition of separation of powers as "probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Nevada Pol'y Rsch Inst. Inc. v. Cannizzaro*, 138 Nev. Adv. Op. 28 at *9, 507 P.3d 1203, 1209 (2022) (quoting *Heller v. Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004)). The Court continued its reasoning, "[t]hus, the question of whether respondents' dual service violates the separation-of-powers clause is one that implicates specific conduct of state officials and a matter of great and equal concern to all Nevada citizens." *Id*. Finally, the Court concluded that the separation-of-powers issue in this case "is of such significant public importance as to require resolution for future guidance." *Id*., 507 P.3d at 1211.

For these reasons, NPRI seeks this Court's retention of the instant appeal.

ISSUES PRESENTED FOR REVIEW

This appeal presents the following issue(s) for appellate consideration:

1) Whether it is a violation of the separation-of-powers clause of the Nevada Constitution, Nevada Const. art. 3, § 1(1), for an individual to engage in dual government service, i.e., to be employed in the executive branch by a state or local government while simultaneously serving in the Nevada Legislature.

2) Whether the district court erred in denying NPRI's motion to strike Respondents' improper and successive motions to dismiss and joinders thereto. The second issue has relevance only in the event the Court does not address the separation-of-powers issue stated above.

I.

STATEMENT OF THE CASE

In this appeal, the parties are disputing whether dual service in the executive branch of four (4) legislators who remain as named defendants below violates the separation-of-powers clause of the Nevada Constitution, Nevada Const. art. 3, § 1(1). NPRI sought amendment of its pleading to add seven (7) individuals similarly situated prior to entry of the district court's order, but the district court proceeded with its decision before hearing the matter and deemed it moot.[1] NPRI's position regardless is that the controversy before this Court is solely a legal one: whether the Nevada Constitution prohibits a person charged with the exercise of **powers** belonging to the legislative branch from exercising **any functions** appertaining to the executive branch. There is no factual dispute that Respondents are such persons, therefore referral back to the district court for further factual development is unnecessary because only issues of law exist for the Court to answer.

It is also without question that NPRI properly seeks definitive adjudication of the disputed constitutional right of Respondents to undertake the dual service at issue. Unlike the Court's predecessor, who dismissed NPRI's separation-of-powers

---

[1] NPRI alleged in its motion to amend that, in addition to the Respondents herein, the following seven (7) legislators currently engage in dual service in violation of the separation-of-powers clause: Assemblyperson Natha C. Anderson, Assemblyperson Reuben D'Silva, Assemblyperson Cecelia Gonzalez, Senator Lisa Krasner, Assemblyperson Selena La Rue Hatch, Assemblyperson David Orentlicher, and Assemblyperson Shondra Summers-Armstrong.

challenge on procedural grounds, Judge Peterson in issuing her merit-based decision stated that she "is doing as the Nevada Supreme Court instructed and is reviewing the case on the merits, particularly whether the law supports the claims in the Amended Complaint…." Judge Peterson's Order therefore, regardless of its outcome, provides the Court the much-anticipated opportunity to construe the meaning of Nevada Const. art. 3, § 1(1), which it alone has the power to do. *Ex parte Blanchard*, 9 Nev. 101, 104 (1874).

It is axiomatic that dual service in the legislative and executive branches dilutes, if not entirely destroys, the very foundation upon which the concept of Nevada's representative government rests, i.e., that its legislature enacts the will of the people rather than the will of the executive. This is why the Court confirmed long ago that the "division of powers" is "probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967). Divided government is so vital to a free society that, as the Court explained, "[t]here must be a fullness of conception of the principle of the separation of powers involving all of the elements of its meaning and its correlations to attain …. the maximum protection for the rights of the people." *Id.*, 83 Nev. at 22, 422 P.2d at 243-44. Indeed, "[t]o permit even one seemingly harmless prohibited encroachment and adopt an indifferent attitude could lead to very destructive results." *Id.*, 83 Nev. at

22, 422 P.2d at 243.

Because Nevadans are a free people, they are deserving of protection from prohibited executive branch encroachments on its representative government. For this reason, NPRI respectfully asks the Court to enforce the Nevada Constitution in keeping with both its letter and spirit and find that no legislator charged with the exercise of legislative powers shall exercise any executive branch functions, except in cases expressly directed or permitted by the Nevada Constitution.

In the alternative, because Judge Peterson based her decision on the common law doctrine of incompatible offices, which the parties never raised, NPRI asks the Court to follow its federal counterpart and remand the matter for adjudication on the merits attuned to the case shaped by the parties, rather than the case the district court cut from whole cloth. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (explaining that under the party presentation principle, "[w]e rely on the parties to frame the issues for decision"); *see also State v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark (Doane)*, 138 Nev. Adv. Op. 90, *7-8 (Dec. 30, 2022) (quoting *Greenlaw v. U.S.*, 554 U.S. 237, 243 (2008) in confirming Nevada's adherence to the principle of party presentation).

Additionally, if the Court acts in the alternative, NPRI respectfully requests the Court's remand order include reversal of the district court's denial of NPRI's motion to strike and direction for the district court to adjudicate the matter solely

upon review of the parties' arguments pertaining to the appropriately filed motion to dismiss of Respondent, James Ohrenschall.

II.

STATEMENT OF RELEVANT FACTS

The district court decided all matters upon review of the parties' pleadings and papers, thus the only facts at issue in this appeal are the facts set forth in NPRI's Amended Complaint for Declaratory and Injunctive Relief. (AA Vol. 1 PGS 1 – 7). Therein, NPRI asserted the factual basis to invoke application of the separation-of-powers clause to prohibit all then-named defendants from continuing to engage in impermissible dual government service. (AA Vol. 1 PGS 2 - 5). Specifically, NPRI challenged thirteen (13) individual defendants known to be simultaneously holding elected legislative office and employment with the executive brand in a state or local government entity. (AA Vol. 1 PGS 3 – 5).

The appeal is only proceeding against the four (4) defendants still named in the district court, however, after the remaining defendants either left public employment entirely or declined the opportunity to run for re-election to their legislative seat. (AA Vol. 2 PG 354). For the Court's ease of reference, the remaining facts herein state the relevant procedural developments in the case following the first appeal, including clarification of those matters that are, and are not, subject to this second appeal.

In April 2022, the Court granted NPRI standing to pursue its claims and reversed and remanded the matter for further proceedings thereon. *Cannizzaro*, 138 Nev. Adv. Op. 28 at *14-15, 507 P.3d at 1211. Thereafter, on June 30, 2022 and July 1, 2022, respectively, the four (4) remaining defendants filed a total of ten (10) motions to dismiss and joinders. Listed in the order filed, the district court received: (1) NSHE Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5) ("Neal MTD") (AA Vol. 1 PGS 13 – 39); (2) Defendant James Ohrenschall's Motion to Dismiss ("Ohrenschall MTD") (AA Vol. 1 PGS 40 – 54); (3) Defendants Brittney Miller and Selena Torres's Joinder to Defendant Dina Neal's Motion to Dismiss (AA Vol. 1 PGS 55 – 57); (4) Defendants Brittney Miller and Selena Torres's Partial Joinder to Defendant James Ohrenschall's Motion to Dismiss (AA Vol. 1 PGS 58 – 60); (5) NSHE Defendant Dina Neal's Joinder to Defendant James Ohrenschall's Motion to Dismiss (AA Vol. 1 PGS 61 – 63); (6) Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief ("Legislature MTD") (AA Vol. 1 PGS 64 – 83); (7) NSHE Defendant Dina Neal's Joinder to Legislative Counsel Bureau's Nevada Legislature's Motion to Dismiss Amended Complaint for Declaratory and Injunctive Relief (AA Vol. 1 PGS 84 – 86); (8) Defendants Brittney Miller and Selena Torres's Partial Joinder to Nevada Legislature's Motion to Dismiss (AA Vol. 1 PGS 87 – 89); (9) Defendant James Ohrenschall's Joinder to NSHE

Defendant Dina Neal's Motion to Dismiss Pursuant to NRCP 12(b)(5) (AA Vol. 1 PGS 90 – 92); and (10) Defendant James Ohrenschall's Joinder, in Part, to Legislature of the State of Nevada's Motion to Dismiss Complaint (AA Vol. 1 PGS 93 – 95).

On July 18, 2022, NPRI filed separate oppositions to the Ohrenschall MTD (AA Vol. 1 PGS 107 – 118), the Legislature MTD (AA Vol. 1 PGS 119 – 131), and the Neal MTD (AA Vol. 1 PGS 132 – 142), inclusive of opposition to their respective joinders. The moving parties thereafter filed replies in support of their motions on July 28, 2022 (AA Vol. 1 PGS 161 – 165 (Neal), 166 – 175 (Ohrenschall), and 179 – 198 (Legislature)), and the joining parties, Defendants Miller and Torres, filed their omnibus joinder to the moving parties' replies the same day. (AA Vol. 1 PGS 176 – 178). Related to the Neal MTD, at the district court's request, Defendant Neal and NPRI filed supplemental briefs thereafter specifically addressing Neal's employment in the executive branch, and the Legislature filed its own supplement regarding the same, on September 23, 2022. (AA Vol. 2 PGS 304 – 310 (Neal), 311 – 339 (NPRI), and 340 – 351 (Legislature)).

Believing that all of the motions to dismiss and joinders were successive and impermissible under NRCP 12(g)(2), with the single exception of the Ohrenschall MTD, NPRI filed a motion to strike all such filings on July 13, 2022. (AA Vol. 1

PGS 96 – 106). Defendants Neal and Legislature thereafter filed oppositions to NPRI's motion to strike on July 27, 2022 (AA Vol. 1 PGS 143 – 147 (Neal) and 148 – 157), and Defendants Miller and Torres included their joinders to these oppositions in their omnibus joinder filed on July 28, 2022. (AA Vol. 1 PGS 176 – 178).

Finally, although not relevant to the appeal, the district court also received and considered Defendants Brittney Miller and Selena Torres's Motion to Sever Pursuant to NRCP 21, filed June 28, 2022, and a supplement thereto filed July 1, 2022. NPRI opposed the motion to sever and supplement on July 18, 2022, and a reply completed this briefing on July 28, 2022.

The district court took oral argument on all pending matters on August 4, 2022. (AA Vol. 2 PGS 215 – 303). At the time, the district court also called for the parties to submit proposed findings of fact and conclusions of law for consideration. (AA Vol. 3 PGS 419 – 479). On January 4, 2023, the district court issued its order granting in part and denying in part the various motions submitted by the parties. (AA Vol. 2 PGS 352 – 381). With regard to the denials in part, the district court first specifically denied dismissal as to all arguments made in the Legislature MTD, which the Defendant Legislature did not appeal. (AA Vol. 2 PGS 355, 357 at fn. 2, and 358 at fn. 4). The district court also denied the motion to strike filed by NPRI (AA Vol. 2 PGS 357 – 358) and denied as moot the motion

to sever filed by Defendants Miller and Torres (AA Vol. 2 PG 386). Only the denial of NPRI's motion to strike is included as an alternative in the instant appeal.

The district court did grant dismissal of NPRI's claims however, albeit based on an argument regarding the common law doctrine of incompatible offices never raised by the parties, by first finding that Nevada "is not one of those states" with "specific constitutional or statutory prohibitions against dual public employment." (AA Vol. 2 PG 389). The district court then continued in its structural error by framing the case on its own, engaging in an evaluation of three (3) factors "to determine whether an individual's dual employment violates the separation-of-powers clause," each of which ultimately ties to the incompatible offices analysis. Those factors were identified as follows: (1) "whether the dual roles are incompatible based on the common law doctrine of incompatible offices," (2) "whether the individual legislator's employment is with a state entity or a local political subdivision," and (3) "if the roles are compatible and the individual works for a state entity …. whether the position with the state entity is that of an employee or an officer." (*Id.*)

Based on its analysis of the factors it identified, the district court then determined that: (1) no officer or employee of a state or local government may also serve as a state legislator if the roles are not compatible, and it is the purview of the court to determine compatibility; (2) those employed by local government

entities are not a part of the state executive branch and therefore may serve in the legislative branch providing the roles are compatible; and (3) public officers of the state executive branch may not serve in the legislature; however, those who are public employees may, providing the roles are compatible. (AA Vol. 2 PG 380).

In applying these holdings, the district court dismissed NPRI's claims as to all remaining defendants by finding "there is no common law incompatibility issue for an individual to be employed as a county public school teacher, a public defender, or a professor at a state college and simultaneously serve as a state legislator." The district court further found "that there is no conflict between the positions and no prejudice suffered by NPRI based on the dual employment." (AA Vol. 2 PGS 362 – 363). Finally, the district court found that separation-of-powers does not apply to the remaining local government employees because it does not apply to an employee of a local political subdivision who does not hold an incompatible dual position, and it does not apply to the remaining state employee because she does not exercise a sovereign function of the executive branch. (AA Vol. 2 PGS 367 and 378 – 379).

For these reasons, NPRI asks the Court in this appeal to disregard the district court's radical transformation of the parties' case and enter its own merits determination based on the issues and arguments presented by the parties, giving the fullness of meaning to the Nevada Constitution its framers intended. *Galloway*,

83 Nev. at 22, 422 P.2d at 243-44.

III.

SUMMARY OF ARGUMENT

The people of the State of Nevada divided the powers of its government into three distinct categories: legislative, executive, and judicial. Contrary to the district court's holding, the framers of Nevada's Constitution did enshrine a specific prohibition against dual service. Very clearly and more specifically than its federal counterpart, Nevada's separation-of-powers clause states that, "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." Nevada Const. art. 3, § 1(1) (emphasis added).

In the instant appeal, there is no factual dispute that Respondents exercise the power of the legislative branch in their capacity as elected state legislators. As such, the Nevada Constitution on its face prohibits them from exercising any functions related to the executive branch while so serving. Further, there is no legal dispute that state and local governmental entities that belong to neither the judicial nor legislative branches, and which are responsible for "carrying out and enforcing the laws enacted by the Legislature," are part of the executive branch. *Galloway*, 83 Nev. at 20, 422 P.2d at 242 (1967). As such, any employee of a state or local government entity that carries out and enforces the laws of this state necessarily

exercises functions related to the executive branch. *See, e.g.*, *Harris Assocs. v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 640, 81 P.3d 532, 533 (2003) (recognizing local school district as a political subdivision of the state); *see also Comm'n on Ethics v. Hardy*, 125 Nev. 285, 298, 212 P.3d 1098, 1107-08 (2009) (holding that every Nevada government entity "must have a primary connection to and derive its power to act from one of the three branches of government" and that determining which of the three branches an entity resides within requires analyzing the purpose for which it was created).

NPRI respectfully asserts, therefore, that all persons engaging in dual service, regardless of whether employed by a state or local government entity or their scope of employment, are in plain violation of the separation-of-powers clause of the Nevada Constitution. Specifically, Respondents herein, as well as those pending inclusion by amendment at the time the district court issued its order, exercise the power of the legislative branch in their capacity as legislators while simultaneously performing functions related to the executive branch in their capacity as state and local government employees. Unable to justify this arrangement under the plain text of the Nevada Constitution, Respondents asked the district court, and will surely ask this Court, to reinterpret the text of the Constitution to mean something else entirely. Respondents asserted below that "any function" means only the narrow category of "sovereign powers," which only

public officials and officers, as distinct from public employees, perform. The Court, however, can and should construe the text of the separation-of-powers clause as written. *See Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001) (confirming use of same rules of construction to interpret statutes used when construing constitutional provisions); *see also Erwin v. State*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) ("[w]here the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself"). The argument that the clause should be interpreted to apply only to sovereign functions or public officers would require the Court to "read language into the provision that it does not contain," which is a task the Court "will not undertake." *Legislature of State v. Settelmeyer*, 137 Nev. Adv. Op. 21, 486 P.3d 1276, 1282 (2021). Furthermore, the use of the word "any" to qualify "functions" is mutually exclusive to placing a limit on its application, as the Court has held the word "any" means "any and all" and "indiscriminately of whatever kind." *Id.*, 486 P.3d at 1281 (quoting Black's Law Dictionary (6th ed. 1990).

Respondents have no legal support for their request for such a narrow interpretation of the separation-of-powers clause, and indeed, none exists. Further, any case law from jurisdictions with the same constitutional dual service prohibition utilizing the terms powers and functions as in the Nevada Constitution

unequivocally supports NPRI's requested construction. Accordingly, NPRI respectfully seeks the Court's definitive decision that the Nevada Constitution means what it says and prohibits, without exception, any person exercising the power of the legislative branch from simultaneously exercising any functions in executive branch employment.

In the unlikely event the Court declines to reach the ultimate separation-of-powers issue at this time, NPRI seeks to have the district court's dismissal order vacated upon application of the principle of party presentation, or otherwise reversed and remanded, based upon the inapplicability of the common law doctrine of incompatible offices set forth herein. Any remand order should also include an order of reversal of the district court's denial of NPRI's motion to strike all successive motions to dismiss and joinders and a mandate that the district court's further proceedings be limited to the adjudication of the Ohrenschall MTD, upon the arguments actually set forth by the parties.

IV.

ARGUMENT

A. Standard of Review.

The Court rigorously reviews 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.

Questions of statutory construction however, including the meaning and scope of a statute or constitutional provision, are questions of law that this Court reviews de novo. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

B. Nevada's Separation-of-Powers Clause Is Ripe for Decision Prohibiting Dual Service for All Persons Exercising Legislative Powers and Executive Branch Functions.

As a threshold matter, the Court may look to Section IV(C), below, for NPRI's arguments as to the procedural and substantive bases to disregard the district court's inventive reasoning for dismissing its separation-of-powers challenge. As the parties themselves framed the case below and for this appeal, however, Respondents' only substantive argument for why their government service does not violate separation-of-powers is the untenable position that the separation-of-powers clause has already been interpreted to prohibit only public officials or officers, as opposed to public employees, from holding positions in separate branches of government. (AA Vol. 1 PG 16).[2] Respondents provide no

---

[2] As noted above, the other arguments presented by Respondents below, i.e., the alleged failure to join required parties under NRCP 19 and ostensibly NRS Chapter 41, were specifically denied by the district court and are not subject to cross-appeal herein. (AA Vol. 2 PGS 355 and 358 at fn. 4).

binding authority to support this argument, however, because none exists. To the contrary, for decades the Court has strongly indicated the reach of separation-of-powers can and will extend to all public employees. *See*, *e.g.*, *Heller*, 120 Nev. at 472, 93 P.3d at 757 (holding that "declaratory relief, possibly coupled with a request for injunctive relief, could be sought against other executive branch employees") (emphasis added); *see also Galloway*, 83 Nev. at 21-22, 422 P.2d at 243 (holding that even ministerial functions of each governmental branch frequently overlap, and it is in the area of "inherent ministerial powers and functions that prohibited encroachments upon the basic powers of [a branch] most frequently occur"). Finally, the Court in its prior remand order to the district court succinctly noted that, "future guidance is necessary because of the lack of judicial interpretation of Nevada's separation-of-powers clause." *Cannizzaro*, 138 Nev. Adv. Op. 28 at *11, 507 P.3d at 1210.

Accordingly, Respondents' arguments seeking to establish a limitation purportedly to already exist in the Court's separation-of-powers jurisprudence between public officers and public employees is unavailing and should be disregarded. Conversely, NPRI's argument for application of the separation-of-powers clause to the "fullness of conception" contemplated is supported by prior decisions in this and other jurisdictions with the same or substantially similar language.

1. *This Court Previously Approved Declaratory and Injunctive Relief as the Vehicle for a Separation-of-Powers Challenge Against Legislators Employed in the Executive Branch.*

In the Court's *Heller* decision, then-Secretary of State Dean Heller sought a writ of mandamus to challenge state and local government employees' service in the Legislature as violating the Nevada Constitution's separation-of-powers doctrine. In the end, the Court denied the writ after determining in relevant part that the Secretary of State had sued the wrong party, *i.e.*, the Legislature as a whole, to prevent service therein by executive branch employees. *Heller*, 120 Nev. at 462-63, 93 P.3d at 750. In so doing, however, the Court provided a clear path, chosen herein by NPRI, to raise the challenge.

Specifically, the Court recognized two mechanisms for challenging what it deemed the "dual service issue." *Heller*, 120 Nev. at 472, 93 P.3d at 756. It held 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*., 120 Nev. at 472, 93 P.3d at 757 (citation omitted). It continued to opine that, "[s]uch a challenge might be well suited for quo warranto <u>or a declaratory relief action filed in the district court</u>." *Id*. (emphasis added). Most telling and particularly relevant to the instant case, however, is the distinction the Court draws between how each of the two types of actions could proceed, 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.

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

In sum, the Court squarely endorsed the bringing of the declaratory and injunctive relief causes of action alleged by NPRI against executive branch employees without sovereign power, like the Respondents herein. Further, the Court imposed no restrictions concerning the functions engaged in by the executive branch employees so challenged, and rightfully so, given the Court's prior recognition that it is precisely in the area of non-sovereign, ministerial functions that separation-of-powers violations most frequently occur. *See Galloway*, 83 Nev. at 22, 422 P.2d at 243. As such, any argument that NPRI's lawsuit is not properly before the Court because it is not limited to public officials and officers fails in its entirety.

2. *The Court Recognizes "Prohibited Encroachments" on the Separation of Powers Usually Occur in the Exercise of Inherent Ministerial Powers and Functions.*

In 1967, the Court used Nevada's separation-of-powers doctrine to invalidate a statute that required district courts to issue marriage certificates. The Court found this was not a judicial act and thus the legislature could not compel the judiciary to perform it. Before reaching that conclusion, the Court conducted an exhaustive analysis of separation-of-powers more broadly, and the role it plays in Nevada's system of government specifically. The Court described separation-of-powers as "probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway*, 83 Nev. at 20, 422 P.2d at 242. The Court further explained that, in addition to the constitutionally expressed powers and functions belonging to each branch of government, each branch "possesses inherent and incidental powers that are properly termed ministerial." *Id.* The Court continued, "Ministerial functions are methods of implementation to accomplish or put into effect the basic function of each Department. No Department could properly function without the inherent ministerial functions." *Id.*

Having thus identified ministerial functions as an essential and fundamental part of the exercise of power itself, the Court next cautioned against the "error" of adopting too restricted a view of Nevada's separation-of-powers doctrine:

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

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

As quoted above, the Court stressed that in order to ensure that not even one "seemingly harmless prohibited encroachment" is tolerated, the separation-of-powers doctrine must be given a "fullness of conception, involving all of the elements of its meaning and its correlations," while warning that prohibited encroachments are most likely to occur in the area of ministerial functions. Thus, the Court long ago rejected any notion that only public officials or officers exercising sovereign functions are sufficient to trigger violations, having specifically warned against prohibited encroachments that occur in the non-sovereign area of functions deemed ministerial. While the Court's reasoning is

fundamentally at odds with the arguments Respondents made below, it aligns perfectly with the text of Nevada's separation-of-powers clause, which NPRI respectfully seeks to enforce through the instant appeal.

3. *Other State Courts Interpreting the Same or Substantially Similar Separation-of-Powers Clauses Support NPRI's Requested Interpretation.*

As noted above, this Court has not directly applied the separation-of-powers clause to a person holding both legislative office and a position of public employment. Other states analyzing the same or substantially similar constitutional language, however, readily concluded that prohibiting a legislator from also exercising the **functions** of another branch proscribes all public employment regardless of the employing entity or duties performed. *See State ex rel. Black v. Burch*, 226 Ind. 445, 463-64, 80 N.E.2d 294, 302 (1948) (constitution stating "no person, charged with official duties under one of these departments, shall exercise any of the functions of another" prohibited legislators from serving as employees of state boards and commissions, reasoning "[i]f persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department, the door is opened to influence and control by the employing department"); *Monaghan v. Sch. Dist. No. 1, Clackamas Cnty*, 211 Or. 360, 370, 315 P.2d 797, 802 (1957) (constitution stating "no person charged with official duties under one of these departments, shall exercise any of the functions of another" prohibited legislator from serving as public school teacher,

reasoning "role as a teacher subjugates the department of his employment to the possibility of being 'controlled by, or subjected, directly or indirectly, to the coercive influence of' the other department wherein he has official duties and vice versa"). *Cf.*, *also*, *Saint v. Allen*, 169 La. 1046, 126 So. 548, 555 (1930) (constitution stating "no person or collection of persons holding office in one of them, shall exercise power belonging to either of the others" prohibited legislator from serving as attorney for state highway commission, reasoning "[i]t is not necessary, to constitute a violation of the article, that a person should hold offices in two departments of government…[i]t is sufficient if he is an officer in one department and at the times is employed to perform duties, or exercise power, belonging to another department"); *State ex rel. Spire v. Conway*, 238 Neb. 766, 789, 472 N.W.2d 403, 414-15 (1991) (constitution stating "no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others" prohibited legislator from serving as assistant professor at state-funded college).

C. The District Court Abused Its Discretion By Disregarding the Parties' Presentations and Applying the Common Law Doctrine of Incompatible Offices.

1. *The District Court's Order Should Be Vacated in Its Entirety Based on the Principle of Party Presentation Alone.*

In May 2020, the United States Supreme Court vacated an opinion of the Ninth Circuit Court of Appeals solely because the Ninth Circuit decided the case

on a point the parties did not raise. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). The underlying case involved the criminal conviction of an immigration consultant charged under a federal law that prohibits encouraging or inducing an alien to enter or reside in the United States knowing or in reckless disregard of the fact that such entry or residence is unlawful. *Id.*, at 1576. The parties argued whether the law was applicable but not whether the law itself was flawed. The Ninth Circuit, however, reversed the conviction by finding the law overbroad under the First Amendment. *Id*. Justice Ginsburg, writing for a unanimous Court, held the Ninth Circuit "departed so drastically from the principle of party presentation as to constitute an abuse of discretion" and ordered the decision vacated and remanded "for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties." *Id*., at 1578, 1582

On this same basis, the Court should vacate the district court's decision in its entirety but, for the reasons argued above, need not remand the matter for further district court review. The parties' presentation below sought only to address the issue now on appeal, i.e., whether it is a violation of the separation-of-powers clause of the Nevada Constitution, Nevada Const. art. 3, § 1(1), for an individual to serve in the Nevada Legislature while simultaneously employed by a state or local government entity. The district court, however, completely

disregarded the arguments of the parties in this regard, after indicating the inclination to deny the motions and requesting proposed findings of fact and conclusions of law at the end of the parties' oral presentations on August 4, 2023. (AA Vol. 2 PG 301). Like the Ninth Circuit, when the district court rendered its decision five months to the day later it abused its discretion by so drastically departing from the parties' presentations. Specifically, the district court erroneously declared Nevada as a state with no constitutional prohibition against dual service and, without undertaking any analysis as to applicability, rendered the decision to dismiss NPRI's claims based on the common law doctrine of incompatible offices.

For these reasons, as further supported by the following argument, NPRI respectfully requests the Court vacate the district court's order and proceed with an ultimate decision based on the parties' actual presentations below. *See State v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark (Doane)*, 138 Nev. Adv. Op. 90, *7-8 (Dec. 30, 2022) (quoting *Greenlaw v. U.S.*, 554 U.S. 237, 243 (2008) (confirming Nevada's adherence to the principle of party presentation).

2. *The District Court's Application of the Common Law Doctrine of Incompatible Offices Constitutes Clear Error.*

The district court clearly erred in applying the common law doctrine of incompatible offices to render its decision for two separate and compelling reasons. First, the Court in finding the district court erred in its application of the

doctrine should follow other state precedent and find specific constitutional provisions simply supersede the common law doctrine. In New Hampshire, the appellate court held that the separation-of-powers provision in its state constitution does not apply to the issue of incompatible public offices period, because incompatibility is addressed in other, more specific provisions of the constitution. *See State by Att'y Gen. v. Meader,* 80 N.H. 292, 293, 116 A. 433, 434 (1922). Like in New Hampshire, the Nevada Constitution specifically addresses incompatible offices in multiple articles. *See* Nevada Const. art. 4, § 9; art. 5, § 12; art. 6, § 11. This should leave no room for the doctrine's application in the separation-of-powers context. More recently, the Florida Supreme Court found the common law doctrine could not exist, noting that like Nevada, "when taken as a whole, the constitutional provisions governing public officials in Florida are even more restrictive …. than the judicially enacted common law doctrines in other jurisdictions." *State ex rel. Clayton v. Board of Regents*, 635 So.2d 937, 938 (Fla. 1994).

Second, contrary to the district court's order, Nevada has dealt directly with the doctrine, albeit not as to persons holding public offices in the state government. (AA Vol. 2 PG 359); *see Clark Cnty. v. City of Las Vegas*, 92 Nev. 323, 346, 550 P.2d 779, 794 (applying the doctrine to public offices in city and county governments). The import of the Court's prior jurisprudence is that

application of the doctrine should only be to persons holding two public offices, and not those who hold a public office and a position of public employment. This application of the doctrine is consistent with California's limitation as well, which as the district court noted deserves deference where the framers modeled the Nevada Constitution after the California Constitution. (AA Vol. 2 PG 364); *see also State ex rel. Harvey v. Second Jud. Dist. Ct.,* 117 Nev. 754, 763, 32 P.3d 1263, 1269 (2001). In *Eldridge v. Sierra View Loc. Hosp. Dist.*, 224 Cal. App. 3d 311, 319 (1990), the California appellate court succinctly held that "[the doctrine] has no application when one of the positions is an employment rather than a public office." The district court noted the California holding in its order but ultimately erred by disregarding it and the Nevada precedent, as it did with the parties' presentations. (AA Vol. 2 PGS 361 – 362 and 362 at fn. 7).

D. The District Court Erred By Denying NPRI's Motion to Strike Respondents' Successive Motions to Dismiss and Joinders.

The plain language of NRCP 12(g)(2) reads as follows, "**Limitation on Further Motions**. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." (Emphasis in original). Further, the exceptions stated in NRCP 12(h)(2) and (3), which only permit certain matters to be raised a second time by other means later in the case or where the subject matter jurisdiction of the court is

legitimately truly in question, were not present below. The record below is clear that the only party who did not previously move for dismissal in the instant case was Defendant Ohrenschall. As such, the Ohrenschall MTD is the only filing not subject to NPRI's motion to strike argument on appeal. However, all other motions to dismiss and their joinders, including Defendant Ohrenschall's joinders were not properly before the district court and should have been stricken.

First, both the title and substance of the Neal MTD constitute an admission to seeking successive relief pursuant to NRCP 12(b)(5), which NRCP 12(g)(2) specifically precludes. (AA Vol. 1 PGS 13 – 39). Even more egregious than this disregard for procedure, however, is the fact that she raised arguments she knew to be unsound and the subject of prior motion practice. The entire premise of the Neal MTD, in fact, is the unsupported and erroneous conclusion that the separation-of-powers clause "has been interpreted to prohibit public officials or officers, as opposed to mere public employees, from holding positions in separate branches of government." (AA Vol. 1 PG 16). This assertion, however, is completely contrary to the Court's prior remand order in Case No. 82341, which unequivocally stated in relevant part:

> Our refusal to grant standing [to NPRI] under these circumstances could result in serious public injury – either by the continued allegedly unlawful service of the above-named officials, or by the refusal of qualified persons to run for office for fear of acting unconstitutionally – <u>because the unsettled issue continues to arise</u>. (Citation omitted.)

Cannizzaro, 138 Nev. Adv. Op. 28 at *10, 507 P.3d at 1209 (emphasis added); *see also Id*., at *11, 507 P.3d at 1210 (stating "future guidance is necessary because of the lack of judicial interpretation of Nevada's separation-of-powers clause" and expressing in a footnote concerning the prior non-binding opinions issued by the Nevada Attorney General and Nevada Legislative Counsel Bureau that these opinions "serve to demonstrate the recurring and unresolved nature of the dual service issue."). Additionally, the fact that the district court previously granted dismissal solely on NPRI's purported lack of standing does not mean that these arguments, which were previously made and/or joined by defendants, were not fully considered. Raising the arguments in a successive NRCP 12(b)(5) motion or joining in any other motion based on the same, is clearly procedurally improper.

Second, the Defendant Legislature also fully engaged in the dismissal process below and should have been precluded from filing its own successive motion to dismiss. But even without the district court finding its arguments in support of intervention sufficient to warrant striking the Legislature MTD pursuant to NRCP 12(g)(2), there can be no doubt that the Defendant Legislature's prior countermotion to dismiss brought on behalf of itself and all other then-remaining defendants mandated the application of NRCP 12(g)(2). Specifically, prior to the entry of district court's original dismissal order, NPRI sought clarification on the basis for the district court's first decision to dismiss the case in

its entirety, as well as the basis for granting intervention. The Defendant Legislature not only authored the joint opposition to the motion for clarification, it also included a Countermotion to Dismiss All Remaining Defendants Based on Plaintiff's Lack of Standing. The countermotion relied squarely upon NRCP 12 and provided ample opportunity for the Nevada Legislature to raise all grounds for seeking dismissal. NRCP 12(g)(2) therefore precluded it from seeking a second bite at the apple for matters that were available but omitted from this earlier countermotion.

Finally, with regard to the substance of the Legislature MTD, neither of the exceptions to the application of NRCP 12(g)(2) apply. The entire argument regarding the purported failure of NPRI to join required parties was made pursuant to NRCP 19(a). (AA Vol. 1 PGS 77 – 80). But the exception to the limitation of further motions found in NRCP 12(h)(2) pertains only to motions brought under NRCP 19(b) where joinder of a party is not feasible, not NRCP 19(a) where joinder is required if feasible, the latter of which must clearly be filed in the first instance. Also, while the exception found in NRCP 12(h)(3) references lack of subject-matter jurisdiction as a basis for dismissal at any time, this Court settled the matter of jurisdiction at the conclusion of its prior remand order, stating it was "therefore revers[ing] the district court order dismissing NPRI's complaint and remand[ing] <u>for further proceedings on its claims</u>." *Cannizzaro*, 138 Nev. Adv.

Op. 28 at *14-15, 507 P.3d 1211 (emphasis added). Any argument that the district court still lacked subject-matter jurisdiction based on the application of the provisions of NRS Chapter 41 is unavailing. NRS 41.031, NRS 41.0337 and NRS 41.039, by their plain language, are statutes pertaining to causes of action implicating the liability of the state or one of its political subdivisions. NPRI's separation-of-powers challenge in no way implicates liability for any party, much less the state, and there can be no question of subject matter jurisdiction being challenged for the purported failure to meet requirements of an inapplicable statute.

Additionally, Respondents Miller and Torres filed a joinder to the Neal MTD and a partial joinder to the Legislature MTD. (AA Vol. 1 PGS 55 – 60). These joinders were, however, equally successive where they also filed and/or joined fully briefed prior motions to dismiss brought pursuant to NRCP 12. And, while Defendant Ohrenschall's ability to file a first motion to dismiss pursuant to NRCP 12 is not disputed on appeal, the local rules of the district court do not permit any consideration of a joinder to a motion otherwise stricken. *See* EDCR 2.20(d). Accordingly, for all of the same reasons argued above, all joinders should also have been stricken as procedurally improper under NRCP 12(g)(2).

V.

CONCLUSION

For all these reasons, NPRI respectfully requests this Court enter a published decision finding Respondents' dual service violates the separation-of-powers requirement of the Nevada Constitution. In the alternative only, NPRI respectfully seeks an order for reversal and remand that includes the finding that the district court erred in denying NPRI's motion to strike the successive motions to dismiss and joinders filed by Respondent Miller, Neal, Torres and Nevada Legislature.

Dated this 12th day of June, 2023.

FOX ROTHSCHILD LLP

By: */s/ Deanna L. Forbush*
DEANNA L. FORBUSH
Nevada Bar No. 6646
dforbush@foxrothschild.com
COLLEEN E. MCCARTY
Nevada Bar No. 13186
cmccarty@foxrothschild.com
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Attorneys for Appellant
Nevada Policy Research Institute

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening 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 Opening Brief complies with the page or type-volume limitations of NRAP 32(a)(7) 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 8,940 words.

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

/ / /

/ / /

/ / /

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

Dated this 12th day of June, 2023.

FOX ROTHSCHILD LLP

By:*/s/ Deanna L. Forbush*____________
DEANNA L. FORBUSH
Nevada Bar No. 6646
dforbush@foxrothschild.com
COLLEEN E. MCCARTY
Nevada Bar No. 13186
cmccarty@foxrothschild.com
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Attorneys for Appellant
Nevada Policy Research Institute

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2023, I caused the foregoing **APPELLANT NEVADA POLICY RESEARCH INSTITUTE'S OPENING BRIEF** 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:

Berna L. Rhodes-Ford, General Counsel
Nevada State College
1300 Nevada State Drive, RSC 374
Henderson, Nevada 89002
Email: berna.rhodes-ford@nsc.edu
Attorney for Defendant
Dina Neal

Bradley Schrager, Esq.
Royi Moas, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman &
Rabkin, LLP
3773 Howard Hughes Pkwy
Suite 590 South
Las Vegas, Nevada 89169
Email: bschrager@wrslawyers.com
Email: rmoas@wrslawyers.com
Email: dbravo@wrslawyers.com
Attorneys for Defendants Brittney Miller
and Selena Torres

Jonathan D. Blum, Esq.
Wiley Petersen
1050 Indigo Drive, Suite 200B
Las Vegas, Nevada 89145
Email: jblum@wileypetersenlaw.com
Attorney for Defendant
James Ohrenschall

Kevin C. Powers, General Counsel
Legislative Counsel Bureau, Legal
Division
401 S. Carson Street
Carson City, Nevada 89701
Email: kpowers@lcb.state.nv.us
Attorney for Nevada Legislature

/s/ Deborah L. Pressley
An Employee of Fox Rothschild LLP