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6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR CARSON CITY**
8

9 WILLIAM POJUNIS;

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11 Plaintiff,

Case No. 11-OC-003941 B
Dept. No. 1

12 vs.

**PLAINTIFF'S OPPOSITION TO
DEFENDANT THE STATE OF
NEVADA'S MOTION TO DISMISS
PURSUANT TO NRCP 12(b)(1)
AND DEFENDANT THE PUBLIC
UTILITIES COMMISSION OF
NEVADA'S MOTION TO DISMISS
PURSUANT TO NRCP 12(b)(5).**

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15 MOISES DENIS; THE PUBLIC UTILITIES COMMISSION
OF NEVADA; and THE STATE OF NEVADA on
16 Relation of The Public Utilities Commission of Nevada,

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18 Defendants.
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20 COMES NOW Plaintiff WILLIAM POJUNIS (hereinafter "POJUNIS") by and through his counsel of
21 record, NPRI'S CENTER FOR JUSTICE AND CONSTITUTIONAL LITIGATION, and hereby
22 respectfully requests that this Court deny Defendant THE STATE OF NEVADA'S Motion to
23 Dismiss Pursuant to NRCP 12(b)(1) and Defendant THE PUBLIC UTILITIES COMMISSION OF
24 NEVADA's Motion to Dismiss pursuant to NRCP 12(b)(5), based upon the following Memorandum
25 of Points and Authorities.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **I. STATEMENT OF THE FACTS**

4 On November 30, 2011, Plaintiff POJUNIS filed a Complaint for Declaratory Judgment and
5 Injunctive Relief with this Court asserting that Defendant Moises Denis (hereinafter "DENIS"),
6 in holding the position of Computer Technician in the Nevada State executive department (i.e.
7 the Public Utilities Commission of Nevada) while serving in the Nevada State Senate
8 (legislative department), was in violation of the Nevada Constitution, Article 3, § 1, which reads
9 in relevant part:

10 The powers of the Government of the State of Nevada shall be divided into three
11 separate departments, the Legislative, the Executive, and the Judicial; and no
12 persons charged with the exercise of powers properly belonging to one of these
13 departments shall exercise *any functions* pertaining to either of the others . . .

14 Although claiming his actions had nothing to do with Plaintiff's filing of the Complaint, on
15 December 19, 2011, within hours of being served with a copy thereof, DENIS publicly
16 announced his resignation from his executive department position with the Public Utilities
17 Commission of Nevada, effective on December 28, 2011; and, on December 20, 2011,
18 Defendant Denis filed a Motion to Dismiss Pursuant to NRCP 12(b)(1) and 12(b)(5), a Motion
19 for a More Definite Statement Pursuant to NRCP 12(e), and a Motion to Strike Prayer for
20 Relief.

21 Having filed a timely Opposition to Defendant DENIS' Motions to Dismiss and Motion to
22 Strike (to which Defendant DENIS subsequently replied), Defendants THE PUBLIC UTILITIES
23 COMMISSION OF NEVADA (hereinafter "PUCN") and THE STATE OF NEVADA (hereinafter
24 "STATE"), filed Motions to Dismiss on January 27, 2012 and January 30, 2012, respectively, in
25 accordance with the more lenient time standards granted Defendants STATE and PUCN under
26 NRS 41.0341 -- Motions which Plaintiff POJUNIS herein now opposes.

27 Although filed pursuant to NRCP 12(b)(1) rather than NRCP 12(b)(5), the STATE's basis for
28 dismissal rests entirely upon Defendant DENIS' resignation from his executive branch position
making the case moot, an argument made by and contained wholly within Defendant PUCN's

1 Motion to Dismiss and, as such, Defendants STATE's and PUCN's Motions to Dismiss are
2 hereinafter treated as one.

3 **II. INTRODUCTION**

4 Contrary to Defendants' Motions of January 27 and 30, 2012, Plaintiff's case is neither
5 moot, insufficient in its allegations, nor otherwise legally infirm.

6 Like Defendant DENIS, Defendants PUCN (and STATE) argue that because Defendant
7 DENIS resigned his position with the PUCN, the case is moot. Unlike Defendant DENIS'
8 Motions to Dismiss, however, Defendant PUCN acknowledges the legal exceptions to the
9 mootness doctrine but claims they do not apply in this case.

10 Alternatively, Defendant PUCN argues that even were the case not moot, Plaintiff POJUNIS
11 lacks standing because any injury resulting from the Defendants' allegedly-unconstitutional
12 actions are too intangible, abstract, and speculative with respect to POJUNIS to establish
13 standing.

14 Defendant PUCN also asserts that this case should be dismissed for failure to state a claim
15 insofar as the Nevada Constitution does not "expressly" or "directly" prohibit an individual from
16 exercising functions in more than one branch concurrently. (This, of course, is exactly what is
17 at issue in this case and the basis upon which this Court is being called upon to provide
18 declaratory relief).

19 Defendant PUCN then asserts that Plaintiff PONJUNIS' has no federal due process claim,
20 even when a state fails to abide by its own state constitution.

21 Finally, Defendant PUCN, in its Motion to Dismiss, suggests that no right of judicial review
22 exists for unconstitutional hiring actions undertaken by the executive branch and that, because
23 other statutes were enacted by the Nevada legislature to facilitate those very same actions
24 herein challenged by POJUNIS (statutes which Plaintiff POJUNIS would assert are likewise
25 contrary to the plain language of Article 3, Section 1 of the Nevada Constitution), such statutes'
26 existence somehow relieve the PUCN of a duty to conduct themselves in a manner consistent
27 with the Nevada Constitution.
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1 Defendant PUCN's Motion to Dismiss also contains references to Plaintiff POJUNIS' lack of
2 specificity in his Complaint. However, Plaintiff's Complaint is well pled and easily conforms to
3 the liberal requirements of NRCP 8(a) "being a short and plain statement of the claim showing
4 the pleader is entitled to relief" in his description of how DENIS, a *state actor* who is carrying
5 out activities of the PUCN while serving in the Nevada legislature is simultaneously "exercising
6 functions" in both the executive and legislative departments, violates the Nevada State
7 Constitution. Defendants somehow read the plain language of the constitutional provision in
8 question to require more specificity. Much of what Defendant argues is missing, would
9 normally occur through the discovery process, a step Defendants are hoping to avoid and
10 preempt by way of a premature dismissal. Arguably, Defendant DENIS' understanding of the
11 essence of the Complaint is self-evident, given his almost-immediate resignation from his
12 executive-branch employment upon being served with the aforementioned Summons and
13 Complaint.

14 III. LEGAL ARGUMENT

15 A. Even if *Arguendo*, the Case Were Moot, Exceptions to the Mootness Doctrine Apply 16 in This Case.

17 1. This Case Clearly Meets the "Widespread Importance" or "Public Interest" 18 Exception to the Mootness Doctrine

19 Defendant PUCN, by and through its attorney would have this Court render moot and
20 dismiss this case due, in part, to DENIS resigning his position with the Public Utilities
21 Commission of Nevada, reportedly effective on December 28, 2011.

22 As a general rule, Nevada courts only decide "cases that present live controversies."
23 *University Systems v Nevadans for Sound Government*, 120 Nev. 712, 720, 100 P.3d 179, 186
24 (2004). However, even when a case is moot, it may be considered by the Court when it
25 involves a matter of "widespread importance." *Personhood Nevada v. Bristol*, ___ Nev. ___,
26 ___, 245 P.3d 572, 574 (2010). In fact, "[i]t is within the inherent discretion of this Court to
27 consider issues of substantial public importance which are likely to recur, in spite of any
28 intervening event during the pendency of an appeal which has rendered the matter moot."
State v. Glusman, 98 Nev 412, 418, 651 P.2d 639, 643 (1982). The criteria for application of

1 the public interest exception to the mootness doctrine are: (a) the question is of a public nature;
2 (b) an authoritative resolution of the question is desirable to guide public officers; and (c) the
3 question is likely to recur.” *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228
4 Ill.2d 200, 208, 886 N.E.2d 1011, 1017 (2008).

5 Although a case of statutory (rather than constitutional) interpretation, relying upon criteria
6 similar to *Cinkus*, the Nevada Supreme Court applied a public interest exception in determining
7 that a case, while technically moot, should proceed, holding that where: “the potential for
8 recurring disputes . . . is great . . . with significant prospects for evading review” and “continuing
9 uncertainty . . . presents substantial and vexing problems to agencies charged with meeting the
10 . . . needs of government, . . . the mootness doctrine must yield in *the public interest* to the
11 more pressing expedient of statutory interpretation.” *Board of County Com’rs Clark County v.*
12 *White*, 102 Nev. 587, 589, 729 P.2d 1347, 1349 (1986) (emphasis added). The instant case is
13 the quintessential “poster child” for the public interest exception denoted in both *Cinkus* and
14 *Board of County Com’rs*.

15 In its Motion to Dismiss, Defendant PUCN reads *Personhood* too narrowly in asserting that
16 “this case involves a specific set of facts and is therefore not sufficiently public or widespread to
17 necessitate review,” (PUCN Motion p.6), and that “the possibility of an equivalent future case is
18 too speculative to qualify as ‘capable of repetition, yet evading review.’” *Id.* The *Cinkus* test
19 only requires, however, that: “*the question* is of a public nature; an authoritative resolution of
20 *the question* is desirable to guide public officers; and *the question* is likely to recur.” (emphasis
21 added). It is not necessary, as the PUCN would suggest, that the exact same parties and facts
22 exist – only that “*the question*” is likely to recur.

23 Contrary to the assertions of Defendant PUCN that such circumstances are unlikely to
24 recur, the facts “specific to this case” gave rise to the “legal question” brought forth in *Heller v.*
25 *Legislature*, 120 Nev. 456, 93 P.3d 746, (2004), *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d
26 237 (1967), and the plethora of Nevada Attorney General Advisory Opinions cited below. The
27 question of whether executive branch employees (which arguably include employees of
28

1 political subdivisions -- especially given that Nevada is a Dillon's Rule State)¹ may serve
2 concurrently in the legislature continues to exist, recur and affect, (even in a perhaps publicly
3 unseen way) those attempting to make a decision whether or not to run for the state legislature.

4 Even since the filing of Plaintiff POJUNIS' Opposition to Defendant DENIS' Motions to
5 Dismiss on January 9, 2012, Plaintiff has discovered yet another instance of such a
6 constitutional violation with Assemblyman Marcus Conklin serving both in the Nevada
7 Legislature and as an employee of the Nevada System of Higher Education. Sheila Leslie,
8 likewise, until the date of filing of this Opposition, remained both a member of the Nevada
9 legislature and an employee of the Nevada Judicial Branch; however, as of now, reportedly
10 intends to resign one Senate seat but only for the purpose of running for another. Thus,
11 Defendant PUCN's assertion that "no members of the Nevada Legislature currently hold
12 employment with the Executive or Judicial Branches" is seemingly incorrect.

13 The litany of AG Advisory Opinions, along with *Heller*, *Truesdell*, and the instant case
14 strongly suggest that this is exactly the case of "widespread importance" or "public interest" for
15 which this well-established *Cinkus* and *Personhood* exception was intended to include even if,
16 *arguendo*, there were no imminent examples of a violation.

17 (a) *The Case is of a Very "Public Nature."*

18 It is difficult to imagine a case with a more fundamental and "public" legal issue. This case
19 potentially resolves, in part, the important state constitutional question of certain qualifications
20 as to who may hold public employment and/or public office in each of the three branches of the
21 Nevada state government. In fact, "[i]t is axiomatic that the qualifications of a declared
22 candidate for public office is a public issue." *Matson v. Dvorak*, 40 Cal. App.4th 539, 548, 46
23 Cal.Rptr.2d 880, 885-86 (1995).

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25 ¹ "In contrast to the federal-state relationship, since the Supreme Court's turn-of-the-century ruling in
26 *Hunter v. City of Pittsburgh*, courts have considered municipalities to be 'political subdivisions of the State'
27 and have held that '[t]he number, nature and duration of the powers conferred upon [them] . . . rests in the
28 absolute discretion of the State.' . . . Furthermore, some state courts to this day . . . construe the powers
delegated to localities very narrowly pursuant to "Dillon's Rule" named after its nineteenth-century author,
John Dillon, whose 1872 treatise on municipal government called on courts to limit the power of local
government whenever possible." David A. King, *Formalizing Local Constitutional Standards of Review and
the Implications for Federalism*, 97 U. Va. L. Rev. 1685, 1688-89 (2011) (internal footnotes omitted).

1 (b) *An Authoritative Resolution of the Question is Desirable to Guide Public Officers.*

2 Dating back to at least 1911, no fewer than fourteen (sometimes conflicting) Nevada
3 Attorney General Advisory Opinions have been issued strongly relating to this point of law.² As
4 recently as 2004, such an Opinion was issued on this precise question of law, concluding that
5 “Article 3, Section 1 of the Nevada Constitution bars any employee from serving in the
6 executive branch of government and simultaneously serving as a member of the Nevada State
7 Legislature.” Op. Nev. Att’y Gen. No. 3 (March 1, 2004).

8 Even more recently, Brian Sandoval, (former Nevada Attorney General (in 2004)), now
9 sitting Governor of the State of Nevada, reportedly commented on the instant case stating that
10 it “brings up a very important constitutional issue” and “[w]hat is important is there be a final
11 adjudication of that constitutional question by our Nevada Supreme Court. Settle it once and
12 for all.”³

13 (c) *The Question is Likely to Recur and is, in Fact, Already Occurring/Recurring.*

14 The aforementioned historical string of Nevada Attorney General Advisory Opinions is
15 strong empirical evidence that this question is almost certain to recur going forward. However,
16 it is unnecessary to rely on historical data and empirics in an attempt to predict future
17 recurrences given that no fewer than eight legislators are currently exercising functions in either
18 the executive or judicial branch, or political subdivisions thereof.⁴ At least one sitting legislator
19 left her job in the state executive branch upon being elected as a result of the lack of clarity on
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21 ² Op. Nev. Att’y Gen. (Jan. 30, 1911). Op. Nev. Att’y Gen. No. 39 (April 23, 1913). Op. Nev. Att’y Gen. No.
22 28 (March 12, 1951). Op. Nev. Att’y Gen. No. 183 (July 9, 1952). Op. Nev. Att’y Gen. No. 3 (Dec. 22, 1954).
23 Op. Nev. Att’y Gen. No. 353 (November 24, 1954). Op. Nev. Att’y Gen. No. 212 (Sep. 21, 1956). Op. Nev.
24 Att’y Gen. No. 379 (April 30, 1958). Op. Nev. Att’y Gen. No. 95 (September 28, 1959). Op. Nev. Att’y Gen.
No. 207 (Feb. 26, 1965). Op. Nev. Att’y Gen. No. 401 (April 20, 1967). Op. Nev. Att’y Gen. No. 4 (Jan. 26,
1971). Op. Nev. Att’y Gen. No. 168 (May 22, 1974). Op. Nev. Att’y Gen. No. 3 (March 1, 2004).

25 ³ Ray Hagar, *Sandoval Says State is Seeing Gains*, Reno Gazette Journal (December 19, 2011)
26 <http://www.rgj.com/article/20111220/NEWS/112180357/Sandoval-says-state-seeing-gains-> .

27 ⁴ (Sen. Mo Denis, Public Utilities Commission of Nevada); Assemblyman Marcus Conklin, Nevada System of
28 Higher Education; (Sen. Sheila Leslie, Second Judicial District Court); Assemblyman Kelvin Atkinson, Clark
County; Assemblywoman Olivia Diaz, Clark County School District; Assemblyman Jason Frierson, Clark
County; Assemblyman Scott Hammond, Clark County School District; Assemblywoman Melissa Woodbury,
Clark County School District.

1 this point of law.⁵ It would, of course, be a most inefficient use of judicial resources to file
2 declaratory actions against each individual so situated only to have them subsequently resign
3 upon being served with a summons and complaint (and then possibly re-hired).

4 Because the issue presented by this case is unquestionably of a public nature, resolution of
5 the question is most desirable to guide citizens and public officers going forward; and because
6 more instances of the legal question raised are already occurring and likely to recur, this case
7 survives dismissal and is justiciable under the public interest exception to the mootness
8 doctrine.

9 **2. The Case is Justiciable as it Satisfies the Voluntary Cessation Exception to**
10 **Mootness.**

11 “It is well settled that the voluntary cessation of allegedly unlawful conduct does not moot a
12 case in which the legality of that conduct is challenged.” *Christian Legal Soc. Chapter of the*
13 *University of California, Hastings College of the Law v. Martinez*, ___ U.S. ___, 130 S.Ct.
14 2971, 3010 (2010). “Voluntary Cessation does not moot a case or controversy unless
15 subsequent events make it absolutely clear that the allegedly wrongful behavior could not
16 reasonably be expected to recur.” *Parents Involved in Community Schools v. Seattle School*
17 *Dist. No. 1*, 551 U.S.701, 719 (2007) (citing *Friends of the Earth v. Laidlaw Environmental*
18 *Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)). According to the U.S. Supreme Court in
19 *Parents Involved*, demonstrating that allegedly wrongful behavior is not likely to recur is a
20 “heavy burden” on the moving party. *Parents Involved* at 719.

21 The PUCN asserts that because Defendant DENIS did not submit an application for the job
22 from which he reportedly resigned the voluntary cessation exception does not apply. However,
23 absent any discovery as to Defendant DENIS current employment and, after seventeen years
24 on the job at the Public Utilities Commission of Nevada and six years in the Nevada State
25 Assembly, it is not “absolutely clear” that Defendant DENIS “could not reasonably be expected”
26 to return to either some job at the Public Utilities Commission of Nevada or accept another
27 position within either the executive or judicial departments of the State of Nevada. Defendant

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⁵ Nevada Attorney Lucy Flores, reportedly resigned her position with the Nevada System of Higher Education upon election to the Nevada State Assembly to avoid the controversy surrounding this issue.

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DENIS has certainly not met the “heavy burden” required to evade the Voluntary Cessation exception. Thus, the facts of this case bring it within the Voluntary Cessation exception to the mootness doctrine and it remains justiciable by this Court.

3. The Case is Justiciable as it Satisfies the Capable-of-Repetition-Yet-Evading-Review Exception to Mootness.

“If the underlying dispute is ‘capable of repetition, yet evading review,’ it is not moot.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (internal quotations omitted). Although some jurisdictions hold that this exception is only applicable when “there is a reasonable expectation that the same complaining party will be subjected to the same action again,” *Foster v. Carson*, 347 F.3d 742, 746 (9th Cir. 2003). Much like the “public interest” or “widespread importance” exception, Defendant PUCN reads this exception too narrowly as the modern trend is that under the *capable of repetition yet evading review* exception, a case is justiciable even though the potentially repetitive act may never again involve those parties before the court. The issue must simply be a matter of *public interest* that will likely continue to arise yet become moot before the Court has an opportunity to review it. See generally *Yancy v. Shatzer*, 337 Or. 345, 375-83, 97 P.3d 1161, 1177-81 (2004)(Case Appendix).

Again, in this case, Defendant DENIS, with seventeen years of state employment could easily return to a state position in either the executive or judicial departments if the case is dismissed. Moreover, as noted above, there are already numerous, similarly situated, potential defendants currently violating the same constitutional provision by serving functions in more than one branch simultaneously. It would be imprudent and a waste of judicial resources if additional cases needed to be brought to accomplish a final judicial resolution of the constitutional question in this case when, instead, this Court could grant declaratory and injunctive relief barring the State from employing those serving functions in the legislative branch from simultaneously serving functions in either the executive or judicial branches.

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1 **4. The Case is Not Moot as it Satisfies the “Ongoing Collateral Legal**
2 **Consequences Exception” to Mootness.**

3 Among the relief requested by Plaintiff is that the unconstitutional disbursement of funds to
4 Defendant DENIS during his tenure of unconstitutional employment be restored to the state
5 treasury. His reported resignation from the Public Utilities Commission of Nevada, by itself,
6 does nothing to render this issue moot. Only a declaration by the Court as to the
7 constitutionality of Defendant DENIS holding positions simultaneously resolves the issue of
8 whether that disbursement of funds was unconstitutional and should be restored to the State
9 treasury.

10 Moreover, rather than immediate dismissal, at a minimum Plaintiff should be entitled to
11 discover the extent of the lingering collateral damage including potential lucrative retirement
12 benefits and, otherwise, the extent to which Defendant DENIS’ unconstitutional employment
13 will result in continuing injury.

14 Because this case satisfies the conditions of each of the aforementioned exceptions to the
15 mootness doctrine, even if, *arguendo*, the case were otherwise moot, it remains justiciable
16 under these exceptions.

17 **B. The Injuries of Which Plaintiff POJUNIS Complains Are Not Too Speculative to**
18 **Warrant Standing.**

19 Defendant PUCN would have this Court believe that because there was no guarantee that
20 Plaintiff POJUNIS would ultimately be awarded the job unconstitutionally held by Defendant
21 DENIS, there is no injury particular enough to POJUNIS to warrant POJUNIS having standing
22 to bring this case. Yet, Plaintiff POJUNIS is palpably injured by Defendant DENIS’ holding of a
23 job unconstitutionally.

24 As a matter of logic, any chance at a job unconstitutionally held is certainly better than no
25 chance at such a job. With Defendant DENIS holding the job unconstitutionally, Plaintiff
26 POJUNIS had no chance to compete for the job. In actuality, it is the ability to compete for the
27 job that is the injury-in-fact required for standing. Any other conclusion on this question would
28 be untenable. To conclude otherwise would necessitate that, for example, before a minority

1 applicant could challenge the ongoing discriminatory practices of a potential employer, she
2 would have to prove in advance that she will be awarded the job once the discriminatory
3 actions are discontinued, even as against all other minority applicants.

4 The U.S. Supreme Court dealt with this issue comprehensively in *Northeastern Florida*
5 *Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*,
6 508 U.S. 656, 665-666 (1993) and held that denial of “the ability to compete” is the “injury-in-
7 fact” necessary for standing where an unconstitutional act by government disadvantages a
8 competing party.

9 In addressing whether a contractor disadvantaged by a system of minority preferences had
10 standing absent proving he would have been awarded said contract, the Supreme Court in
11 *Associated General Contractors Court* analogized to the issue of standing as found in *Regents*
12 *of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the court held that a twice-rejected
13 white male applicant who claimed that a medical school's admissions program, which reserved
14 16 of the 100 places in the entering class for minority applicants, was inconsistent with the
15 Equal Protection Clause. Addressing the argument that Bakke lacked standing to challenge the
16 program because he could not prove that absent the unconstitutional action, he would have
17 been admitted, Justice Powell concluded that the “constitutional requirements of Art. III” had
18 been satisfied, because the requisite “injury” was the medical school's “decision not to permit
19 Bakke to *compete* for all 100 places in the class.” *Id.*, at 281, n. 14 (emphasis added). Thus,
20 even if POJUNIS were unable to prove that he would have been *hired* in the absence of the
21 unconstitutional action by Defendants, it certainly does not follow that he lacked standing.

22 Ironically, Defendant PUCN also relies upon *Heller v. Legislature*, 120 Nev. 456, 93 P.3d
23 746 (2004) for the proposition that Plaintiff has no standing. However, no case could be more
24 on point for the opposite proposition. Indeed, while the outcome in the *Heller* case turned, in
25 part, on the issue of standing, PONJUNIS' Complaint mirrors the requirements laid out by the
26 Nevada Supreme Court in *Heller* as to how precisely standing may be achieved to challenge
27 the constitutionality of the issue in question; that is, Plaintiff's seeking the executive branch
28 position held by the legislator and the Nevada Supreme Court's explicit guidance that

1 “[i]ndividual legislators would need to be named as . . . declaratory relief defendants.” *Id* at 473,
2 757.

3 **C. Plaintiff POJUNIS Has Sufficiently Pled Claims of Unconstitutionality.**

4 Seemingly at the heart of Defendant PUCN’s assertion that Plaintiff POJUNIS’ allegations
5 are insufficient to establish a claim upon which the Court can grant relief is a fundamental
6 disagreement over the plain meaning of Article 3, Section 1 of the Nevada Constitution. That is,
7 whether the Nevada Constitution does or does not “expressly” or “directly” prohibit an individual
8 from exercising functions in more than one branch concurrently. This, of course, is precisely
9 what is at issue in this case and the question upon which this Court is being called upon for
10 declaratory relief.

11 The NRCP requires of POJUNIS only a “short and plain statement of the claim showing that
12 the pleader is entitled to relief.” NRCP 8(a)(1). Details of both fact and law come later.
13 Defendant PUCN apparently hopes to skip immediately to dismissal when, if anything, a Motion
14 for Summary Judgment pursuant to NRCP 56 would be more appropriate, especially given that
15 this case presents what is seemingly a pure question of law. By dismissal, Defendants PUCN
16 and STATE hope instead to avoid a declaratory judgment which would limit their ability to rent
17 seek by having their employees direct resources to their respective coffers using their positions
18 in the legislature to do so – one of the very activities Article 3, § 1 was intended to prohibit.

19 In this case, it would be nearly impossible to plead insufficiently and Plaintiff has not
20 achieved the near-impossible. First, the provision of the Nevada constitution which Plaintiff
21 asserts was violated, is so all-inclusive, merely alleging that Defendant DENIS simultaneously
22 exercised “any function[s]” in more than one branch suffices as a pleading. Because the
23 Plaintiff includes in ¶ 8 of the Complaint the constitutional language reading “no persons
24 charged with the exercise of powers properly belonging to one of these departments shall
25 exercise *any functions, appertaining to either of the others*” (emphasis added) and, in ¶¶ 1 and
26 4, identifies the two positions simultaneously held by Defendant Denis, one of which is
27 specifically identified as in the executive branch, the other of which is specifically identified as
28 in the legislative branch, the pleading is more than sufficient. Even if Defendants believe “any

1 function” means something other than *any function*, the proper place for this argument is in a
2 Motion for Summary Judgment, rather than a Motion to Dismiss for “inadequate” description.

3 Secondly, as denoted above, the Complaint precisely mirrors the pleading requirements as
4 laid out by the Nevada Supreme Court in *Heller v. Legislature of State of Nev.*, 120 Nev. 456,
5 473, 93 P.3d 746, 757 (2004), as to Plaintiff’s seeking the executive branch position held by the
6 legislator.

7 There is little mystery as to what Plaintiff is claiming or the nature of the relief he seeks.
8 Here, the Complaint meets all the requirements of the rules of procedure. It sets forth “a short
9 and plain statement of the claim” showing that Plaintiff POJUNIS is “entitled to relief and it
10 includes a demand for judgment for the relief sought.” Defendant PUCN and STATE need not
11 guess at anything to formulate a proper response to the Complaint.

12 **D. Judicial Review is Appropriate Where the State of Nevada and its Agencies Violate**
13 **the Plain Language of the Nevada Constitution.**

14 Defendant PUCN argues that this Court has no role in providing declaratory relief when the
15 Nevada Executive Branch and its agencies violate the plain language of the Nevada
16 Constitution with respect to hiring decisions. That the Judicial Branch would have no right of
17 judicial review over such actions by the Executive Branch is untenable. For example in *Board*
18 *of Regents of University of Nevada System v. Oakley*, 97 Nev. 605, 637 P.2d 1199 (1981), the
19 Nevada Supreme Court upheld a lower court’s decision to nullify the termination of an
20 executive branch (state university) employee for reasons of age discrimination that conflicted
21 with a non-discrimination statute. Although based upon a statute, certainly the Judicial Branch
22 must enjoy the same right of judicial review and declaratory relief to uphold a constitutional
23 provision.

24 Defendant PUCN mischaracterizes the thrust of the instant case so as to liken it more to the
25 facts of *Heller* and evade judgment. In *Heller*, the Nevada Supreme Court relied upon the
26 Nevada Constitution Article 4, § 6 which reads in relevant part that “[e]ach House shall judge of
27 the qualifications, elections and returns of its own members.” It was, in fact, the existence of
28 this clause that led the Nevada Supreme Court in *Heller* to determine that it would be a

1 violation of the separation of powers for the court to grant the requested declaratory relief and
2 to explain that the way to attain standing and challenge this constitutional question is by the
3 means identical to those chosen in the instant case.

4 There is, of course, no parallel provision in the Nevada Constitution that prohibits the Court
5 from exercising judicial review over hiring by the Executive or Judicial branches that may
6 violate the plain language of Article 3, § 1 or other constitutional violations.

7 Attempting to rely upon the rationale in *Heller*, Defendant PUCN also mischaracterizes the
8 relief sought in this case as to “oust . . . state employees from the legislature” (PUCN Motion
9 p.10 n.1). Instead, Plaintiff merely seeks a declaratory judgment requiring state executive and
10 judicial branch employees not violate the Separation of Powers clause in holding those
11 executive and judicial branch positions. Defendant DENIS is attempting to moot this case
12 having resigned from his executive branch position -- he has not, of course, been “ousted”
13 from the legislature.

14 **E. Defendant PUCN May Not Rely on as Unconstitutional Act by Another Branch to**
15 **Justify Another or Escape Liability for Constitutional Violations.**

16 Defendant PUCN, in attempting to evade judicial review of unconstitutional hiring practices,
17 (discussed above in III-D), asserts that as a co-equal branch of government, (PUCN Motion
18 p.11), they are beyond the reach of the judicial branch with respect to those hiring practices.
19 As a co-equal branch, however, Defendant PUCN must then also have a co-equal duty to act in
20 a constitutional manner and may not rely upon an unconstitutional act by the legislature to
21 shield them from liability from unconstitutional actions.

22 This, however, is what Defendant PUCN attempts to do in asserting the proposition that
23 because the Nevada Legislature passed statutes such as NRS 284.3775, 286.385, and
24 286.551 (undoubtedly with the assistance of “separation of powers” violators in the legislature)
25 to facilitate the violation of the plain language of the Separation of Powers clause, they are
26 shielded from constitutional liability for engaging in activity contemplated by those statutes. One
27 constitutionally infirm action must not be allowed, however, to justify and legitimize the next.
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In fact, that these statutes were ever passed demonstrates precisely the reason that the plain language of Article 3, § 1 of the Nevada Constitution must be upheld and declaratory relief granted in this case. One branch passing legislation to facilitate the unconstitutional act of another cries out for this Court's attention and aptly demonstrates that, as denoted in the POJUNIS Complaint, "the rationale underlying the Separation of Powers provision can be traced to the desire of the constitutional framers to encourage and preserve independence and integrity of action and decision on the part of individual members of the Nevada state government and guard against *conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers.*" (Complaint ¶ 9)(emphasis added).

IV. CONCLUSION

For all the aforementioned reasons and authorities, Plaintiff's POJUNIS' case is neither moot, lacking in its allegations, lacking in justiciable claims, nor otherwise lacking in legal merit, and, therefore, Defendants STATE's and PUCN's Motions to Dismiss should be denied.

Respectfully submitted,
NPRI CENTER FOR JUSTICE AND
CONSTITUTIONAL LITIGATION
BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of February, 2012, I caused to be deposited in the United States Mail at Reno, Nevada, a true and correct copy of the foregoing PLAINTIFF's OPPOSITION TO DEFENDANT THE STATE OF NEVADA'S MOTION TO DISMISS PURSUANT TO NRCP 12(b)(1) AND DEFENDANT THE PUBLIC UTILITIES COMMISSION OF NEVADA's and STATE OF NEVADA's MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5), enclosed in a sealed envelope upon which first class postage was paid, addressed as follows:

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