IN THE SUPREME COURT OF NEVADA

LENDER PROCESSING SERVICES, INC., FIDELITY NATIONAL INFORMATION SERVICE, INC., LPS DEFAULT SOLUTIONS, INC., AND DOCX, LLC, Petitioners, vs. **THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE 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 **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

INTRODUCTION

The narrow question presented by Petitioners is whether a writ should issue requiring the District Court to deny the State's Motion to Associate Counsel Betsy Alexandra Miller, and her law firm Cohen Milstein Sellers & Toll, PLLC ("Cohen Milstein"), because the Attorney General's agreement employing and compensating Cohen Milstein on a contingency fee basis violates NRS 228.110(2).[1] Under the plain and unambiguous language of the statute, the Attorney General ("AG") clearly violated

[1] Respondent dedicates the first ten and one half pages of its Answering Brief to the foreclosure crisis in Nevada, the "bad acts" purportedly committed by Petitioners, and its prosecution of claims against non-party lenders regarding mortgage loans that Petitioners had no role in making. *See* Answering Brief at 1-11. The merits, or lack thereof, of the underlying action are not relevant here. Petitioners respectfully decline the State's

NRS 228.110(2) when she agreed to employ and compensate Cohen Milstein on a contingency fee basis where the AG is not disqualified and no specific act of the Legislature authorizes the employment of the law firm. As discussed herein, Respondent's various arguments to the contrary presented in the Answering Brief are entirely unavailing. While Nevada has enacted a few statutes that authorize the AG on a limited basis to employ and compensate counsel, none apply to the circumstances presented here. Respondent does not identify any statute that "specifically authorizes the employment of other attorneys or counselors at law" for this case because no such statute exists.

This Court has granted review to determine whether the District Court should be required to enter an order denying the State's Motion to Associate counsel due to the illegal Contingency Fee Professional Services Agreement ("CFA") entered between the AG and Cohen Milstein on October 29, 2009.[2] As a matter of law, a writ should be entered because NRS 228.110(2) clearly prohibits the AG's employment and contingency fee compensation of Cohen Milstein.[3] Specifically, NRS 228.110(2) states:

> No officer ... of the Executive Department of the Government of the State of Nevada shall employ any attorney at law ... to represent the State of Nevada within the State, *or* to be compensated by state funds, directly or indirectly, as an attorney acting within the State....

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invitation to address here the merits of Respondent's claims that should properly be determined by the District Court.

[2] The CFA was attached to Petition Appendix, Exhibit C, as LPS 062-077.

[3] Of note, NRS 228.110(3) *voids* "all claims for legal services rendered in violation of this section."

(*Emphasis added.*) It is without dispute that the AG is an officer of the Executive Department.[4]

NRS 228.110(2) also unambiguously provides for certain very limited circumstances under which outside counsel can be employed or compensated, namely if: 1) the Attorney General and its deputies are disqualified, or 2) the Legislature has specifically authorized the employment or compensation by act. Respondent has not, because it cannot, demonstrate that either of these exceptions applies to the instant action. The AG has not been disqualified, nor is the contingency fee employment and compensation of Cohen Milstein specifically permitted by any affirmative Legislative act.

Curiously, Respondent relies heavily upon NRS 41.03435 to argue that its "broad authority to hire outside counsel to assist the Office is *implicit*" and that it is "commonly understood" that the AG may hire outside counsel. Answering Brief at 28 (*emphasis added*). NRS 41.03435 exemplifies what NRS 228.110(2) requires in order for the AG to retain outside counsel. That is, NRS 41.03435 is a distinct example of a legislative act that provides the AG with *explicit* authority to employ special counsel, specifically for the limited purpose of *defending* the state in certain liability actions (as is conceded by Respondent in the Answering Brief at 28),[5] with compensation payable only from the Reserve for Statutory Contingency Account. NRS 41.03435 does not apply in this

[4] *See* NRS Const. Art. 5, § 19(1) (including the attorney general as an elected member of the Executive Department).

[5] *See also* Chapter 41; 1980 Nev. Op. Att'y Gen. 153 (1980) ("NRS 41.03435 is part of those sections of the Nevada Revised Statutes relating to the liability of and actions against the State and its officers and employees.").

instance because the AG is *prosecuting* Petitioners in the underlying matter. Nevertheless, the enactment of NRS 41.03435 demonstrates the Legislature's ability and willingness to enact specific legislation that permits the AG to employ outside counsel in limited circumstances not present here. Stated simply, Section 41.03435 is a perfect example of what the Legislature could have done if it decided to authorize the AG to employ and compensate outside, contingency fee counsel to assist in prosecuting a claim such as is presented below. However, no such statute enacted by the Legislature authorizes the AG to employ and compensate Cohen Milstein in this matter.

Notably, NRS 41.03435 also provides specific details on authorized compensation to these special counsel. ("Compensation for special counsel *must* be paid out of the Reserve for Statutory Contingency Account") (*emphasis added*). The contingency fee agreement with Cohen Milstein provides expressly that attorney fees are *not* payable under the State's statutory contingency account. *See* CFA ¶ 3.3.8; *see also* ¶ 21 (providing for waiver of any and all claims for compensation from the State's statutory contingency account). Rather, Cohen Milstein's contingent fee is to be paid as a percentage of any penalties collected from Petitioners, which would otherwise, by statute, be payable into the State's general fund.[6] *Cf. id.* ¶ 3.3, NRS 598.0975(1)(a) (mandating that all fees, penalties, and other monies collected pursuant to the Nevada Deceptive Trade Practices Act "must be deposited in the State General Fund and may only be used to offset the costs of administering and enforcing the Act"). Therefore, even if

[6] Though the CFA also allows for recovery as a percentage of collected damages, the State's lawsuit against Petitioners does not seek relief in the form of damages. *See* State's First Amended Complaint, Appendix Ex. H.

Respondent could rely upon NRS 41.03435 as authority to employ Cohen Milstein, which the AG does not, the source of payment for the private law firm's fees clearly does not comply with the provisions of NRS 228.110(2). Cohen Milstein's fees are improperly payable as a percentage of penalties that would otherwise be deposited in the State General Fund, which precludes any determination of compliance with NRS 228.110(2). *See* NRS 228.110(2) (expressly prohibiting compensation by state funds "directly or indirectly"). Thus, not only is the engagement of Cohen Milstein unlawful and without express statutory authority, but its compensation structure is equally without authority.

Petitioners agree with Respondent's comment that NRS 41.03435 "demonstrates that the Legislature is capable of setting forth particular limits on the employment with outside counsel with clarity." Answering Brief at 40. Indeed, NRS 228.110(2) mandates as much under the legislative authority exception glaringly absent in the instant matter. In fact, within the statutory scheme of Chapter 228 itself, the Legislature has exhibited its ability and willingness to provide the AG with limited authority to deputize outside counsel in certain very specific circumstances that are inapplicable to the instant matter. *See* NRS 228.090 (authorizing appointment by the AG of a special deputy in remote counties or in litigation involving, *inter alia*, 100 or more litigants); NRS 228.091 (authorizing appointment by the AG of a special deputy where the AG has been designated as legal adviser for a regulatory body and mandating compensation by the regulatory body for the special deputy). The Petition should be granted because the AG has not been disqualified from the underlying lawsuit and because no legislative act –

such as the explicit authority provided by the Legislature in NRS 41.03435, 228.090, and 228.091, *e.g.* – authorizes the employment of Cohen Milstein. Moreover, the contingency fee compensation arrangement with Cohen Milstein violates NRS 228.110(2), as well as NRS 598.0975(1)(a).

No statute upon which the AG relies by implication justifies the illegal and improper employment and compensation agreement with Cohen Milstein. Nor does the common law. The AG's powers are not based in either the constitution or common law. Rather, the AG's authority is strictly prescribed by the Legislature. *See Ryan v. Eighth Judicial Dist. Court In & For Clark County*, 88 Nev. 638, 642, 503 P.2d 842, 844 (1972) ("The powers and duties of the attorney general, therefore, are to be found only in legislative enactment. They are not found anywhere in the Constitution of our State"). Thus, even if the AG possessed common law authority to employ or compensate outside counsel, such authority cannot be exercised where it is explicitly prohibited by statute, namely NRS 228.110(2). *See Ryan*, 88 Nev. at 643, 503 P.2d at 845 (where "such an exercise of power would be repugnant to the statutory law of this state... [t]he attorney general may not look to common law to justify his action.")

Without a viable argument on the merits, Respondent is left to challenge the propriety of Petitioners' application for a writ and Petitioners' standing to request relief from this Court. Answering Brief at 15-23. These arguments, too, are unavailing because the AG's defense of the illegal employment and compensation of Cohen Milstein presents an important issue of law, which clearly requires clarification given the AG's admission (at page 41 of Answering Brief) of repeatedly entering into employment

contracts with outside counsel in other matters, also in apparent violation of 228.110(2). *See Employers Ins. Co. of Nevada v. State Bd. Of Examiners*, 117 Nev. 249, 253, 21 P.3d 628, 630 (2001) (allowing for consideration of a writ of mandamus where an "important issue of law needs clarification and public policy is served"); *Smith v. District Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997) (same).

Further, Petitioners have adequately demonstrated injury and a beneficial interest in the sought remedy sufficient to pursue a mandamus action. *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 460-61, 93 P.3d 746, 749 (2004); *Kirkpatrick v. Eighth Jud. Dist. Ct.*, 118 Nev. 233, 241, 43 P.3d 998, 1004 (2002). Petitioners have suffered a violation of their due process rights in being forced to defend themselves in an inherently biased, quasi-criminal enforcement proceeding that exposes them to improper monetary penalties. *See Merck Sharp & Dohme Corp. v. Conway*, 2012 WL 966948 (E.D. Ky. March 21, 2012) (finding concrete and ongoing injury in fact and rejecting the attorney general's assertion that defendant lacked standing to contest the attorney general's hiring of private attorneys on a contingency fee basis in connection with enforcement of Kentucky's deceptive trade practices act).

Because the AG is prohibited under NRS 228.110(2) from entering into the employment and contingency fee compensation agreement with Cohen Milstein, Petitioners request this Court's intervention in the form of the issuance of a writ, denial of which will cause great harm to Petitioners and the State of Nevada.

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ARGUMENT

I. PETITIONERS HAVE STANDING TO ENFORCE NRS 228.110

A. Respondent asks this Court to apply the wrong standard of review

Respondent misstates the standard of review applicable to the Petition. Answering Brief at 3. This Court must review the District Court's interpretation and application of NRS 228.110 on a *de novo* basis, not a "manifest abuse of discretion" standard as argued by Respondent. Issues of statutory interpretation are subject to a *de novo* standard of review. *Barney v. Mt. Rose Heating & Air*, 124 Nev. 821, 825, 192 P.3d 730, 733 (2008). Because the Petition raises the issue of the proper interpretation of NRS 228.110, the standard of review is *de novo*.

Respondent seeks to reframe the issue before the Court as simply a question of whether the District Court properly granted the State's motion to associate counsel under the factors set forth in Supreme Court Rule ("SCR") 42. Answering Brief at 3. However, the record is clear that the District Court did not view the motion as a typical motion to associate and the usual considerations of SCR 42 were not in dispute. *See, e.g.*, Amended Appendix to Petition, Ex D, LPS 94 ("the issue is can the Attorney General's Office retain outside counsel at the expense of the State of Nevada to assist them. That's the real question.") Nor do Petitioners simply contest Respondent's compliance with SCR 42.

Motions to associate counsel generally do not implicate violations of statutes. Here, the District Court was confronted with a highly unusual motion to associate where the state's chief legal officer sought to involve out of state contingency fee counsel in

direct violation of statute. The motion to associate was the triggering event for Petitioner's challenge, but the challenge implicated a broader question. The District Court agreed with LPS that in order for Cohen Milstein to be admitted to practice as counsel for the State, the State was required to demonstrate either that NRS 228.110 did not apply in this instance, or that Cohen Milstein's admission complied with the statute. *Id.* at LPS 94-95. The State provided additional briefing in support of its motion to associate, and the District Court ruled that implied authority within the legislative history provided the AG with authority to enter into the CFA. Amended Appendix to Petition, Ex. G at LPS 248-49. Because the District Court's ruling concerned the interpretation of a statute as opposed to a simple SCR 42 request, *de novo* review of the District Court's order is appropriate. *See Barney*, 124 Nev. at 825, 192 P.3d at 733.

B. Petitioners have set forth a sufficient basis to request the relief sought

Respondent incorrectly claims that Petitioners have no basis for asking this Court to intervene. In fact, the Court has already determined that Petitioners set forth a sufficient basis to request the relief sought in the Petition when it stated in its August 9, 2012 Order that Petitioners had presented "issues of arguable merit" and required the State to respond to the Petition. Nevertheless, on the question of whether a writ is an appropriate remedy, Respondent has failed to show why a writ would not be proper if this Court determines that the AG has violated NRS 228.110.

Respondent argues that Petitioners should be required to wait until after a final judgment in the case to appeal the District Court's decision that allowed Cohen Milstein to participate as *de facto* deputized counsel. The State's position is that Petitioners' right

to appeal after a final judgment is an adequate remedy. However, this argument ignores the practicalities of the narrow issue before the Court, and the significant consequences of allowing Cohen Milstein to illegally and improperly continue to participate as contingency fee counsel in violation of Nevada law. If this Court determines that Respondent violated NRS 228.110 by employing and compensating Cohen Milstein on a contingency fee basis, then immediate relief under a writ of mandamus or prohibition is appropriate. If Cohen Milstein's involvement in the case violates Nevada law, a writ must issue to stop the AG's continuing violation of the statute and unauthorized act of employing and agreeing to compensate Cohen Milstein on a contingency fee basis. Otherwise, Cohen Milstein would be allowed to participate throughout the pendency of the case even though its retention was improper and despite significant due process concerns concerning the private law firm's effective veto power over settlement negotiations. *See* CFA ¶ 3.5.4.[7] While Respondent claims that the litigation will continue with or without Cohen Milstein, it is clear from the CFA that Cohen Milstein has a profit motive in the outcome of the case, and its involvement can only harm LPS by continuing to influence the AG's objectives and impair the AG's flexibility in resolving the case. Indeed, the CFA requires as much. *See id.*

While writs of mandamus and prohibition are extraordinary remedies, they are appropriate where a petitioner has no "plain, speedy and adequate remedy in the ordinary

[7] The CFA provides that "In the event the Litigation is resolved by the settlement for injunctive relief only... [Cohen Milstein] will receive costs and hourly fees at a fair market value of their legal services expended on behalf of the State. In such an event, *the State agrees not to settle the case unless the defendants agree to pay said amount.*" CFA ¶ 3.5.4 (*emphasis added).*

course of law". *Smith v. Eighth Judicial Dist. Ct.*, 107 Nev. 674, 678, 818 P.2d 875 (1991). Petitioners have no such remedy here. The harm from having claims prosecuted against it by counsel retained in violation of law cannot be undone following completion of the case. Judicial economy is much better served by the issuance of a writ at this stage requiring Respondent to cease the utilization of improperly retained outside counsel, thus avoiding significant and irreparable future harm. Furthermore, the Court will consider a writ of mandamus where, as here, an "important issue of law needs clarification and public policy is served". *Employers Ins. Co. of Nevada v. State Bd. Of Examiners*, 117 Nev. at 253, 21 P.3d at 630; *Smith v. District Court*, 113 Nev. at 1344, 950 P.2d at 281.

The State argues that there is no urgency for the relief requested because LPS "waited 18 months to challenge outside counsel's participation in the matter." Answering Brief at 17. This argument is incorrect and misleading. While LPS was aware of the existence of a relationship between the AG and Cohen Milstein, it was not until Respondent sought to associate Cohen Milstein as counsel in this case that the issue of whether the private law firm's retention and compensation became ripe for challenge.[8] Cohen Milstein brought its motion to associate counsel on an order shortening time, and Petitioners took less than 48 hours to object to the motion and bring the issues before the District Court. Petitioners acted immediately, and the District Court agreed that rather than simply addressing the SCR 42 elements for allowing *pro hac vice* admission, the

[8] Petitioners timely submitted their Opposition to the State's Motion to Associate Counsel on June 27, 2012, the day after the State filed its Motion on June 26, 2012 and set its Motion for hearing on June 28, 2012. Amended Appendix Ex. C; *see* EDCR Rule 2.20(e) (providing a party with 10 days after service of motion to file notice of opposition thereto).

State needed to show that the AG's retention and employment of Cohen Milstein was not in violation of NRS 228.110. Thus, the delay arguments advanced by Respondent are without merit.[9]

Further, the argument that this Court must only look at SCR 42 is incorrect and attempts to improperly narrow the issue so as to avoid addressing the AG's (repeated) violation of Nevada statutes. The District Court went beyond SCR 42 and ruled on the issue now before this Court: whether the AG's retention and compensation of Cohen Milstein violates Nevada law. Because that issue was raised the moment Respondent made it an issue in this case by seeking Cohen Milstein's *pro hac vice* admission, the issue is now properly before this Court.

C. Petitioners have sufficiently raised allegations to support standing

To establish standing, a plaintiff must demonstrate an injury that can be fairly traced to the conduct complained of and redressed by the relief requested. *Kirkpatrick*, 118 Nev. at 233; 43 P.3d at 1004. In order to establish standing in a mandamus proceeding, the petitioner must demonstrate a "beneficial interest" in obtaining writ relief. *Heller*, Nev., 120 Nev. at 461, 93 P.3d at 749. In defining "beneficial interest" in Nevada, this Court looked to California decisional law determining that in order to "demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a *direct and substantial interest* that falls within the zone of interests to be

[9] Though Petitioners deny Respondent's characterization of the requested writ as a motion to disqualify counsel, the record shows that Petitioners did not waive their right to oppose the Motion to Associate Cohen Milstein under Nevada's disqualification law. *See Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 44, 49-50, 152 P.3d 737, 740-41 (2007 (stating that waiver to challenge counsel

protected by the legal duty asserted." *Id.* (*emphasis added*). Stated differently, the Court went on to note in *Heller*, that a "writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." *Id.* Petitioners will suffer a significant detriment should the writ be denied because their due process rights are being infringed upon by the AG's illegal and improper employment and contingency fee arrangement with Cohen Milstein, and an award of monetary penalties without due process of law would cause further injury to Petitioners. Furthermore, Petitioners will benefit in that they will not be forced to defend themselves in an inherently biased, quasi-criminal enforcement proceeding subject to an unrelated third party's pecuniary interests (here Cohen Milstein).[10]

NRS 228.110(3) renders void the legal services provided by Cohen Milstein in this quasi-criminal prosecution under the illegal and improper CFA. Additionally, the CFA itself effectively grants Cohen Milstein veto power over any settlement proposal that the AG might otherwise entertain, holding Petitioners hostage to negotiations improperly impacted by the interests of Cohen Milstein. *See* CFA ¶ 3.5.4. Moreover, Petitioners' due process rights are subject to heightened concerns because Cohen Milstein is effectively deputized by the AG to seek civil penalties, punitive measures that are akin to criminal prosecution.[11] However, Cohen Milstein cannot be legally deputized because it

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requires the clear and intentional relinquishment of a known right and holding that a two year delay did not necessarily constitute waiver).

[10] *See* FN 7, *supra.*

[11] *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) ("the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding") (citation omitted); *U.S. v. Glidden Co.*, 119 F.2d 235, 245 (6th Cir. 1941) (explaining that an "action, although civil in form, is quasi criminal in its nature" if it seeks to "recover penalties or declare forfeitures"; the purpose

is engaged in private practice. *See* NRS 228.080 ("deputy attorneys general shall not engage in the private practice of law.")

The Eastern District of Kentucky recently had cause to examine the underlying defendant, Merck's, standing to challenge the Kentucky Attorney General's employment of private, outside contingency fee counsel in prosecuting that state's deceptive trade practices act. Where the Kentucky Attorney General challenged Merck's standing to challenge outside counsel's retention, the court determined that Merck had suffered an injury in fact in being forced to "defend itself in an inherently biased quasi-criminal proceeding." *Merck Sharp & Dohme Corp.*, 2012 WL 966948 at * 4. The court continued, stating:

> Moreover, there is a causal connection between the injury and the conduct complained of, because the alleged bias flows from the use of contingency fees to compensate the attorneys prosecuting the action. Finally, a favorable decision would result in the AG being enjoined from using contingency fee attorneys in prosecuting the case against Merck and, therefore, the injury would be redressed. Merck clearly has standing."

Id.; *see also Meredith v. Ieyoub*, 700 So.2d 478, 480 (1997) (noting that petitioners "clearly have an interest and therefore have standing to institute this action to restrain the Attorney General from entering into the [contingency fee] contract"). Similarly, Petitioners here clearly have standing to seek the requested relief.

Respondent argues that Petitioners' due process rights are not impinged because "there can be no question that the Attorney General's Office has retained and exercised

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of a "civil action is compensation and not punishment")(citation omitted); *U.S. v. Sanchez*, 520 F. Supp. 1038, 1040 (S.D. Fla. 1981), *aff'd*, 703 F.2d 580 (11th Cir. 1983) (the "[c]ourt would note that while technically these cases are civil actions, the imposition of a fine as a penalty for violation of the law can be considered 'quasi-criminal' in nature").

sufficient control and direct involvement to outweigh any concerns over the interest of outside counsel." Answering Brief at 44. In making this assertion, the State acknowledges reliance on the California Supreme Court's decision in *County of Santa Clara v. Atlantic Richfield Co.*, 50 Cal. 4th 35, 235 P.3d 21 (Cal. 2010), *cert. denied*, 131 S. Ct. 920 (2011) and claims that *Santa Clara* is the "leading authority on safeguarding due process where outside counsel are retained on a contingency fee basis" Answering Brief at 43. A careful read of *Santa Clara*, however, reveals that the "control test" applied therein cannot be relied upon by Respondent in the instant matter. In *Santa Clara*, the California court made at least two important observations that distinguish that case. First, the court noted that in order for a "control test" to adequately protect due process rights, agreements with contingency fee counsel "must specifically provide that decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity's own attorneys." *Santa Clara*, 50 Cal. 4th at 63, 235 P.3d at 39. This requirement alone distinguishes *Santa Clara* from the instant matter wherein the CFA provides Cohen Milstein with veto power over settlement negotiations. *See* CFA ¶ 3.5.4 ("...the State agrees not to settle the case unless the defendants agree to pay" Cohen Milstein's costs and hourly fees at a fair market value should litigation be resolved by settlement for injunctive relief only.) Similarly fatal to application of the "control test", the court in *Santa Clara* noted that:

> The public nuisance action in the present case ... involves a qualitatively different set of interests – interests that are not substantially similar to the fundamental rights at stake in a criminal prosecution... Indeed, as discussed above, we specifically observed in *Clancy* that the government was not precluded from engaging private counsel on a contingent-fee basis in an ordinary civil case.

> Thus, for example, *public entities may employ private counsel* on such a basis to litigate a tort action involving damage to government property, or *to prosecute other actions in which the governmental entity's interests in the litigation are those of an ordinary party, rather than those of the public.*

Santa Clara, 50 Cal. at 55, 235 P.3d at 34 (*emphasis added*) (citing *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 748, 705 P.2d 347, 352 (1985). Even if a control test were part of the considerations reflected in the explicit requirements of NRS 228.110(2), which it is not, the legal and factual nature of the underlying proceeding forecloses application of a control test to justify the improper employment and contingency fee compensation of Cohen Milstein.

Respondent's further contention that Petitioners have no private right of action under 228.110(2) mischaracterizes the applicable standard to establish standing, as its own cited case reveals. In *Stockmeier* (cited at page 21 of the Answering Brief), the Court looked to its "long history of requiring an actual justiciable controversy as a predicate to judicial relief." *Stockmeier v. Nevada Dept. of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225-226 (2006) *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). As demonstrated above, Petitioners have adequately shown an actionable justiciable controversy entitling them to the requested relief. In assessing private rights of action in *Stockmeier*, this Court explained:

> However, where the Legislature has provided the people of Nevada with certain statutory rights, we have not required constitutional standing to assert such rights but instead have examined the language of the statute itself to determine whether the plaintiff had standing to sue. To do otherwise would be to bar the people of Nevada from seeking recourse in state courts whenever the Legislature has provided statutory rights that are *broader than constitutional standing would allow.*

Id. at 393-94, 226 (*emphasis added*). Petitioners are not seeking relief any broader than what constitutional standing would allow. Moreover, Petitioners here are not invoking NRS 228.110(2) to bring suit against Respondent. *See, e.g., Baldanado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008) (the other Nevada private right of action case cited by Respondent at page 21 of the Answering Brief, which involved Las Vegas table game dealers' unsuccessful attempt to assert a private right of action for damages based on the alleged violation of NRS 608.160, a labor law that prohibits employers from taking employee tips).

In short, Petitioners have adequately alleged facts that provide it with clear standing to challenge Respondent's illegal and improper contingency fee employment agreement with Cohen Milstein.

II. THE ATTORNEY GENERAL HAS VIOLATED NRS 228.110 BY ENTERING INTO AN EMPLOYMENT AND CONTINGENCY FEE AGREEMENT WITH OUTSIDE COUNSEL

A. The Statute is Unambiguous

On its face, NRS 228.110(2) clearly prohibits the AG's employment and contingency fee compensation of Cohen Milstein. Specifically, NRS 228.110(2) states:

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

(*Emphasis added*). The statute is unambiguous. The AG could only retain Cohen Milstein in this case if the AG's office were disqualified or if an act of the Legislature

specifically authorized the employment. Neither exception provided in the clear language of NRS 228.110(2) is present here. As raised in the Petition, where a statute is clear and unambiguous, the courts "may not go beyond the statute's language to consider legislative intent."[12] *See* Petition at 13-14 (quoting cases including *Erwin v. State*, 111 Nev. 1535, 1538, 908 P.2d 1367, 1369 (Nev. 1995)). Despite the State's ineffective invitations to do otherwise, the Court need not go beyond the plain language of the statute to determine that the CFA violates NRS 228.110(2).

B. The Attorney General Does Not Have Legislative Authority to Enter into an Employment and Contingency Fee Agreement with Outside Counsel

Respondent is unable to point to any legislative authority that would validate the CFA with Cohen Milstein. Indeed, the State makes two arguments that in no way support its position, but instead demonstrate that the employment and contingency fee arrangement with Cohen Milstein violates NRS 228.110.

i. The Synopsis of Senate Bill 89 does not support the Attorney General's employment and contingency fee compensation of Cohen Milstein

Respondent offers the Official Synopsis of S.B. 89, which amended a completely irrelevant statute, NRS 41.03435, discussed directly below. The Official Synopsis of S.B. 89, quoted by the State, provides "Under existing law, the Attorney General is the legal adviser on all state matters arising in the Executive Department of State

[12] Should the Court be inclined to look at the legislative history behind NRS 228, Senate Bill No. 81, approved in 1931, entitles Chapter 228's predecessor statute, Chapter 235, as "An Act defining certain duties of the attorney-general; prohibiting the employment of other attorneys or counselors at law to be compensated by the state, except in certain cases; authorizing the appointment of special deputy attorneys-general in certain cases, and providing compensation therefor; and repealing all acts and parts of acts in conflict therewith."

Government and represents all entities in the Executive Department *unless the Legislature has enacted legislation specifically authorizing the employment of private legal counsel.*" Answering Brief at 39 (*quoting* S.B. 89, 2007 Leg., 74th Leg. (as introduced by Senate Feb. 13, 2007)) (*emphasis added*). Failing to amply clarify how this language bolsters its position, Respondent argues that the Official Synopsis shows that "NRS 228.110 was intended to establish the Attorney General as counsel for the Executive Department and to limit *other agencies* in the Executive Department from using private counsel...." Answering Brief at 39 (*emphasis added*). However, there is nothing in the language of 228.110(2) that excludes the AG from the prohibition of employing or compensating outside counsel. To the contrary, NRS 228.110(2) expressly refers to "officers" of "the Executive Department", which include the attorney general. *See* NRS Const. Art. 5, § 19(1) (identifying the attorney general as an "officer" of the Executive Department). Nor does a reading of the Official Synopsis otherwise support Respondent's argument. In fact, in the Official Synopsis of S.B. 89, the Legislature emphasizes the requirement of legislative authority to employ private legal counsel, which runs contrary to the AG's argument that she has unrestricted power to employ outside counsel.

ii. NRS 41.03435 does not support the Attorney General's employment and contingency fee compensation of Cohen Milstein

Similarly inexplicable, Respondent invokes NRS 41.03435, which actually supports Petitioners' requested relief and contravenes the AG's position. Answering Brief at 28 (stating that the statute "explicitly recognizes" that the AG may hire outside

counsel without demonstrating a conflict of interest.) However, NRS 41.03435 does not provide the AG with authority to retain Cohen Milstein. NRS 41.03435 is part of a broad statutory scheme starting at NRS 41.0305, entitled "Liability of and Actions Against the State, Its Agencies and Political Subdivisions." NRS 41.03435 relates to situations where the "official attorney", as defined in NRS 41.0338, must *defend* certain state employees, officers, and others as provided in NRS 41.0339, as Respondent concedes at page 28 of the Answering Brief. NRS 41.03435 in turn grants the AG authority to outsource such defensive representation to special counsel, and further expressly regulates compensation to special counsel in those specific types of cases. The situation here, with the AG employing and compensating special counsel to *prosecute* a quasi-criminal action, does not fall within the strictures of NRS Chapter 41.

Recognizing that the AG has not met the requirements under NRS 228.110(2) and that NRS 41.03435 does not provide any support for the AG's position, Respondent resorts to the notion that the retention of Cohen Milstein is nevertheless supported by something "implicit in NRS 41.03435." Answering Brief at 28. Respondent claims that the specific provisions of NRS 41.03435 prove that it is "commonly understood that the" AG may retain outside counsel whenever and on whatever terms she chooses. No authority – statutory, case law, or legislative – is cited in support of the AG's claims. Indeed, the Legislature passed NRS 41.03435 in 1979, 48 years after the Legislature enacted NRS 228.110, which prohibited the AG or others in the Executive Branch from employing or compensating outside counsel except under narrow circumstances. Against the backdrop of this long-standing express prohibition, the 1979 session of the Nevada

legislature enacted Assembly Bill 30, which included NRS 41.03435, relating to specific situations where the Legislature expressly grants to the AG limited authority to deputize others to defend state actors in certain cases.[13]

NRS 41.03435 does not implicitly or explicitly recognize that the AG is "understood" to possess broad powers to retain counsel. Rather, NRS 41.03435 provides an example of a legislative act that specifically authorizes the retention of outside counsel in a specific circumstance under specific restrictions: the legislative act exception to the express prohibitions in NRS 228.110(2). NRS 41.03435 further evidences the Legislature's ability and willingness to enact legislation to permit the AG to retain counsel in unique circumstances, a power the Legislature explicitly reserved in NRS 228.110(2). That the Legislature has not carved out of 228.110(2) an exception that authorizes the AG to retain counsel to *prosecute* cases on a contingency fee basis is telling, particularly given the existence of NRS 41.03435.

Finally, if the Attorney General asserts that NRS 41.03435 authorizes her employment and payment agreement with Cohen Milstein, the statute would render the agreement illegal *per se*. NRS 41.03435 specifically requires that compensation for special counsel retained pursuant to that statute "be paid out of the Reserve for Statutory Contingency Account." Section 3.3.8 of the CFA between the AG and Cohen Milstein

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[13] The legislative history of 1979 Assembly Bill 30 indicates that NRS 41.03435 was an outgrowth of a specific concern relating to conflicts between the AG and insurance carriers. The minutes of the January 29, 1979 Assembly Judicial Committee reflect concern by Chief Deputy Attorney General Larry Struve that "problems of conflict might arise . . . when decisions of the chief legal officer of the political subdivision or the State might run counter to those of the insurance carrier's counsel." Nev. Assembly Jud. Comm., *Minutes on Hearing on Assembly Bill 30*, 1979 Sess. (Jan. 29, 1979).

provides that "Attorney fees under this Contract are not payable out of the State of Nevada's statutory contingency account and [Cohen Milstein] will waive any and all claims for compensation or costs under NRS 41.03435. Attorney fees under this Contract shall be paid out of funds pursuant to settlement or out of funds pursuant to final judgment." Thus the CFA expressly defies the requirements of NRS 41.03435.

NRS 228.110(2) prohibits the compensation of counsel by state funds *directly or indirectly*. The CFA provides that Cohen Milstein is to be compensated as a percentage of "a recovery and collection of damages or penalties for the State". CFA ¶ 3.3. There can be no denying that any compensation derived from statutory penalties to Cohen Milstein would represent at least indirect payment by state funds.[14] Such payment would also contravene the Nevada Deceptive Trade Practices Act, which requires that "all fees, civil penalties and other money collected" pursuant to the Act "must be deposited in the State General Fund and may only be used to offset the costs of administering and enforcing the Act." NRS 598.0975(1)(a).

iii. The statutory scheme of Chapter 228 does not support the Attorney General's employment and contingency fee compensation of Cohen Milstein

The Legislature has enacted specific legislation that contravenes Respondent's argument that "the Legislature's actions confirm its intent not to limit the Attorney General's authority, specifically with regard to the discretion to hire outside counsel." [15]

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[14] Again, the First Amended Complaint seeks only penalties, not damages. Appendix Ex. H.

[15] Respondent improperly relies upon a general purchasing statute, applicable to state agencies, to support the employment and compensation of Cohen Milstein. *See* Answering Brief at 27 (invoking NRS 333.700(1)). NRS 333.700 relates to the

Answering Brief at 39. In Chapter 228, two statutes reveal that the Legislature has intentionally provided the AG with explicit authority, under the legislative act exception of NRS 228.110(2), to appoint special deputy attorneys general under two specific circumstances that are not present here.[16] NRS 228.090 authorizes the AG's office to appoint a special deputy in: (1) a remote county where it is in the best interests of the State to do so, or (2) in specific cases involving 100 or more litigants, where the case was completed before the beginning of the term of the sitting AG, and the evidence is voluminous. NRS 228.090 on its face is inapplicable to this matter.

Additionally, NRS 228.091 authorizes the AG to appoint a special deputy if the AG has (a) been designated as the legal adviser for a regulatory body, and (b) determines at any time that it is impracticable, uneconomical, or could constitute a conflict of interest to provide legal advice to the regulatory body. "Regulatory body" is a defined term, which means "[a]ny state agency, board or commission which has the authority to regulate an occupation or profession...". NRS 662.060. Again, this statute is not implicated by this matter, but even if it could somehow be construed that the AG is a "regulatory body" in bringing the underlying enforcement action against Petitioners, NRS

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mechanics of how Nevada state agencies retain independent contractors. Foremost, the AG is not an agency but is rather a member of the Executive Department. *See* NRS Const. Art. 5, § 19(1). Moreover, NRS 333.700 is a general statute where NRS 228.110(2) is a specific statute that expressly prohibits the AG from employing and compensating outside counsel except in circumstances not present here. Thus even if the State could invoke NRS 333.700(1), which it cannot, NRS 228.110(2) controls. *See State Tax Com'n, ex rel. Nevada Dept. of Taxation v. American Home Shield of Nevada, Inc.*, 254 P.3d 601, 605, 127 Adv. Op. 31 (2011) ("a specific statute controls over a general statute").

[16] Respondent does not and cannot contend that Cohen Milstein has been appointed as a special deputy attorney general. Cohen Milstein cannot be a special deputy attorney general because the AG's deputies cannot be engaged in private practice. NRS 228.080(3).

228.091 could still not apply because it mandates that compensation for a special deputy "must be ... [p]aid by the regulatory body for which the special deputy is appointed to provide legal advice." NRS 228.091(2)(b). In short, these two statutes clearly demonstrate, as the unambiguous language of the statute shows, that the Legislature intended to include the AG in the restrictions of NRS 228.110(2). If the AG had the boundless authority that it claims, explicit legislative authorization to appoint special deputies under NRS 228.090 and 228.091 would be unnecessary.

Furthermore, Respondent misconstrues the caselaw cited to support is argument that "[t]he Legislature's decision not to act ... must be interpreted as acquiescence to, if not tacit approval of, the Attorney General's use of outside counsel". Answering Brief at 40. Respondent's cited cases address statutory interpretation by an administrative body, in both instances the Department of Taxation, *charged with* enforcing or applying an ambiguous statute and in no way address acquiescence by *legislative* inaction. *Dep't of Taxation v. DaimlerChrysler Servs. of N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); *Meridian Gold Co. v. State ex rel Department of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003). "Legislative inaction" cannot take the place of the affirmative and specific enactment of a statute as required by NRS 228.110(2). Because the AG's interpretation of NRS 228.110(2) is in conflict with the plain language of the statute, it is in no way entitled to deference. *Meridian Gold,* 119 Nev. at 635, 81 P.3d at 519 ("we will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency").

Finally, Respondent's citation to its own advisory opinion to dictate legislative intent is disingenuous. *See* Answering Brief at 41. The Advisory Opinion cited was specifically responding to a question posed as to the Nevada Industrial Commission's ability to hire an attorney other than the AG. Nevada Industrial Commission, 57-243 Op. Att'y Gen. (Mar. 1, 1957). The Advisory Opinion in no way dealt with the AG's authority to hire outside counsel, and an "Attorney General's Opinion may not be used to create an ambiguity when none exists." *Miller v. Burk*, 124 Nev. 579, 595, 188 P.3d 1112, 1123 FN 54 (Nev. 2008). "Regardless of the Attorney General Opinion's import, it is not binding authority on this court." *Id.*; *see also Goldman v. Bryan*, 106 Nev. 30, 41-42, 787 P.2d 372, 380 (Nev. 1990) ("Under these circumstances, the attorney general's opinion is neither particularly persuasive nor relevant authority. In any event, opinions of the attorney general do not constitute binding legal authority or precedent.")

C. The Attorney General Does Not Have Common Law Authority to Enter into an Employment and Contingency Fee Agreement with Outside Counsel

As discussed extensively in the Petition, the common law is unavailing to the AG, particularly in situations where a specific statute limits her powers as is the case here. See Petition at 14-16. Respondent offers no pertinent authority in the Answering Brief that was not preemptively discussed in the Petition. Neither NRS 1.030 nor the State ex rel. Fowler v. Moore, 46 Nev. 65, 207 P.75 (1922) decision support the AG's claim about her supposedly unfettered powers. See Answering Brief at 28-30. As also discussed in the Petition at page 5, Ryan supports Petitioners' position that the AG's powers are defined and limited by acts of the legislature. Ryan v. Eighth Judicial District Court, 88

Nev. 638, 503 P.2d 842 (1972) (while "the common law may have granted the attorney general the power he here seeks to exercise, such an exercise of power would be repugnant to the statutory law of this state... [t]he attorney general may not look to the common law to justify his action.") The AG's citation to non-Nevada law is not meaningful because those cases do not address situations in which there is a statute expressly prohibiting the AG's course of action. See Answering Brief at 29.

The AG's reliance on State ex rel. List v. Cnty. Of Douglas, 90 Nev. 272, 524 P.2d 1271 (1974) is equally unavailing and inapplicable. See Answering Brief at 30. There, the Court ruled that a writ of mandamus was appropriate to compel Douglas County to pay an amount designated by the Tahoe Regional Planning Agency. Douglas County, 90 Nev. at 275, 524 P.2d at 1273. Nowhere did the Court's opinion mention the common law or the AG's common law powers. Nor did the decision address the AG's authority to do anything, and instead it merely ruled that both the Supreme Court and District Court had concurrent jurisdiction over a petition for a writ of mandamus based on the unique circumstances the case presented. Id. at 276-77, 1274. More critically for present purposes, the Court in Douglas County held that "the attorney general is a constitutional officer in the executive branch of our government and shall perform such duties as may be prescribed by law. The Constitution does not itself define those duties. Consequently, they are to be found only in legislative enactment." Id. at 1273, 275 (emphasis added) (citing Nev. Const. art 5, § 19 and Ryan, 88 Nev. at 642, 503 P.2d 842 (1972)); see also Nev. Const. art. 5, § 22 (the Attorney General "shall perform such other duties as may be prescribed by law.") Rather than supporting the AG's argument that her

powers are not restricted by acts of the legislature, the Court held that the AG's duties are only found in Nevada's statutes. Douglas County, 90 Nev. at 275, 524 P.2d at 1273.

Respondent's arguments that the AG is doing what attorneys general have always done (Answering Brief at 41-44) fundamentally ignores that she derives her power from the Legislature. Even assuming that common law afforded the AG the power to retain outside counsel, this Court has held that the Legislature may overrule the common law by statute. Nevada Cornell Silver Mines v. Hankins, 51 Nev. 420, 279 P. 27, 29 (1929) (citing the predecessor of NRS 1.030 in holding that "the common law exists in this state except when expressly changed by statute"). Even if the common law would have permitted the AG to retain Cohen Milstein on a contingency fee basis in a quasi-criminal enforcement – and the State has failed to cite any authority to support that argument – the specific prohibitions laid out in NRS 228.110, enacted in 1931 after this Court's decision in Hankins, defeat such common law. Put another way, if the Court finds that NRS 228.110 prohibits the AG's conduct, then the common law is no impediment to issuance of the requested writ.

D. The Laws of Other Jurisdictions are Inapplicable

Respondent acknowledges that there is a paucity of Nevada case law concerning whether the AG can hire outside counsel on a contingency fee basis to prosecute this quasi-criminal action. *See* Answering Brief at 30. Consequently, the Answering Brief examines cases from other jurisdictions. *See generally* Answering Brief at 30-35. However, notably absent are those cases that have recognized the troubling nature of

contingency fee arrangements between an attorney general and private outside counsel. *See, e.g., Clancy*, 705 P.2d at 350 (Cal. 1985); *Meredith,* 700 So.2d at 481-83 (La. 1997) (invalidating a contingent-fee agreement on the basis that it violates the separation of powers because the Attorney General lacked authority to pay outside counsel fees from state funds without legislative approval); *Ieyoub ex rel. State v. W.R. Grace & Co.-Conn.*, 708 So. 2d 1227, 1230 (La. App. 3 Cir. 1998) ("In the present case, neither the Louisiana Constitution nor the Legislature by statute authorized the Attorney General to enter into the contingent fee contract .... This contract is, therefore, an unconstitutional infringement on the legislative power over the state's finances. It violates the separation of powers doctrine ... and is invalid and unenforceable"); *see also Merck*, 2012 WL 1029427 (finding that viable challenge existed where the hiring of an outside attorney on a contingency fee basis violated constitutional due process rights, involving the Kentucky Consumer Protection Act action and "coercive" civil penalties).[17]

Additionally, the cases from other jurisdictions discussed in the Answering Brief are distinguishable from the present case in one crucial way: No other state has a statute

[17] The troubling nature of these sort of contingency fee agreements have led the federal government and certain states to enact legislation to curb or eliminate this practice. *See, e.g.,* Exec. Order No. 13433, 72 Fed. Reg. 28,441 (May 16, 2007) ("[I]t is the policy of the United States that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law."); Colo. Rev. Stat. §§ 13-17-301 to -304 (2006); 2005 Conn. Pub. Act. 05-3, § 104(a) (Spec. Sess.); Kan. Stat. § 75-37,135; Minn. Stat. § 8.065; N.D. Cent. Code § 54-12-08.1; Tex. Gov't Code § 2254.103; Va. Code § 2.2-510.1. Because of the unique and explicit bar on employment or compensation of outside counsel under NRS 228.110(2), the enactment of a separate legislative act to prohibit contingency fee agreements, such as that purportedly introduced and subsequently withdrawn by Senator Raggio, is redundant and unnecessary. *See* Answering Brief at 40. Despite Respondent's reference to the Bill

like NRS 228.110(2). That is, of the cases cited in Answering Brief, not one jurisdiction has on its books a statute that bars employment or compensation of outside counsel except in two limited circumstances (neither of which are implicated in this case). *See* NRS 228.110(2). Consequently, the cases from other jurisdictions discussed in the Answering Brief are simply not relevant or instructive. *See* Answering Brief at 30-35.

For example, in *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1240 (Md. 1998), the court based its decision on a finding that "the language of section 6-105(b) permits the Attorney General to enter into a contingency fee contract." This Maryland statute is not the equivalent of, or similar to, NRS 228.110. Likewise, the court in *State ex rel Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000), based its decision regarding the contingency fee arrangement on Missouri Statute § 27.020. This statute is very different than NRS 228.110 as the court explained:

> The statute which allows for the attorney general to hire assistants and to pay them from appropriations does not prohibit the attorney general in the exercise of his common law power from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the State to pay attorney fees directly to the State's outside counsel. *In the absence of a statute to the contrary*, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general.

Id. (emphasis added). See also Mo. Stat. § 27.020. NRS 228.110 is such "a statute to the contrary".[18] Accordingly, the cases from other jurisdictions are inapposite to this state's

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Draft Request, the fact that the bill was never introduced or considered by the Legislature renders the draft request inconsequential.

[18] *See also Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 148 (Minn. Ct. App. 1999) (court basing its decisions on Minn. Stat. §§ 8.01, 8.02, 8.06, 8.15, 15A.01, which are dissimilar to NRS 228.110); *Philip Morris Inc. v. Graham,* No. 960904948, P.A. Vol. I, LPS 148-154 (court based its decision on Utah Code Section 67-5-3 which the court explained "appears to allow payment of contingent fees").

decision on this issue because those cases did not implicate statutes similar to the Nevada Statute NRS 228.110.

IV. PUBLIC POLICY FAVORS DISALLOWING THE ATTORNEY GENERAL FROM HIRING OUTSIDE COUNSEL ON A CONTINGENCY FEE BASIS

A. The Penal Nature of the Underlying Suit Raises Significant Policy Concerns

The Answering Brief is based on case law that has little bearing on the fundamental issues of public policy that are implicated by the instant matter. Many of the cases discussed in the Answering Brief involved primarily traditional claims for compensatory damages. *See, e.g., State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008) (upholding contingency-fee arrangement in public-nuisance action seeking compensatory damages); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1234 (Md. 1998) (upholding contingency-fee arrangement where state sought compensatory damages – i.e., "reimbursement of public funds expended to provide health care for tobacco-related illnesses"); *see also State ex rel Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 125 (Mo. 2000) (resolving the dispute with the tobacco defendants for $6.7 billion and restrictions regarding advertisement and sponsorship). Here, by contrast, the State does not seek to obtain any sort of compensatory damages. Rather, the main purpose of the underlying action is to punish for alleged violations of the Nevada Deceptive Trade Practices Act.

A fundamental difference exists between a civil proceeding seeking compensatory damages and a case that primarily seeks penalties. Thus, public policy concerns are

heightened when an attorney general tries to hire outside counsel on a contingency-fee basis to prosecute a case that is primarily and essentially a penalty law enforcement action. Cases like this one – that seek penalties based on the nature of a defendant's conduct rather than to compensate actual injury – are considered to be penal in nature and raise policy concerns that have more in common with concerns raised in criminal actions than civil ones.[19] In such instances, public policy requires a complete prohibition of contingency fee arrangements because the inherently coercive nature of the action triggers the requirement that those imbued with public power are not permitted to act out of motivations of private gain. *See* Martin H. Redish, "Private Contingent Fee lawyers and Public Power: Constitutional and Political Implications", 18 S. Ct. Econ. Rev. 77, 93 (2010) ("When the state acts as the plaintiff in civil litigation and seeks to impose purely punitive, rather than compensatory relief, technical distinctions between criminal and civil litigation become far less significant" and "the inherently coercive nature of the action triggers the social contract of liberal democracy: those imbued with public power are not permitted to act out of motivations of private gain."); *see also* CFA ¶ 3.3. Accordingly, "[t]he justification for the prohibition against contingent fees in criminal actions extends to certain civil cases." *See Clancy*, 705 P.2d at 352 (Cal. 1985); *see also Santa Clara*, 235 P.3d at 36, *cert. denied*, 131 S. Ct. 920 (2011) (reiterating that government retention of contingency-fee counsel should be prohibited in some civil actions that have criminal characteristics, such as where important constitutional interests

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[19] See FN 11, supra.

are at stake and an injunction could cease operation of an ongoing business). Therefore, the penal and coercive nature of this suit raises significant policy concerns that should disallow the Nevada Attorney General's contingency fee arrangement with outside counsel in this case. The risk that private counsel may misuse the government's enforcement powers to enrich themselves is simply too great and contrary to fundamental principles of our justice system.

B. Principles of Neutrality, Impartiality, and Potential Appearances of Improprieties are Implicated

A related, but distinct, policy reason that favors disallowing the contingency fee agreement in this case is that such an arrangement risks actions and appearance that are contrary to a fair judicial system's essential requirements of neutrality and impartiality. A requirement of impartiality applies to plaintiffs and prosecutors in suits brought to enforce state law and such individuals are subject to special obligations that go beyond the ethical requirement imposed on all attorneys.[20] This requirement of a disinterested prosecutor has been extended to private attorneys representing the government. *See, e.g. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804-06 (1987) (holding that the private attorneys appointed to prosecute a contempt action were subject to the same standards of impartiality as government employee, explaining that because the

[20] *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) ("Prosecutors are also public officials; they too must serve the public interest" and warning that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision); *Brady v. Md.*, 373 U.S. 83, 87 (1963) (clarifying that, although an attorney for the government is an advocate, his client's goal is not to prevail but to establish justice); *U.S. v. Grey*, 422 F.2d 1043, 1045-56 (6th Cir. 1970) (recognizing that a prosecutor "'is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

private attorneys were appointed to represent the United States "to pursue the public interest," they "certainly should be as disinterested as a public prosecutor who undertakes such a prosecution"). Consistent with these principles, the court in *Clancy*, 705 P.2d 347 (Cal. 1985) invalidated fee agreements between states or municipalities and private counsel in enforcement proceedings where counsel's pay hinged on the outcome of the lawsuit.[21]

The risk of abuse as a result of the contingency fee arrangement between the AG and outside private counsel exists because the more penalties awarded, the more the private counsel will be paid. Thus, there is a troubling possibility that counsel will misuse the State's enforcement powers in order to enrich themselves. Moreover, the CFA at issue here presents additional opportunity for criticism where the private law firm is provided with virtual veto power over settlement. *See* CFA ¶ 3.5.4. At the very least, there is a significant risk that there will be the appearance that such actions are not guided by impartial and neutral goals. The Answering Brief claims the "most prominent example of the use of outside counsel by attorneys general was in the tobacco litigation of the 1990s." *See* Respondent's Brief, p. 31. However, the tobacco example demonstrates the risk of the appearances of improprieties arising from such contingency

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therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done'") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

[21] Although the *Clancy* holding was narrowed in *Santa Clara*, the *Santa Clara* court explained that this aspect of the *Clancy* opinion has not been limited so that, as was recognized in *Clancy*, if the interests invoked in a case are akin to the vital interests implicated in a criminal prosecution, such as the action for penalties sought in the underlying action, then invocation of the disqualification rules applicable to criminal prosecutors would be justified and disqualification of the private contingency fee attorneys hired to assist the public entities similarly would be required. *See Santa Clara*, 50 Cal. 4th at 51-52.

fee agreements, which have the potential to undermine public confidence in consumer protection statutes if the statutes are not applied in an even-handed, neutral, and impartial manner. As observed by commentators:

> In some states, the private attorneys hired were political donors, friends, or colleagues of the hiring government official, creating the appearance of impropriety, or worse, resulting in unfair preferential treatment and back-room dealings outside the public's view. In many cases, the private attorney's potential take can be staggering. For example, tobacco litigation fees going to private attorneys instead of the public were estimated at $13.6 billion. Such considerations have given rise to backlash against the government's use of contingency-fee lawyers.

Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Can Governments Impose A New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 934-35 (2009) (internal citations omitted). Another commentator, in describing the history of the Texas tobacco litigation experiences, explained that "[s]uch blatant preferential treatment by [the Texas Attorney General] of firms that supported him politically creates, at the very least, the appearance of impropriety" because in Texas, the then state Attorney General hired firms that contributed substantially to his campaign, and, when calculated over the time spent on the project, those firms were paid over $92,000 per hour in contingency fees. Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U. Dayton L. Rev. 173, 180-81 (2006) (internal citations omitted) (also setting forth other examples illustrating that the public official/private attorney alliance in the tobacco litigation cases created a strong appearance of

impropriety in other states); *see also* David Edward Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DePaul L. Rev. 743, 777 (2000) (describing how attorneys appointed by the former Texas Attorney General, for example, were paid the "shocking amount" of over $92,000 per hour and "it was not mere coincidence that the five Texas firms that handled the tobacco litigation donated nearly $150,000 in contributions to the Texas Attorney General's Office"; also describing how "the Attorney General of Mississippi, Mike Moore, chose his number one campaign contributor, Richard Scruggs, to lead Mississippi's litigation against the tobacco industry").

Many commentators agree that the standard of neutrality required of government attorneys may be violated when private attorneys, with their own agendas, strategies, and goals, represent state interests. For example, one commentator has observed as follows:

> The concept of allowing a Special Assistant to profit from a contingency fee contract is as absurd as allowing the Attorney General himself to receive a payoff for each fraudulent business he successfully challenges or each criminal conviction obtained. ...Each scenario enables a state employee to profit from his position of power in the government. Furthermore, there exists an intrinsic reason why the Attorney General does not and should not receive a personal financial gain from every successful case; "[w]e do not allow judges or prosecutors to take a percentage of the award because we know how that will impact on their behavior." **Therefore when a private attorney, acting as a Special Assistant to the office of the Attorney General, accepts a case on a contingency fee contract, a violation occurs.** The violation is not within the common or statutory law of a state, but rather **it is a violation of the inherent principles upon which the offices of the American Attorneys General were founded.** When a Special Assistant collects on a contingency fee contract, he has betrayed the system that has been created to protect the citizens of the state. Through the use of contingency fee contracts, the Special Assistant is incapable of performing his duty as an impartial state officer. The specific financial interest that the Special Assistant has taken in the litigation presents an inherent conflict between the goals of the state and the personal goals of the appointed attorney.

Dahlquist, 50 DePaul L. Rev. at 780-81 (internal citations omitted and emphasis supplied). Similarly, another commentator has also noted as follows:

> Contingency fee lawyers' incentives to maximize monetary settlements are more problematic in *parens patriae* litigation than in traditional private tort litigation. In traditional private tort litigation, where a single plaintiff is represented by contingency fee counsel, there is every reason to assume that both the client and lawyers are concerned with monetary recovery. Individual tort victims presumably want cash, and so do their lawyers. But in the context of *parens patriae* litigation by the state, the public interest is not always purely monetary. For example, when the litigation process reveals that the state's theory of liability is factually weak or incorrect, the public interest would seem to dictate that the state should drop its case rather than waste more social resources on the litigation and potentially secure an unjustified recovery. Similarly, when public harm would be better redressed by nonmonetary relief, the public interest would seem to dictate that the contingency fee lawyer should trade nonmonetary concessions by defendants in return for reductions in monetary demands. But it is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work.

David A. Dana, *Public Interest and Private Lawyers: Toward A Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 325-26 (2001). *See also* Redish, 18 S. Ct. Econ. Rev. 77 (sharply criticizing contingency-fee arrangements between state attorney generals and outside counsel as "inconsistent with the nation's democratic tradition"); Behrens & Crouse, , 31 U. Dayton L. Rev. at 180 ("The practice of hiring private attorneys to handle coordinate state attorneys general litigation raises troubling questions and creates several fundamental public policy problems. First, governments and private contingency fee attorneys are guided by conflicting goals and principles...Second, the public official/private attorney alliance creates a strong potential for the appearance of impropriety"); William L. Stern, Nicholas A. Roethlisberger, *The "Con" Side: Outsourcing Justice: The California Supreme Court's Decision in County of Santa Clara v. Superior Court (Atlantic Richfield)*, 19

Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 2, 6 (2010) (allowing contingency fees "jeopardizes key civil law enforcement statutes by undermining existing public confidence that those statutes will be applied in an even-handed, neutral, impartial manner by financially disinterested prosecutors").

It is against this backdrop that the elected Legislature is charged with controlling the powers provided to the AG. That the Legislature has "failed to correct" the AG's interpretation of Chapter 228 is of little circumstance on the specific and narrow issue presented here. The AG has entered into an employment *and* compensation contract with Cohen Milstein that violates NRS 228.110(2) in more than one important way. The AG's ability to employ outside counsel is prohibited. The AG's ability to compensate Cohen Milstein with state funds *directly or indirectly* is prohibited. And finally, the contingency-fee aspect of employing outside counsel to enforce a quasi-criminal action while simultaneously giving the outside counsel virtual veto rights on settlement is highly questionable under Nevada law and will cause injury to Petitioners should this contract remain in place.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this court to 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

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writ of prohibition effectuating that result.

DATED: September 25, 2012

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CERTIFICATE OF SERVICE

Pursuant to Nev.R.App.P 25, I hereby certify that on the 25th day of September, 2012 a copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION** was sent via U.S. Mail, first class, postage prepaid, to the following:

Catherine Cortez Masto, Attorney General
Sheri Ann Forbes, Deputy Attorney
555 E. Washington Avenue, #3900
Las Vegas, NV 89101
Attorneys for Plaintiff

Honorable Judge Elizabeth Gonzalez
Eighth Judicial District Court, Dept. 11
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

An Employee of Fox Rothschild LLP

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

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

That he is the attorney for Petitioners in the above-entitled matter; that he has read the above and foregoing Reply in Support of Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes them to be true. He further states that the information set forth herein, subject to any inadvertent and undiscovered errors, may be based upon and necessarily limited by documents and records which may have been consulted and relied upon before preparing this information.

DATED this 25 day of September, 2012.

MARK J. CONNOT

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

SUBSCRIBED and SWORN to
before me this 25th day of September 2012.

NOTARY PUBLIC

KACI THOMPSON
Notary Public State of Nevada
No. 02-75368-1
My appt. exp. Dec. 6, 2012

IN THE SUPREME COURT OF NEVADA

LENDER PROCESSING SERVICES, INC., FIDELITY NATIONAL INFORMATION SERVICE, INC., LPS DEFAULT SOLUTIONS, INC., AND DOCX, LLC, Petitioners, vs. **THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE 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 reply 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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brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: September 25, 2012

FOX ROTHSCHILD, LLP

FOX ROTHSCHILD, LLP
MARK J. CONNOT (10010)
KEVIN M. SUTEHALL (9437)
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