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 University 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]

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

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant, Nevada Policy Research Institute ("NPRI"), is a Nevada domestic non-profit corporation and has no corporate affiliations.

2. NPRI was represented in the district court, and is represented in this Court, by the undersigned attorneys of the law firm of Fox Rothschild LLP.

Dated this 14th day of September 2023.

FOX ROTHSCHILD LLP

By:*/s/ Deanna L. Forbush*_____

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I.

ARGUMENT

A. Introduction.

In the instant appeal, NPRI respectfully asks the Court to enforce the separation-of-powers clause of the Nevada Constitution in keeping with both its letter and spirit and, in so doing, find that no legislator charged with the exercise of legislative powers shall exercise any executive branch functions, period. Contrary to the district court's decision to decline to preclude the dual service of the remaining Respondents, Brittney Miller, Dina Neal, James Ohrenschall and Selena Torres (collectively "Respondents"), both binding Nevada precedent and highly persuasive precedent from other jurisdictions fully endorse NPRI's requested enforcement of Nevada law to ensure that "no persons charged with the exercise of **powers** properly belonging to one [department] 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).

With regard to the prior binding precedent informing on its decision here, the Court has previously held that the performance of non-sovereign functions belonging to one branch of government by persons enjoying the powers of elected office in another branch mandates application of separation-of-powers to invalidate a statute requiring an otherwise improper encroachment. *See, e.g., Galloway v. Truesdell*, 83 Nev. 13, 30, 422 P.2d 237, 249 (1967) (statute unconstitutional that

conferred "ministerial duties on District Judges to issue certificates of permission to marry"); *Desert Chrysler-Plymouth v. Chrysler Corp.*, 95 Nev. 640, 644-45, 600 P.2d 1189, 1191-92 (1979) (statute unconstitutional that required judges to perform "function" of assessing whether additional car dealership is in the public interest). In each case, statutes creating a conflict between judicial branch powers and other branch functions were found to be wholly unconstitutional, and, tellingly, the nature of the functions in dispute never factored into the Court's analysis, which tracks entirely with the plain and unambiguous language of Nevada's separation-of-powers clause.

Should the Court seek more direct precedent, highly persuasive case law from other jurisdictions with the same or substantially similar separation-of-powers clause as found in the Nevada Constitution specifically endorses the finding that legislators are prohibited from exercising any functions as an employee of the executive branch, regardless of the employing entity or the duties performed. *See, e.g., State ex rel. Spire v. Conway*, 238 Neb. 766, 789, 472 N.W.2d 403, 414-15 (1991) (legislator prohibited from serving as assistant professor at state-funded college); *Monaghan v. School Dist. No. 1, Clackamas County*, 211 Or. 360, 370, 315 P.2d 797, 802 (1957) (legislator prohibited from serving as public school teacher); *State ex re. Black v. Burch*, 226 Ind. 445, 463-64, 80 N.E.2d 294, 302 (1948) (legislators prohibited from serving as employees of state boards and

commissions); *Saint v. Allen*, 169 La. 1046, 126 So. 548, 555 (1930) (legislator prohibited from serving as attorney for state highway commission).

Regardless of the approach ultimately taken by the Court, it is clear from the district court's January 2023 order that the constitutional "question of whether respondents' dual service violates the separation-of-powers clause….one that implicates specific conduct of state officials and a matter of great and equal concern to all Nevada citizens," is now squarely before this Court. *Nev. Policy Research Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28 at *9-10, 507 P.3d 1203, 1209 (2022). And to reach its long-awaited decision, the Court need not start from scratch, or rely on the doctrine of incompatible offices used by the district court or other inapposite dismissal arguments offered by Respondents. Indeed, the alternative dismissal arguments that form the gravamen of Respondents' Answering Briefs provide no meaningful dispute to the separation-of-powers interpretation advanced by NPRI in this appeal, and the Court should set aside and leave unconsidered any argument that seeks to avoid the constitutional question.

If the Court is not inclined to decide the ultimate issue at this time, however, NPRI asks in the alternative for the Court to follow its federal counterpart's recent restatement of the principle of party presentation and remand the matter for a decision attuned to the case shaped by the parties, rather than a decision the district court *sua sponte* rendered upon improper application of the doctrine of

incompatible offices. *See United States v. Sineneng-Smith*, ___ U.S. ___, 140 S. Ct. 1575, 1579, 206 L.Ed.2d 866 (2020) ("[A]s a general rule, our system `is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'") (alteration in original). And, in that instance, as already fully briefed by the parties, NPRI further requests that the Court's remand order include an order reversing the district court's denial of NPRI's motion to strike all successive motions to dismiss and joinders thereto and, in turn, base its decision upon review of the parties' arguments pertaining to the timely motion to dismiss of Respondent, James Ohrenschall.

B. Respondents Did Not Oppose NPRI's Argument that the District Court's Reliance on the Common Law Doctrine of Incompatible Offices was Clearly Erroneous.

Respondents took issue with NPRI's reference to the principle of party presentation as a reason to reverse the district court's decision based on its application of the doctrine of incompatible offices. The parties have fully briefed this issue, and the Court will have the opportunity to determine whether the district court "departed so drastically from the principle of party presentation," by ignoring all arguments actually raised by the parties and rendering a decision based on a common law doctrine never raised by the parties, so "as to constitute an abuse of discretion." *Sineneng-Smith*, 140 S. Ct. at 1582. Respondents, however, failed to oppose in any way NPRI's substantive arguments that the

district court erred in its application of the common law doctrine of incompatible offices for two equally compelling reasons: (1) the doctrine's application in the instant case is superseded by Nevada's constitutional provisions, and (2) if the doctrine is applicable in Nevada, it should be limited to persons holding two public offices, which is not at issue here. *See* Opening Brief at pp. 23-25.

Respondent Legislature only addressed the matter with a footnote in its Answering Brief stating its adoption of the arguments made by the other Respondents. *See* Respondent Legislature's Answering Brief at p. 22, fn. 6. Nothing exists for it to adopt, however, because Respondents Neal and Ohrenschall, the only parties to file substantive answering briefs,[1] declined to address the merits of NPRI's arguments, stating only that "this Court will decide the [presumably constitutional] issue de novo and may look to common law doctrine or other laws to affirm the District Court" (*see* Neal Answering Brief at p. 24), and "[w]hether or not this Court adopts the three-part test applied by the district court, the application of the local government and public officer distinctions are appropriate, supported by Nevada law, and reach the same, correct result" (*see* Ohrenschall Answering brief at p. 26; *see also* Neal Answering Brief

[1] Respondents Miller and Torres, as expected, filed nothing more than a basic joinder to any of their co-Respondents' appellate arguments. *See* Respondents Brittney Miller and Selena Torres's Joinder to Respondents' Answering Briefs, filed August 11, 2023.

at p. 25 (stating that, "[i]n sum, this Court could reach the same decision as the District Court with or without relying on the common law doctrine of incompatible offices")).

It is well-settled law that the failure to oppose or refute an argument may constitute an admission that the argument has merit and a consent to granting relief in favor of the moving party. *Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010); *Knickmeyer v. Nevada ex. rel. Eighth Jud. Dist. Ct.*, 173 F.Supp. 1034, 1044 (D. Nev. 2016) (holding the "failure-to-oppose rule does not apply solely to failure to file a physical document, but also to failure to assert in opposition arguments that oppose those presented in the motion."). NPRI substantively argued, without answer, that specific constitutional provisions should supersede application of the common law doctrine in the Nevada separation-of-powers context. The Nevada Constitution specifically addresses incompatible offices in multiple articles, including Nevada Const. art. 4, § 9; art. 5, § 12; art. 6, § 11, which should obviate any use of the doctrine. *See, e.g., State ex rel. Clayton v. Board of Regents*, 635 So.2d 937, 938 (Fla. 1994) (holding common law doctrine may not exist "when….constitutional provisions governing public officials in Florida are even more restrictive"); *Attorney-General v. Meader,* 80 N.H. 292, 293, 116 A. 433, 434 (1922) (holding doctrine of

incompatible public offices does not apply where incompatibility is addressed in specific state constitution provisions).

Respondents also did not answer NPRI's second substantive argument that Nevada courts should limit use of the doctrine, if any, to a challenge to persons holding two public offices. *See, e.g., County of Clark v. City of Las Vegas*, 92 Nev. 323, 346, 550 P.2d 779, 794 (1976) (discussing incompatible offices doctrine involving public offices in city and county governments). NPRI argued application to persons holding two public offices is inapposite to the instant case, where the challenge is solely to persons holding public office and positions of public employment. And such limitation is in keeping with other persuasive precedent. *See, e.g., Eldridge v. Sierra View Local Hosp. Dist.*, 224 Cal. App. 3d 311, 319 (1990) ("[the doctrine] has no application when one of the positions is an employment rather than a public office"). The district court specifically noted the *Eldridge* holding in its decision, too, but ultimately erred by disregarding it along with other relevant case law. (Appellant's Appendix ("AA") Vol. 2 PGS 361 – 362 and 362 at fn. 7.)

For these reasons, the district court clearly erred in granting Respondents' dismissal request based on a flawed application of a superseded and inapplicable common law doctrine. Respondents' failure to oppose NPRI's substantive arguments in this regard further constitutes an admission that the arguments are

meritorious and should be granted. The Court may therefore disregard the district court's decision in its entirety and render its own decision regarding Respondents' dual service based on the plain and unambiguous language of Nevada's separation-of-powers clause and all relevant authorities, both binding and persuasive. *See* Section I(D), below.

C. Respondents' Arguments for Dismissal on Any Other Grounds Also Must Fail for Procedural and Substantive Reasons.

1. *Respondent Legislature Is Aggrieved, and Now Bound, By the District Court's Order Denying Its Requests for Procedural Relief.*

The district court denied the Legislature's motion to dismiss in its entirety below. (AA Vol. 2 PGS 355 and 358 at fn. 4.) The gravamen of that motion, and its Answering Brief now before this Court, are the ostensible failures of NPRI to join required parties under NRCP 19 and NRS Chapter 41. To the extent the Legislature seeks further relief on these procedural grounds, the Court should not consider those matters in the absence of a timely filed cross-appeal. *Ford v. Showboat Operating Co.,* 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) ("[A] respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal.").

The Legislature cites the *Ford* case as well, but it does so for the untenable position that it may raise any arguments without the need to cross-appeal because it "would support affirmance of the district court's order." *See* Legislature's

Answering Brief at p. 1 (citing *Ford*, 110 Nev. at 755). The Legislature's procedural arguments, however, do not go to the merits of the district court's decision and instead seek review only of joinder arguments having nothing to do with interpreting Nevada's separation-of-powers clause. The rules do not permit such an attack by a party who did not appeal from a judgment of the district court, where that party seeks to enlarge its own rights or lessen the rights of its adversary. *Ford*, 110 Nev. at 755, 877 P.2d 548 (quoting *United States v. American Ry. Exp. Co.,* 265 U.S. 425, 435, 44 S.Ct. 560, 563, 68 L.Ed. 1087 (1924)). Any application of the *Ford* holding for this purpose, therefore, would essentially eliminate the need for an aggrieved party to ever seek relief by way of cross-appeal.

In denying all procedural bases for relief asserted by the Legislature, the district court explained it was doing "as the Nevada Supreme Court instructed …. reviewing the case on the merits." (AA Vol. 2 PG 358.) Specifically, the district court identified the sole issue before the Court as "whether it is a violation of the separation-of-powers clause of the Nevada State Constitution for an individual to serve in the Nevada Legislature while concurrently employed by a state or local government entity." (*Id*.) No argument regarding the failure to join parties, whether pursuant to NRCP 19 or the provisions of NRS Chapter 41, speaks to the constitutional question decided by the district court, and the Legislature's effort to

revisit the district court's decision to obtain a different ruling on issues for which it is aggrieved, without also seeking its own appeal, should be summarily denied.[2]

Further, any argument by the Legislature to avoid its appeal mandate by couching its procedural arguments based on NRS Chapter 41 as implicating the subject matter jurisdiction of the district court is equally unavailing. As the district court recognized, by their plain language NRS 41.031, NRS 41.0337 and NRS 41.039 are statutes pertaining to causes of action implicating the liability of the state or one of its political subdivisions. (AA Vol. 2 PG 355.) NPRI's separation-of-powers challenge in no way implicates liability for any party, including 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.

2. *Respondents' Alternative Arguments Seeking Affirmance of the District Court's Order Are Equally Unavailing.*

NPRI anticipated Respondents' substantive arguments in its Opening Brief and submits its oppositions thereto by incorporation herein. Specifically, NPRI set forth in Sections III and IV(B) of its Opening Brief oppositions to Respondents' arguments that their dual service is not a violation of separation-of-powers because the separation-of-powers clause has already been interpreted by this Court

[2] Should the Court entertain the Legislature's procedural arguments made in opposition regardless, NPRI does not waive its counter arguments thereto and respectfully requests to incorporate same by reference from the briefs in the record as through fully set forth herein. (AA Vol. 1 PGS 103-104 and 126-129.)

to prohibit only public officials or officers, as opposed to public employees, from holding positions in separate branches of government, and that the separation-of-powers clause does not apply to local government employees regardless. *See* Opening Brief at pp. 10-11, 14-15. NPRI will limit additional argument on these matters, in compliance with NRAP 28(c), and points the Court if necessary to its more detailed arguments in support of these positions that are otherwise included in the instant record. (AA Vol. 1 PGS 112-117, 126-129, and 137-141.)

D. "This Court Is Finally Tasked With Determining the Bounds and Application of the Nevada Constitution's Separation of Powers Provision."

The above quote is taken directly from the brief of Respondent Ohrenschall. *See* Ohrenschall Answering Brief at p. 4. NPRI sincerely appreciates at least one Respondent acknowledging the true issue on appeal, i.e., whether Respondents' dual service as both elected legislators and executive branch employees violates Nevada's broad separation-of-powers clause. This Court will review the matter *de novo* and needs no further development of the factual record to do so, points which are also acknowledged by Respondent Ohrenschall. *See* Ohrenschall Answering Brief at p. 28-29. Further, all of the alternative arguments for dismissal put forth by Respondents Neal and the Nevada Legislature, and even NPRI's alternative appeal of the denial of its motion to strike, should be considered as nothing more than unnecessary distractions from the ultimate constitutional question.

The district court granted dismissal of NPRI's claims for declaratory and

injunctive relief by first finding that Nevada "is not one of those states" with "specific constitutional or statutory prohibitions against dual public employment." (JA Vol. 2 PG 389.) The district court then completed its fatal structural error by framing the case as one to be decided under the superseded and inapplicable doctrine of incompatible offices, as interpreted by other jurisdictions, and found 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. (JA Vol. 2 PG 380.)

NPRI asks the Court in this appeal to disregard the district court's order in its entirety and enter its own merits determination, supported by prior decisions in this and other jurisdictions with the same or substantially similar separation-of-powers requirement, and finally give the fullness of meaning to the Nevada Constitution its framers intended. *Galloway*, 83 Nev. at 22, 422 P.2d at 243-44. Indeed, in 1967, this Court conducted an exhaustive analysis of separation-of-powers and the role it plays in Nevada's system of government. 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.* The Court further held that the "executive power extends to the carrying out and enforcing the laws enacted by the Legislature." *Id.* Thus, public school teachers, college professors, and public defenders all exercise executive branch functions, as their job-related duties are how the state's education and indigent services laws are carried out, respectively.

This Court thus recognized long ago that in order to ensure 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. *Galloway*, 83 Nev. at 22, 422 P.2d at 244. This binding precedent aligns perfectly with the plain text, and NPRI's requested interpretation of, Nevada's separation-of-powers clause in the instant case. It also aligns perfectly with the decisions of

other state appellate courts previously tasked with determining whether a state legislator also serving as either a state or local executive branch employee, does so in violation of separation of powers. In each case the answer was yes.

Specifically, these other states dealt with state legislators also serving as an assistant professor at a state funded college, a public school teacher, an attorney for an executive branch agency, and a member of state board. And each court readily found what this Court should find: that executive branch employment by state legislators is prohibited, period. *See State ex re. 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. School Dist. No. 1, Clackamas County*, 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).

These courts' conclusions all mirror what is already set forth in the Court's separation-of-powers precedent. As this Court held in *Galloway,* the term functions as used in Article III includes even those "ministerial" and "incidental" functions that are used to "accomplish . . . the basic function of each Department." 83 Nev. at 21, 422 P.2d at 243. Carrying out the laws enacted by the Legislature is the basic function of the Executive Branch. *Halverson v. Hardcastle*, 123 Nev. 245, 260 163 P.3d 428, 439 (2007). Thus, per this Court's binding precedent,

executive branch functions include even those ministerial" and "incidental" functions that serve to carry out and put into effect the laws of this state. Public-school teachers, college professors, and public defenders are all executive branch employees, therefore, because their job-related duties are how the state's education and indigent services law are put into effect. Consequently, Article III forbids state legislators from simultaneously exercising the executive branch functions inherent to these and all positions of public employment.

II.
CONCLUSION

For the foregoing reasons, NPRI respectfully requests this Court enter a published decision to resolve the long-standing issue of whether a legislator charged with the exercise of legislative powers may also exercise functions of his or her executive branch employer and find that Respondents' dual service in the instant case violates the separation-of-powers requirement of the Nevada Constitution.

In the alternative, 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 all successive motions to dismiss and joinders and direction for the district court to enter its order based on the arguments presented by the parties relative

solely to the motion to dismiss of Respondent, James Ohrenschall and joinders thereto.

Dated this 14th day of September, 2023.

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CERTIFICATE OF COMPLIANCE

1. We hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point font and Times New Roman type.

2. We hereby further certify that this Reply Brief complies with the 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 3,869 words.

3. We hereby further certify that we have read this Reply Brief, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that this Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. We understand that we may

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be subject to sanctions in the event that this Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of September 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September 2023, I caused the foregoing **APPELLANT'S REPLY BRIEF** to be served on all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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