



1 **OPPM**

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14 Nevada Policy Research Institute

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

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

19 Plaintiff,

20 vs.

21 NICOLE J. CANNIZZARO, an individual engaging
22 in dual employment with the Nevada State Senate
23 and Clark County District Attorney; KASINA
24 DOUGLASS-BOONE, an individual engaging in
25 dual employment with the Nevada State Assembly
26 and Clark County School District; JASON
27 FRIERSON, an individual engaging in dual
28 employment with the Nevada State Assembly and
Clark County Public Defender; OSVALDO FUMO,
an individual engaging in dual employment with the
Nevada State Assembly and University of Nevada,
Las Vegas; HEIDI SEEVERS GANSERT, an
individual engaging in dual employment with the
Nevada State Senate and University of Nevada
Reno; GLEN LEAVITT, an individual engaging in
dual employment with the Nevada State Assembly
and Regional Transportation Commission;
BRITTNEY MILLER, an individual engaging in
dual employment with the Nevada State Assembly
and Clark County School District; DINA NEAL, an

Case No.: A-20-817757-C

Dept. No.: XXIV

**PLAINTIFF'S OPPOSITION TO
NEVADA LEGISLATURE'S MOTION
TO INTERVENE AS DEFENDANT**

Date of Hearing: December 17, 2020

Time of Hearing: 9:00 a.m.

1 individual engaging in dual employment with the
2 Nevada State Assembly and Nevada State College;
3 JAMES OHRENSCHALL, an individual engaging
4 in dual employment with the Nevada State Senate
5 and Clark County Public Defender; MELANIE
6 SCHEIBLE an individual engaging in dual
7 employment with the Nevada State Senate and Clark
8 County District Attorney; TERESA BENITEZ-
9 THOMPSON, an individual engaging in dual
10 employment with the Nevada State Assembly and
11 University of Nevada, Reno; JILL TOLLES, an
12 individual engaging in dual employment with the
13 Nevada State Assembly and University of Nevada,
14 Reno; and SELENA TORRES, an individual
15 engaging in dual employment with the Nevada State
16 Assembly and Clark County School District,

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Defendants.

1 Nevada Policy Research Institute (“NPRI”), by and through its attorneys of record, Deanna
2 L. Forbush, Esq. and Colleen E. McCarty, Esq., of Fox Rothschild LLP, hereby files its Opposition
3 to the Nevada Legislature’s Motion to Intervene as Defendant, filed on September 30, 2020, by the
4 Legislative Counsel Bureau, Legal Division (“LCB Legal”)¹.

5 This Opposition is made and based on the following Memorandum of Points and Authorities,
6 the papers and pleadings on file, and any oral argument permitted at the hearing of this matter.

7 Dated this 14th day of October, 2020.

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By: /s/ Deanna L. Forbush

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¹ On September 25, 2020, NPRI filed a Motion to Disqualify the Official Attorneys from Representing Defendants Osvaldo Fumo, Heidi Seevers Gansert and Dina Neal (“Motion to Disqualify”), which is currently pending a hearing on December 17, 2020. To the extent the Legislature’s intervention would effectively give all Defendants representation by LCB Legal at taxpayers’ expense, exactly what NPRI asserts is improper, NPRI incorporates same by reference herein.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The Court is likely familiar with the expression “separate the wheat from the chaff.” This is
5 the unenviable task LCB Legal has forced on the Court in order for it to properly review the
6 Legislature’s request to intervene as a 12th named Defendant². What should have been a simple
7 motion to ask the Court to consider a request under NRCP 24(b) for permissive intervention has
8 instead been posed, without legal basis, as a request for intervention as of right under NRCP 24(a),
9 with permissive intervention a mere alternative. This straw person argument for intervention as of
10 right under NRCP 24(a) immediately fails, however, where the statute the Legislature invokes does
11 not apply. And, the potential for the Court to exercise its discretion to allow permissive intervention
12 under NRCP 24(b) also fails upon any fair application of the rule to the facts of the case.

13 LCB Legal spends a full 14 pages of its 16-page brief asserting the wholly inapposite
14 argument for the Legislature’s intervention as of right under NRCP 24(a)(1) and (2), when the very
15 statute it cites as conveying that right, i.e. NRS 281F.720, contains language that unambiguously
16 precludes its application, and, with three motions to dismiss pending before the Court already, the
17 existing parties are clearly representing any tangential interest the Legislature may have in the
18 instant case. Specifically, with regard to the applicability of NRCP 24(a)(1), LCB Legal’s motion
19 conspicuously ignores the entirety of NRS 281F.720, which contains the conditions precedent for
20 intervention as of right. NRS 281F.720 plainly limits intervention to those lawsuits containing
21 either: (a) a challenge to an action (or inaction) of the Legislature itself, which allegation is not
22 present here, or (b) a challenge to a law “on grounds that it is ambiguous, unclear, imprecise,
23 indefinite, or vague, is preempted by federal law, or is otherwise inapplicable, invalid,
24 unenforceable, or unconstitutional.” See NRS 281F.720(2)(a) and (b) (emphasis added).

25 NPRI gives LCB Legal the benefit of the doubt that it is not intentionally seeking to mislead
26

27 ² In its Amended Complaint, NPRI named 13 Defendants known to be simultaneously holding elected offices in the
28 Legislature and paid positions in State or local governments. NPRI subsequently entered Notices of Voluntary Dismissal
for Teresa Benitez-Thompson and Kasina Douglass-Boone upon notification that they were no longer engaging in dual
employment, leaving 11 remaining Defendants as parties to the instant action.

1 the Court in this regard, but not once does the language quoted and emphasized above appear in the
2 Legislature's motion. And, the reason is obvious: NPRI is clearly seeking through its Amended
3 Complaint to enforce the Separation of Powers clause of the Nevada Constitution as written, not
4 challenge it such that the Legislature's defense is necessary. To be more precise, NPRI's allegations
5 make clear that its case is premised on the fact that the Separation of Powers clause is unambiguous,
6 clear, precise, definite, not vague, not preempted by federal law, and not in any way otherwise
7 inapplicable, invalid, unenforceable, or unconstitutional. For these reasons, as detailed more fully
8 herein, intervention as of right is simply not available to the Legislature.

9 In the absence of a basis to consider intervention as of right under NRCP 24(a), the Court is
10 left to determine only whether permissive intervention under NRCP 24(b) is warranted, and it is not.
11 The Legislature's argument for permissive intervention is limited to 31 lines in the last 2 pages of the
12 motion, and, as LCB counsel admits from the outset, the Court's decision is entirely discretionary.
13 *See* Motion at 16:7-10. More importantly, NRCP 24(b) is limited in its application to non-parties
14 with either a conditional right to intervene or a defense in common with the primary case, or, in the
15 case of a non-party governmental entity, to lawsuits that are based on a statute administered by the
16 entity or a regulation, order, requirement or agreement issued under such a statute. Not one of these
17 scenarios is present in the instant case. NPRI purely seeks a determination by the Court, and
18 ultimately by the Nevada Supreme Court, that certain individual Legislators are engaging in dual
19 employment in violation of the Separation of Powers clause of the Nevada Constitution. The
20 Legislature is a branch of government that carries out its duties through individual legislators acting
21 in their official capacities as constituent members, no matter who occupies those seats, and the
22 Legislature pays their statutory salaries and allowances regardless. Thus, in no way is the
23 Legislature directly affected by who serves therein, and the Legislature is in no way called upon to
24 administer the Nevada Constitution in this regard.

25 For these additional reasons, there is no legal basis for the Legislature to intervene in the
26 instant case under any provision of NRCP 24. The Court's denial of LCB Legal's request does not
27 leave the Legislature without possible recourse, however. Should the Court rule in favor of NPRI
28 and those individual Defendants aggrieved by the decision appeal, the Legislature may seek approval

1 from the appellate court to file an *amicus curiae* brief. But allowing the Legislature to insert itself as
2 a party at this stage of the proceedings would appear to be a clear abuse of this Court’s discretion.

3 **II.**

4 **ARGUMENT**

5 **A. The Nevada Legislature Does Not Have the Right to Intervene in the Instant**
6 **Litigation Under NRCP 24(a).**

7 NRCP 24(a) provides the mechanism by which a non-party is permitted to intervene as a
8 matter of right. NRCP 24(a)(1) requires intervention when a state or federal statute gives a non-
9 party the unconditional right to intervene. NRCP 24(a)(2) applies where the non-party claims an
10 interest in the litigation that is not adequately represented by existing parties. Taking each provision
11 in turn, it is clear the Legislature does not have the right to intervene.

12 **I. No Right to Intervene Under NRCP 24(a)(1).**

13 The statute the Legislature relies on for its NRCP 24(a)(1) argument is NRS 218F.720(2)(a)
14 and (b). *See* Motion at 2:9, 5:1-3, 6:7-8, and 8:12-17. The Legislature first attempts to assert NRS
15 218F.720(2)(a) is applicable because NPRI is alleging that the Legislature itself, by its own actions
16 or failure to act, has violated the Nevada Constitution. *See* Motion at 8:12-13. The Amended
17 Complaint on file herein, however, contains no such allegation. Indeed the entirety of the Amended
18 Complaint takes aim solely at individual legislators who are “simultaneously holding elected offices
19 in the Nevada State Legislature and paid positions with Nevada State or local governments in
20 violation of the Separation of Powers requirement of Nevada Const. Art. 3, § 1, ¶ 1.” *See* Amended
21 Complaint at ¶¶ 23, 27. NPRI seeks both declaratory and injunctive relief against these individuals,
22 and only these individuals, to resolve this controversy and stop these ongoing violations. *See*
23 Amended Complaint at ¶¶ 24, 29. And, NPRI asserts in regard to its claim for injunctive relief
24 specifically that, “[w]ithout the Court’s intervention, legislative expenditures or appropriations and
25 taxpayer monies will be paid to Defendants in violation of Nevada Const. Art. 3, § 1, ¶ 1, and
26 irrevocable and irreparable harm will occur to the rights provided under this provision of the Nevada
27 Constitution.” *See* Amended Complaint at ¶ 28.

28 The Legislature would have the Court believe that the mere reference to the Defendants’

1 actions resulting in the payment of “legislative expenditures or appropriations and taxpayer monies”
2 in ¶ 28 of its Amended Complaint is tantamount to NPRI alleging that “the Legislature has violated
3 the Nevada Constitution by authorizing legislative expenditures or appropriations,” such that NRS
4 218F.720(2)(a) would apply. *See* Motion at 9:8-13. This argument is both nonsensical and contrary
5 to Nevada law. The Court may take judicial notice that legislators are compensated by Legislative
6 expenditure, per statutory requirement. Specifically, legislators are paid a minimum daily salary of
7 \$130 for the first 60 days of a regular session and up to 20 days of a special session. NRS
8 218A.630(1)(a) and (b); *see also* https://www.leg.state.nv.us/General/AboutLeg/General_Short.html
9 (last visited Sept. 29, 2020). Legislators also receive a per diem allowance, paid each day the
10 Legislature is in session, which is intended to cover, among other things, lodging, meals and
11 incidental expenses. NRS 218A.635, *et seq.* While in session, Legislators are also entitled to
12 allowances for communications, postage, stationery and travel. *Id.* And, while the Legislature is
13 not in session, each Senator and Assembly member is entitled to receive a salary and the per diem
14 allowance and travel expenses for each day of attendance at a conference, training session, meeting,
15 seminar, or other gathering at which the Legislator officially represents the State or its Legislature.
16 *Id.* Each of the aforementioned statutory requirements exists independent of which persons hold
17 these elected offices, and NPRI is in no way challenging the Legislature’s carrying out of or
18 compliance with these requirements.

19 Where the Legislature is truly wrong-footed, however, is when it attempts to rely on NRS
20 218F.720(2)(b) for its argument under NRCP 24(a)(1). The Legislature selectively quotes the statute
21 as providing it the unconditional right to intervene because NPRI:

22 “[c]hallenges, contests or raises as an issue, either in law or in equity, in
23 whole or in part, or facially or as applied, the **meaning, intent, purpose,**
24 **scope, applicability,** validity, **enforceability** or constitutionality of any
25 law, resolution, initiative, referendum or other legislative or
26 **constitutional measure.**”

26 *See* Motion at 9:20-23 (citation omitted) (emphasis in original). In reality, when cited in its entirety,
27 this statutory provision would provide the Legislature the unconditional right to intervene only if
28 NPRI:

1 “[c]hallenges, contests or raises as an issue, either in law or in equity, in
2 whole or in part, or facially or as applied, the meaning, intent, purpose,
3 scope, applicability, validity, enforceability or constitutionality of any law,
4 resolution, initiative, referendum or other legislative or constitutional
5 measure on the grounds that it is ambiguous, unclear, imprecise indefinite,
6 or vague, is preempted by federal law, or is otherwise inapplicable,
7 invalid, unenforceable or unconstitutional.”

8 NRS 281F.720(2)(b) (emphasis added). This additional language is determinative of the statute’s
9 application, and it is never once acknowledged by the Legislature in its motion. Tellingly, this
10 language is also conspicuously absent from the Resolution of the Legislative Commission that LCB
11 Legal obtained on September 18, 2020 and touts as directing it to intervene in the instant action. *See*
12 Motion at 3:17-20 and Exhibit B to the Motion at 3:14-17.

13 As any fair reading of the Amended Complaint makes clear, NPRI is seeking to enforce the
14 Separation of Powers clause of the Nevada Constitution, not challenge it on any grounds. Contrary
15 to the language in the preceding paragraph, NPRI’s entire case is premised on the fact that the
16 Separation of Powers clause is unambiguous, clear, precise, definite, not vague, not preempted by
17 federal law, and not in any way otherwise inapplicable, invalid, unenforceable, or unconstitutional.
18 And, certainly, NPRI’s efforts to enforce the Nevada Constitution will in no way invoke the need for
19 the Legislature to provide a defense to the Separation of Powers clause itself. For these reasons,
20 intervention as of right under NRCP 24(a)(1) is not available to the Legislature in the instant case,
21 and its motion should be denied on this basis.

22 **2. No Right to Intervene Under NRCP 24(a)(2).**

23 To intervene under NRCP 24(a)(2), a non-party must meet four requirements: (1) that it has a
24 sufficient interest in the litigation’s subject matter; (2) that it could suffer an impairment of its ability
25 to protect that interest if it does not intervene; (3) that its interest is not adequately represented by
26 existing parties; and (4) that its application is timely. *See Am. Home Assurance Co. v. Eighth*
27 *Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). Further, determining
28 whether an applicant has met these four requirements is within the district court’s discretion. *Id.*
(citations omitted).

NPRI has addressed in the preceding section why the Legislature has no legitimate interest in

1 the instant action, let alone an interest sufficient to meet the first two requirements stated above. But
2 even if the Court were to find that some protectable interest is held by the Legislature in this case,
3 the Legislature still has no right to intervene if its interest is adequately represented by the existing
4 Defendants. *Am. Home Assurance Co.*, 122 Nev. at 1241, 147 P.3d at 1128. It is the Legislature’s
5 burden to prove its interest is not adequately represented, and although the burden is described as
6 “minimal,” it cannot be met where the Legislature’s interest or ultimate objective in the litigation is
7 the same as the existing Defendants or subsumed within the Defendants’ objective. *Id.* (citation
8 omitted).

9 Whether an existing party’s interest adequately represents an intervenor’s interest is, in fact,
10 crucial to the analysis of a proposed intervention. *See Hairr v. First Judicial Dist. Ct.*, 132 Nev.
11 Adv. Op. 16, 368 P.3d 1198 (2016). In *Hairr*, the State of Nevada was defending litigation
12 regarding the constitutionality of an education grant program instituted by law. *Id.*, 368 P.3d at
13 1199. Parents of students seeking grants sought to intervene in the matter. *Id.* The court ultimately
14 found the parents seeking to intervene had the same interest as the State in having the program
15 declared constitutional. *Id.*, 368 P.3d at 1199-1200. “The most important factor in determining
16 adequacy of representation is how the interest compares with the interests of existing parties...[and]
17 when an applicant for intervention and an existing party have the same ultimate objective, a
18 presumption of adequacy of representation arises.” *Id.*, 368 P.3d at 1201. The State’s representation
19 was therefore presumptively adequate in representing the interests of the parents, and the parents
20 were not permitted to intervene as a matter of right under NRCPP 24(a)(2). *Id.*

21 Here, the requesting intervenor is the Nevada Legislature, and there is no question it has the
22 same interest and ultimate objective as the Defendants in this litigation, which is to first seek
23 dismissal of NPRI’s Amended Complaint, and, when that is not successful, to obtain a ruling from
24 this Court that the Separation of Powers clause of the Nevada Constitution does not prohibit state
25 legislators from holding positions of public employment with the State executive branch or with
26 local governments. The Legislature, in fact, references this exact determination by the Legislative
27 Commission as a key factual underpinning of its motion. *See Motion* at 4:5-9. More importantly,
28 the Legislature presents no argument or allegation that Defendants’ representation of its interests or

1 carrying out of its objective to obtain the same ruling as LCB Legal obtained from the Legislative
2 Commission is deficient or lacking.

3 The Legislature’s only attempt to differentiate its interests from that of the Defendants is to
4 claim it has “independent legal interests in defending the validity of its legislative actions in
5 exercising the constitutional power of appropriation.” *See* Motion at 13:11-12. As addressed by
6 NPRI in the preceding section, its Amended Complaint is devoid of any challenge to the
7 Legislature’s compliance with any of its requirements, appropriations or otherwise, which exist
8 independent of the persons holding elected offices as its constituent members. And, even if NPRI
9 were engaging in such a challenge, which it is not, no less that six of the eleven existing Defendants
10 have either filed or joined a total of three motion to dismiss, which seek to attack from every
11 conceivable angle NPRI’s sincere efforts to obtain a definitive ruling on their dual employment.³
12 While NPRI is amazed that Defendants have chosen this approach, rather than seeking to advance
13 their position for final appellate review in the most expeditious way possible, the fact remains that
14 their representation is entirely aligned with the Legislature, and the Legislature’s interest is more
15 than adequately protected. Because the Legislature fails to meet this essential prong for the right to
16 intervene under NRCP 24(a)(2), the Court should deny its motion on this basis as well.

17 **B. The Nevada Legislature Does Not Qualify for Permissive Intervention in the**
18 **Instant Litigation Under NRCP 24(b).**

19 Under the NRCP 24(b), as amended effective March 1, 2019, Nevada courts may grant
20 permissive intervention to non-parties with either a conditional right to intervene or a defense in
21 common with the primary case, or, in the case of a non-party governmental entity, in lawsuits that
22 are based on a statute administered by the entity or a regulation, order, requirement or agreement
23 issued under such a statute. *See* NRCP 24(b)(1) and (2). It is axiomatic that permissive intervention
24 is wholly discretionary with the court, and the Legislature acknowledges as much in its motion. *See*
25 Motion at 16:7-10.

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27 ³ Although eleven Defendants remain as parties to this litigation, NPRI notes three of those Defendants—Nicole
28 Cannizzaro, James Ohrenschall, and Melanie Scheible—have so far evaded service and are the subject of a pending
motion for order to serve by publication. In fact, the number seeking dismissal is six of eight, or 75%, of the named
Defendants.

1 As demonstrated above, not one of the above scenarios is present in the instant case. NPRI is
2 purely seeking a determination by this Court, and ultimately by the Supreme Court, that certain
3 individual Legislators are engaging in dual employment in violation of the Separation of Powers
4 clause of the Nevada Constitution. The Legislature is a branch of government that carries out its
5 duties through individual legislators acting in their official capacities as constituent members,
6 regardless of who is sitting in those seats. And, the Legislature pays its constituent members daily
7 salaries and per diem and other allowances as set forth in statute. In no way would the Legislature
8 be directly affected by who its constituent members are, and the Legislature is not called upon to
9 defend the Separation of Powers clause of the Nevada Constitution when certain constituent
10 members are accused of violating its dual employment prohibition.

11 Indeed, the Legislature's participation in the case will add nothing to the merits of the
12 defense because the existing Defendants already represent any interest the Legislature may have in
13 the outcome of the litigation. The Legislature's intervention would needlessly multiply the
14 litigation. Its involvement would undoubtedly cause delay and increase costs through additional sets
15 of written discovery, additional schedules to accommodate; and additional attorneys conducting voir
16 dire, opening statements, direct and cross examinations, and closing arguments at trial. Increased
17 costs and potential for delay, which come with no measurable benefit, are sufficient reasons alone to
18 deny permissive intervention. *See Hairr*, 368 P.3d at 1202. Here, the Legislature's intervention
19 would only prolong the litigation and serve no other purpose, and the Court should exercise its
20 considerable discretion to maintain the status quo and deny permissive intervention.

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III.

CONCLUSION

NPRI respectfully asserts that the Nevada Legislature fails to qualify for intervention under either NRCP 24(a) or (b) and requests that its motion to intervene be denied in its entirety.

Dated this 14th day of October, 2020.

FOX ROTHSCHILD LLP

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CERTIFICATE OF SERVICE

Pursuant to NRCPC 5(b), I certify that I am an employee of Fox Rothschild LLP and that on this 14th day of October, 2020, I caused the foregoing document entitled **PLAINTIFF’S OPPOSITION TO NEVADA LEGISLATURE’S MOTION TO INTERVENE AS DEFENDANT** to be served upon each of the parties, listed below, via electronic service through the Eighth Judicial District Court’s Odyssey E-File and Serve system.

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