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IN THE SUPREME COURT OF NEVADA

LENDER PROCESSING SERVICES,
INC., FIDELITY NATIONAL
INFORMATION SERVICE, INC., LPS
DEFAULT SOLUTIONS, INC., AND
DOCX, LLC,

Petitioners,

vs.

Supreme Court Case No.: 61387

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE ELIZABETH
GONZALEZ, DISTRICT JUDGE,

District Court Case No.: A-11-653289-B

Respondent,

And

STATE OF NEVADA,

Real party in interest.

PETITIONERS' ANSWER TO BRIEF OF AMICUS CURIAE, FRANKIE SUE
DEL PAPA, IN SUPPORT OF STATE OF NEVADA

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1 INTRODUCTION

2 Amicus Curiae Frankie Sue Del Papa (“Amicus”) has submitted its brief “to highlight
3 Nevada specific separation of powers and political concerns”. Amicus Brief at 2.
4 Ironically, highlighting these concerns, as advocated by Amicus, brings to light that the
5 Attorney General violated the separation of powers clause of the Nevada Constitution
6 when she entered an employment and contingency fee compensation contract with Cohen
7 Milstein Sellers & Toll PLLC (“Cohen Milstein”). While Amicus argues that the
8 Legislature’s enactment of NRS § 228.110(2) violates the separation of powers clause, it
9 is the Attorney General who has improperly exercised powers that belong only to the
10 Legislature. Only the Legislature can make appropriations and only the Legislature can
11 prescribe the powers of the Attorney General.
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15 In Chapter 228, the Legislature clearly and unequivocally preserved its control of
16 the State’s purse strings in connection with the employment of outside counsel. *See* NRS
17 § 228.110(2); *see also* NRS §§ 228.090 and 228.091. As discussed in Petitioner’s Reply
18 in Support of Petition for Writ of Mandamus or, in the Alternative Writ of Prohibition
19 (“Reply in Support of Writ”) at 4, the illegal contract with private outside counsel
20 wrongfully diverts money from the State in violation of Nevada law. The contingency
21 fee contract amounts to an appropriation that violates the Legislature’s exclusive domain
22 to allocate State funds. *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967).
23 Nothing in the Constitution, nothing in the statutes, and nothing in applicable common
24 law grants the Attorney General authority to evade or ignore the Legislature’s express
25 directives. The Supreme Court has held that the Attorney General’s powers are provided
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1 by the Legislature and that the Attorney General may not act in contravention of statutory
2 law. *Ryan v. Eighth Judicial Dist. Court In & For Clark County*, 88 Nev. 638, 642-43,
3 503 P.2d 842, 845 (1972). In order to avoid undermining its own argument, Amicus is
4 forced to rely on and cite to cases from states without statutes equivalent to the specific
5 and restrictive language of NRS § 228.110, none of which are persuasive authority in
6 relation to the Writ Petition.
7

8 Defying its duty to enforce Nevada legislation, the Attorney General is violating
9 express statutory enactment through the contingency fee contract. This failure, by the
10 State's chief legal officer, justifies a Writ by this Court to discontinue this practice.
11

12 **THE STATE'S CONTRACT WITH COHEN MILSTEIN VIOLATES THE**
13 **SEPARATION OF POWERS CLAUSE OF THE NEVADA CONSTITUTION**

14 Amicus states that its brief is intended "to highlight Nevada specific separation of
15 powers and political concerns that are implicated by Petitioners' request for extraordinary
16 relief." Amicus Brief at 2. Acceptance of Amicus's proposal to apply separation of
17 powers analysis reveals that the Attorney General has violated the separation of powers
18 clause of the Constitution in more than one important way. First, the contingency fee
19 contract with Cohen Milstein violates the Legislature's exclusive power to allocate state
20 funds.¹ Second, this Court has determined that the Attorney General's powers are
21 derived solely by grant of the Legislature.² Despite Amicus's failed arguments at page 6
22 to the contrary, neither the Constitution³ nor the common law⁴ justify the Attorney
23 General's actions where, as here, statutory law specifically prohibits the conduct. *See*
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27 ¹ *Galloway*, 83 Nev. at 20, 422 P.2d at 242.

² *Ryan*, 88 Nev. at 642, 503 P.2d at 844.

³ *State v. Douglas*, 33 Nev. 82, 110 P. 177, 180 (1910).

1 Ryan, 88 Nev. 638, 642, 503 P.2d 842, 844 (1972) (the Attorney General's "duties and
2 powers were to be legislatively defined. The powers and duties of the attorney general,
3 therefore, are to be found only in legislative enactment. They are not found anywhere in
4 the Constitution of our State.") Therefore, the Attorney General's contingency fee
5 contract with Cohen Milstein is an improper exercise of authority that violates the
6 separation of powers clause of the Nevada Constitution.
7

8 The Constitution provides for three co-equal branches of government: the
9 Legislative, Executive, and Judicial. Nev. Const. Art 3, § 1. "No persons charged with
10 the exercise of powers properly belonging to one of these departments shall exercise any
11 functions" assigned to other branches, except as specifically provided in the Constitution.
12
13 *Id.* The Legislature maintains sole authority to make appropriations. *Whitehead v.*
14 *Nevada Comm'n on Judicial Discipline*, 110 Nev. 874, 909, 878 P.2d 913, 935 (1994)
15 (*citing Galloway*, 83 Nev. at 20, 422 P.2d at 242) ("Legislative power is the power to set
16 the policies of the state through its enactments and the allocation of funds"); *State v.*
17 *Second Judicial Dist. Court In & For Washoe County*, 85 Nev. 241, 243, 453 P.2d 421,
18 422 (1969) ("all appropriations must be within the legislative will"). NRS § 228.110 is
19 an example of the Legislature properly restricting allocation of the State's funds by
20 delineating the conditions under which outside counsel can be employed or compensated,
21 and reserving for the Legislature the ability to authorize employment in instances where
22 the Attorney General is not disqualified. NRS § 228.110(2). The contingency fee
23 agreement at issue provides for compensation to Cohen Milstein as a percentage of the
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28 ⁴ Ryan, 88 Nev. at 643, 503 P.2d at 845.

1 State's recovery,⁵ an appropriation that, in addition to violating NRS § 228.110,
2 improperly invades exclusive Legislative authority to maintain sole control of the
3 allocation of State funds.

4
5 Furthermore, the contingency fee contract violates the Legislature's exclusive
6 authority to prescribe the powers of the Attorney General.⁶ *Ryan*, 88 Nev. at 642, 503
7 P.2d at 844 ("The powers and duties of the attorney general, therefore, are to be found
8 only in legislative enactment"). The Legislature's intent to limit the Attorney General's
9 power to employ or compensate private attorneys is expressly and unambiguously set
10 forth in NRS § 228.110(2). ("No officer ... of the Executive Department ... shall employ
11 any attorney at law to represent the State ..., or to be compensated by state funds, directly
12 or indirectly ... unless an act of the Legislature specifically authorizes the
13 employment..."). As discussed in Petitioner's Reply in Support of Writ, at 23-24, the
14 Legislature invoked the legislative act exception of NRS § 228.110 to enact two statutes
15 under Chapter 228 that provide the Attorney General with explicit authority to employ
16 outside counsel.

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20 NRS § 228.090 authorizes the Attorney General's office to appoint a special
21 deputy in remote counties or in particular cases concerning a special set of circumstances
22 involving, among other things, 100 or more litigants. NRS § 228.090 authorizes the
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25 ⁵ See Contingency Fee Agreement ¶ 3.3.

26 ⁶ Amicus contends that "Even if N.R.S. § 228.110(2) attempted to limit the Attorney
27 General's ability to affiliate outside counsel ..., the Legislature's attempt would violate
28 the separation of powers clause of the Nevada Constitution of the Nevada Constitution
and improperly strip the Attorney General of both constitutional and common law
powers." However, as discussed in the next section, Nevada law clearly provides that the
Attorney General's powers are derived from Legislative act, not the Nevada Constitution
or Nevada common law.

1 Attorney General to appoint a special deputy to provide legal advice to a regulatory body,
2 mandating that compensation for such a special deputy be paid “by the regulatory body
3 for which the special deputy is appointed to provide legal advice.” NRS § 228.091(2)(b);
4 *see also* NRS § 41.03435 (allowing for employment of outside counsel to defend the
5 State in certain liability actions and providing that “[c]ompensation for special counsel
6 must be paid out of the Reserve for Statutory Contingency Account”). The clear
7 language of NRS § 228.110(2) establishes that the Legislature intended to prohibit the
8 employment or compensation of outside counsel, and exercised its authority properly
9 within the Legislature’s exclusive purview to appropriate State funds. *See Galloway*, 83
10 Nev. at 20, 420 P.2d at 242. Moreover, the Legislature has demonstrated its willingness
11 and ability to provide the Attorney General with limited authority to employ outside
12 counsel in compliance with NRS § 228.110 while controlling mechanisms for
13 compensation. *See, e.g.*, NRS § 228.091(2)(b), NRS § 41.03435.

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17 In sum, the Attorney General, an officer of the Executive branch, has violated the
18 separation of powers clause of the Nevada Constitution by entering a contingency fee
19 employment contract with Cohen Milstein. *See generally* Contingency Fee Agreement,
20 including ¶ 3.3, which provides for payment to the law firm as a percentage of any
21 recovery by the State. The agreement violates the express language of NRS
22 § 228.110(2), oversteps the powers granted to the Attorney General by the Legislature,
23 and violates the Legislature’s sole authority to appropriate State funds. Furthermore, the
24 agreement violates NRS § 598.0975(1)(a), which requires that “all fees, civil penalties
25 and other money collected” pursuant to the Nevada Deceptive Trade Practices Act “must
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1 be deposited in the State General Fund and may only be used to offset the costs of
2 administering and enforcing the Act.” Petitioners have accepted Amicus’s invitation to
3 evaluate Nevada-specific separation of powers and political question concerns, and the
4 true concern remains that the Attorney General, not the Legislature as Amicus argues, has
5 flagrantly ignored the powers granted to the Legislative branch as interpreted by the
6 Judiciary.
7

8 **AMICUS CITES NO LAW THAT JUSTIFIES ITS CONTRACT WITH COHEN**
9 **MILSTEIN**

10 NRS § 228.110, entitled “limitation on employment of private attorney”, states:

11 No officer, commissioner or appointee of the Executive Department of the
12 Government of the State of Nevada shall employ any attorney at law or counselor
13 at law to represent the State of Nevada within the State, or to be compensated by
14 state funds, directly or indirectly, as an attorney acting within the State for the
15 State of Nevada or any agency in the Executive Department thereof unless the
16 Attorney General and the deputies of the Attorney General are disqualified to act
17 in such matter or unless an act of the Legislature specifically authorizes the
18 employment of other attorneys or counselors at law.

19 NRS § 228.110(2). The Attorney General, a member of the Executive branch, may not
20 either 1) employ an outside attorney to represent the State of Nevada within the State, or
21 2) compensate an attorney, directly or indirectly, with state funds. *Id.* The contract with
22 Cohen Milstein, on its face, violates both of these prohibitions.⁷

23 Importantly, the cases that Amicus cites wherein outside counsel “assisted the
24 state with complex matters” were not litigated in Nevada. Amicus Brief at 1-2 (*citing*
25 *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004) (the “Yucca
26 Mountain nuclear waste” matter)); *id.* at 1, 3 (*citing State of New York v. Phillip Morris*,

27 ⁷ As is discussed at length in the Reply in Support of Writ at 12-14, and is the subject of a
28 related federal action, *LPS v. Masto*, United States District Court for the District of
Nevada, case no. 2:12-CV-01122-JCM-PAL, the contingency fee agreement raises

1 *Inc.*, 308 A.D. 2d 57, 60 (N.Y.A.D. 2003) (the “tobacco cases”). Notably, these cases
2 involved plaintiffs in addition to the State of Nevada, such as the Environmental
3 Protection Agency and various other states, and it is unknown how the law firms
4 involved were compensated, or even if they were compensated under contract with the
5 State of Nevada. *Id.* In contrast, the contingency fee contract with Cohen Milstein
6 clearly provides for payment to the law firm⁸ with State funds that, by statute, must be
7 paid into the State’s general fund. *See* NRS § 598.0975(1)(a). Therefore, even if the
8 cited multi-plaintiff litigation with use of private outside counsel did not violate NRS
9 § 228.110(2), the Cohen Milstein contingency fee contract clearly does.

12 Similarly inapposite are cases from other states cited for the proposition that the
13 Attorney General may employ private outside counsel. *See* Amicus Brief at 3-5. States
14 that have examined whether an attorney general has the power to appoint special counsel
15 on a contingency fee basis have first determined, as a threshold issue, whether a statute
16 exists, such as NRS § 228.110, that would prohibit the employment. *See, e.g. State ex*
17 *rel Nixon v. Am. Tobacco Co., Inc.*, 34 S.W. 3d 122, 136 (Mo. 2000) (“In the absence of a
18 statute to the contrary, we conclude that the attorney general does have the power to enter
19 into this type of arrangement with his special assistant attorneys general”); *State ex rel*
20 *Fahlgren Martin, Inc. v. McGraw*, 190 W. Va. 306, 312, 438 S.E.2d 338, 344 (1993)
21 (“because the Attorney General has no common law authority, his power is limited to
22 what is conferred by law through statute and the Constitution. Because the Constitution

26 constitutional concerns in connection with the selective deputization of a private law firm
27 to prosecute quasi-criminal claims against Petitioners.
28 ⁸ The Contingency Fee Agreement at ¶ 3.3 provides for payment to Cohen Milstein based upon a percentage of recovery by the State.

1 confers only those powers ‘prescribed by law,’ we turn to the statute to see what powers
2 have been granted by the legislature”).

3
4 None of the jurisdictions from which Amicus attempts to derive the authority for
5 its proposition have statutes as specific and restrictive as those found in Chapter 228,
6 which governs the Office of the Attorney General. *See, e.g.*, La. Rev. Stat. Ann. § 36:702
7 (in Louisiana, the attorney general shall “[e]mploy, appoint, remove, assign, and promote
8 such personnel as is necessary for the efficient administration of the department”); N.Y.
9 Exec. Law § 63 (McKinney) (in New York, “the attorney-general may ... appoint and
10 employ, and at pleasure remove, such deputies, officers and other persons as he deems
11 necessary, determine their duties and, with the approval of the governor, fix their
12 compensation”); R.I. Const. art. IX, § 12 (in Rhode Island, [t]he duties and powers of the
13 secretary, attorney-general ... shall be the same under this Constitution as are now
14 established, or as from time to time may be prescribed by law); S.C. Code Ann. § 1-7-160
15 (in South Carolina “[a] department or agency of state government may not hire a
16 classified or temporary attorney as an employee except upon the written approval of the
17 Attorney General and at compensation approved by him.”).

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21 Moreover, neither constitutional nor common law supply the Attorney General
22 with the requisite authority or right to enter into the contract with Cohen Milstein in
23 contravention of the express statutory provision. *See* Amicus Brief at 6 (NRS § 228.110
24 “strip[s] the Attorney General of both constitutional and common law powers.”) First,
25 this Court has determined that the Legislature, not the Constitution, sets forth the
26 Attorney General’s powers and duties. *Ryan*, 88 Nev. at 643, 503 P.2d at 845 (“The
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1 powers and duties of the attorney general . . . are to be found only in legislative
2 enactment. They are not found anywhere in the Constitution of our State”. Second, to
3 the extent that certain powers available to the Attorney General at common law may have
4 survived, they are superseded by NRS § 228.110(2) in this case. *Ryan*, 88 Nev. at 643,
5 503 P.2d at 845. Amicus cites *Fowler v. Moore*, 46 Nev. 65, 207 P. 75 (1922) to support
6 its theory that surviving common law powers allow the State to employ and compensate
7 outside counsel. Amicus Brief at 4. However, in the more recently decided *Ryan* case,
8 this Court, considering *Fowler*, stated that while “the common law may have granted the
9 attorney general the power he here seeks to exercise, such an exercise of power would be
10 repugnant to the statutory law of this state... [and the] attorney general may not look to
11 the common law to justify his action.” *Ryan*, 88 Nev. at 643, 503 P.2d at 845. The
12 existence of NRS § 228.110, in combination with the narrow authority properly provided
13 to the Attorney General by the Legislature and as interpreted by the courts, distinguishes
14 Nevada from the jurisdictions cited. *Id.* at 642, 844.

18 Interpreting an attorney general’s powers as limited is not unique to Nevada. *See*
19 *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 466, 160 P.3d 1216, 1244 (Ariz. Ct. App.
20 2007) (“Our supreme court has clarified that the responsibilities and functions of the
21 Attorney General come from the state constitution or statutes; the Attorney General has
22 no authority arising from the common law”); *State v. Block*, 150 N.M. 598, 263 P.3d 940,
23 945 (2011) (“the attorney general has no common law powers; instead his/her duties are
24 determined entirely by statute”); *City of Seattle v. McKenna*, 172 Wash. 2d 551, 559, 259
25 P.3d 1087, 1091 (2011) (“[it is] clear that the Washington Constitution does not vest the
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1 attorney general with any common law powers. The attorney general's authority is solely
2 to 'be the legal adviser of the state officers' and to perform those duties as prescribed by
3 statute"); *Com v. Briggs*, 608 Pa. 430, 491, 12 A.3d 291, 328 (2011) *cert. denied*, 132 S.
4 Ct. 267 (U.S. 2011) ("it is now firmly established in this Commonwealth that the powers
5 of the attorney general are strictly limited and are solely a 'matter of legislative
6 designation and enumeration'").
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8 In sum, the cases and anecdotal, though unsupported, "evidence" provided by
9 Amicus provide no justification for the State's illegal contract with Cohen Milstein.
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CONCLUSION

Amicus's spotlight on Constitutional separation of powers concerns reveals yet another impropriety associated with the Attorney General's contingency fee contract with Cohen Milstein. For this reason, along with those raised in the Petition and the Reply in Support of Writ, the Court should issue a writ of mandamus compelling the District Court, Eighth Judicial District, Department XI to vacate its order granting the State's motion to associate counsel or, in the alternative, a writ of prohibition effectuating that result.

DATED: October 16, 2012

FOX ROTHSCHILD, LLP



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Attorneys for Petitioners


VERIFICATION

1 STATE OF NEVADA)
2) ss:
3 COUNTY OF CLARK)

4 MARK J. CONNOT, being first duly sworn, hereby deposes and says:

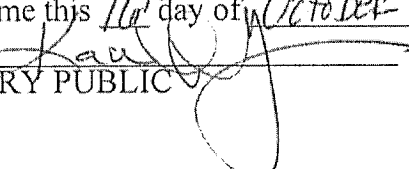
5 That he is the attorney for Petitioners in the above-entitled matter; that he has read
6 the above and foregoing Answer To Brief Of Amicus Curiae, Frankie Sue Del Papa, In
7 Support Of State Of Nevada, knows the contents thereof, and that the same is true of his
8 own knowledge, except as to those matters therein stated on information and belief, and
9 as to those matters, he believes them to be true. He further states that the information set
10 forth herein, subject to any inadvertent and undiscovered errors, may be based upon and
11 necessarily limited by documents and records which may have been consulted and relied
12 upon before preparing this information.
13
14

15 DATED this 16 day of October, 2012.

17
18 
19 MARK J. CONNOT

20 STATE OF NEVADA)
21) ss
22 COUNTY OF CLARK)

23 SUBSCRIBED and SWORN to
24 before me this 16th day of October, 2012.

25 
26 NOTARY PUBLIC



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IN THE SUPREME COURT OF NEVADA

**LENDER PROCESSING SERVICES,
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DOCX, LLC,**

Petitioners,

vs.

**THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
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HONORABLE ELIZABETH
GONZALEZ, DISTRICT JUDGE,**

Respondent,

And

STATE OF NEVADA,

Real party in interest.

Supreme Court Case No.: 61387

District Court Case No.: A-11-653289-B

CERTIFICATE OF COMPLIANCE

I, Mark J. Connot, hereby certify that I have read the foregoing 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires assertions in the petition regarding matters in the record to be supported by appropriate references to the record. I understand that I may be subject to sanctions in the event the accompanying

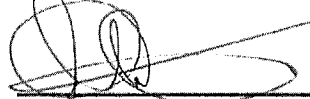
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1 brief is not in conformity with the requirements of the Nevada Rules of Appellate
2 Procedure.

3 DATED: October 16, 2012

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1 CERTIFICATE OF SERVICE

2
3 Pursuant to Nev.R.App.P 25, I hereby certify that on the 16th day of October, 2012
4 a copy of the foregoing ANSWER TO BRIEF OF AMICUS CURIAE, FRANKIE
5 SUE DEL PAPA, IN SUPPORT OF STATE OF NEVADA was sent via U.S. Mail,
6 first class, postage prepaid, to the following:
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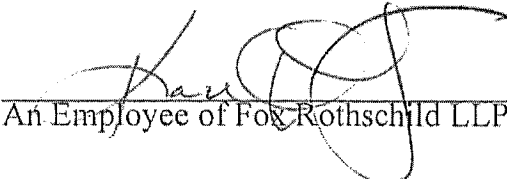
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