IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondents,

And

STATE OF NEVADA,

Real Party In Interest.

Supreme Court Case No. 61387

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

RESPONDENTS' BRIEF ANSWERING PETITION FOR *WRIT* OF *MANDAMUS* OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

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Petitioner Lender Processing Services and its subsidiaries, Petitioners LPS Default Solutions and DocX, (collectively, "LPS" or "Petitioner") are currently being investigated by several states for widespread, systematic fraud in the preparation of documents used to carry out mortgage foreclosures. Federal banking regulators concluded their investigation of LPS's business practices – which they characterized as "unsafe and unsound banking practices" – with a Consent Order in 2011 that required LPS to audit, monitor and correct these practices. The State of Nevada, represented by the Attorney General, initiated an investigation of LPS in 2010; the State's findings prompted the State to sue LPS in 2011 for fraudulent document executions, fraudulent notarizations, and the fraudulent presentation of its fees as "attorneys' fees" and "trustees' fees" to be assessed against defaulting and bankrupt homeowners, among other things. LPS's business practices are an affront to the integrity of the State's land records and justice system, which depend upon the accuracy, veracity and authenticity of documents submitted to courts and county recorders. Further, because Nevada is a non-judicial foreclosure state, where courts oversee only the foreclosures challenged by homeowners or rolled into bankruptcy proceedings, LPS has worked these deceptions on unknowing consumers wholly beyond the supervision of the courts.

To forestall a ruling on the merits of the State's claims in the District Court for Clark County, this billion dollar corporation sued Attorney General Catherine Cortez Masto in federal court, alleging that the Office of the Attorney General's use of outside counsel to assist in its investigation and litigation against LPS violates a state law that establishes the Attorney General as the chief lawyer for the Executive Department of the State government and abridges LPS's due process rights under the federal Constitution. LPS now asks this Court to intervene in the state trial court proceeding and to bar the State from using the resources and expertise of outside counsel in the case. LPS's only purpose in filing this Petition is to gain a tactical

advantage in the State's case – by diverting resources from the State's prosecution now and ensuring that the State cannot match its resources in the future.

LPS's request should be denied. In the ordinary course of litigation, LPS may pursue remedies that are both adequate and timely; therefore the extraordinary remedy of a *writ* of *mandamus* or prohibition is neither necessary nor warranted. If, however, the Court reviews the merits of LPS's Petition, LPS cannot establish any entitlement to the relief it requests.

The Nevada Attorney General, openly and with the approval of the State Board of Examiners, for decades has retained outside counsel to periodically assist the Office of Attorney General ("the Office") in carrying out its duties – supplementing limited public resources and leveling the playing field against well-resourced adversaries. The Nevada Constitution, statutes, and common law provide the authority for the Attorney General to engage outside counsel, and no Nevada statute withdraws that authority. Both the language and manifest intent of NRS 228.110, on which LPS rests its argument, make clear that the statute operates to preserve the Attorney General's role as legal counsel to the executive branch and to limit the ability of executive agencies to seek counsel other than the Attorney General. NRS 228.110 does not limit the Attorney General's own authority to hire counsel to work with her Office to carry out the statutory and inherent functions of the office.

Finally, even if NRS 228.110 applies to the situation presented here, it would not restrict the Office's retention of outside counsel to assist, not replace, the Office in its case against LPS because the Attorney General's Office has directed and controlled this investigation and litigation. There is no basis, either in law or fact, for LPS to assert that anyone other than the Attorney General represents the State in this matter.

For these reasons, LPS's petition for a *writ* of *mandamus* or prohibition directing the Clark County District Court to deny the Attorney General's motion to associate counsel in the State's case against LPS should be denied.

STANDARD OF REVIEW

The decision to grant or deny a motion to associate counsel under Supreme Court Rule 42 is committed to the discretion of the district courts. SCR 42(6). Such a decision is reviewed for manifest abuse of discretion on a petition for a *writ* of *mandamus*. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603, 637 P.2d 524, 536 (1981). In the context of a *writ* petition, further, this Court gives deference to the district court's findings of fact. *Gonski v. Second Jud. Dist. Ct.*, 126 Nev. __, __, 245 P.3d 1164, 1168 (2010). Questions of law, which include questions of statutory interpretation, are reviewed *de novo*. *Wheble v. Eighth Jud. Dist. Ct.*, 128 Nev. __, __, 272 P.3d 134, 136 (2012)

FACTS

While the causes of the current housing crisis in Nevada may still be debated, its consequences are clear. Analysts estimate that between 2009 and 2012, more than 280,000 Nevada homeowners have lost their homes, as well as their savings, their economic security, and stability, to foreclosure.[1] In Nevada's cities, the impact has been particularly calamitous; before the end of 2011, nearly one in five Las Vegas homeowners had been displaced by foreclosure.[2] Nevada had the highest foreclosure rate in the nation for 58 straight months – until November 2011.

Even those who have held on to their homes have been hurt. A University of Nevada study has found that homeowners in Nevada who made timely mortgage

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[1] Center for Responsible Lending, *The Cost of Bad Lending in Nevada* (Aug. 2010), http://www.responsiblelending.org/mortgage-lending/tools-resources/factsheets/nevada.html.

[2] Steve Green, *Las Vegas House Prices Continue to Slide, Down 9 Percent from Year Ago*, Las Vegas Sun, Nov. 8, 2011.

payments saw their property values reduced by an average of $78,000 from July 2008 to July 2009.[3] These losses can be attributed to "toxic neighbors" – foreclosed properties that suffer neglect, abandonment and vandalism.[4] Foreclosed properties, moreover, have swelled the inventory of real estate for sale; accordingly, property values in Nevada have plummeted. The Center for Responsible Lending projects that the total home equity in Nevada that will be lost due to foreclosures of nearby properties exceeds $54 billion.[5] Las Vegas homeowners owe, collectively, $14.1 billion more in property debt than their homes are worth.[6]

This crisis has had profound social and economic impacts on the State. Among them are: increased transience in the population, which has disrupted neighborhoods, schools, and families; massive drops in personal and household wealth and retirement savings, particularly damaging to elderly Nevada residents who are unlikely to have time to rebuild; increased unemployment; and reductions in the State's tax base. As the State's chief law enforcement officer, the Attorney General has the responsibility to hold wrongdoers accountable, to secure, to the extent possible, redress for the State and its residents, and to deter the types of conduct that created this crisis. With exclusive powers to investigate unscrupulous business conduct and enforce the Nevada Deceptive Trade Practices Act, the Attorney General has brought or settled actions against mortgage lenders, loan servicers, and Wall Street investment banks, among others – huge, national

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[3] Buck Wargo, *Foreclosed Homes a Bane to Neighbors in Las Vegas Valley Communities*, Las Vegas Sun, Dec. 10, 2010.
[4] Conor Shine, *Las Vegas Working on Way to Curb Blight of Foreclosure*, Las Vegas Sun, Nov. 16, 2011.
[5] Center for Responsible Lending, *supra* note 1.
[6] Press Release, Core Logic, New Core Logic Data Shows 23 Percent of Borrowers Underwater with $750 Billion Dollars of Negative Equity (Mar. 8, 2011), http://www.corelogic.com/about-us/news/new-corelogic-data-shows-23-percent-of-borrowers-underwater-with-$750-billion-dollars-of-negative-equity.aspx.

corporations that defrauded Nevada consumers and both contributed to and profited from the run-up and collapse of the State's housing market.

The Attorney General's Use of Outside Counsel

As the state's chief law enforcement officer, the Attorney General provides legal counsel to and represents six constitutional officers, 97 state agencies and 111 Boards and Commissions, and assists the 17 district attorneys of the State. In addition to the role of legal counselor, the Office of the Attorney General is also charged with upholding the laws of this State and has specific criminal prosecutorial authority in the areas of Medicaid fraud, insurance fraud, workers' compensation fraud, securities fraud, crimes involving public integrity and prison inmate cases. In addition, the Attorney General has a Bureau of Consumer Protection that was created in 1997 to represent the interests of consumers of Nevada's regulated public utilities and to investigate and enforce the Nevada Deceptive Trade Practices Act. The current day-to-day work of those responsible for consumer protection and deceptive trade enforcement is carried out by two Senior Deputy Attorneys General responding to and preventing deceptive trade in the State and responding to consumer inquiries despite the 2009 elimination of the Nevada Consumer Affairs Division. Since 2007 the Office's budget, like all State budgets, has been reduced. Specifically, in fiscal years 2008 and 2009 the budget was reduced 12.3% from the previous budget, followed by an approximate reduction of 30% in fiscal years 2010 and 2011. Despite these cuts, the Office has faced increased workloads and attempted to fulfill the duties and responsibilities listed above.

Under Attorney General Masto, the Office has attempted to meet the challenges to fulfill her charter and the increased expectations of our citizens to protect the rights of Nevadans to solve the problems in our state during the housing crisis. She has chosen to hire outside contingency fee counsel in a handful of complex matters critical to the State and people of Nevada, to assist her Office where

it lacked the ability to expeditiously marshal the resources or specialized expertise to handle the matter on its own. *See* Affidavit of Ernest Figueroa ¶ 4, Petitioners' Appendix ("P.A.") Vol. I, LPS127. The use of outside counsel has allowed the Attorney General's Office to immediately and quickly arrange the resources to investigate matters fully within the appropriate time limitations and to handle on equal footing large, complex cases that are central to its enforcement duties and critical to protecting the residents of Nevada. When she has retained outside counsel, a contract has been awarded through a formal procurement process and then reviewed and approved by the State Board of Examiners, an independent body – comprised of the Governor, the Secretary of State and the Attorney General – that reviews all purchasing contracts for the State. *Id.* ¶ 5, P.A. Vol. I, LPS127. While outside counsel provides significant additional resources, the Attorney General continues to control the cases. *Id.* ¶ 6, P.A. Vol. I, LPS127.

In 2009, the Attorney General's Office sought outside counsel willing to work on a contingency fee basis to assist in addressing the complex and widespread mortgage-related fraud that has imposed devastating economic costs on the State of Nevada and taken an immeasurable emotional and financial toll on hundreds of thousands of Nevada families. *Id.* ¶ 8, P.A. Vol. I, LPS127. Cohen Milstein Sellers & Toll's Public Client Practice[7] was chosen to represent the State through a Request for Solicitation process. *Id.*, P.A. Vol. I, LPS127. The State Board of Examiners approved the Office's contract with CMST on December 8, 2009. *Id.*; LPS's Compl. ¶ 22, *LPS v. Masto*, No. 2:12-cv-01122 (D. Nev. June 27, 2012) ("Federal

[7] Led by a former attorney general for the District of Columbia, CMST's Public Client Practice is dedicated exclusively to working with "Attorneys General and their legal teams to investigate and, when appropriate, litigate strategic enforcement actions that will recoup funds owed to the State or its residents, and achieve key equitable or other reform remedies." http://www.cohenmilstein.com/practices.php?PracticeID=8 (last visited Sept. 6, 2012).

Proceeding"), ECF No. 1, P.A. Vol. I, LPS067 (citing and appending the State's Contingency Fee Professional Services Agreement ("Contingency Fee Agreement" or "Contract")).

The Contingency Fee Agreement includes the following provisions:

> Contractor and the Attorney General will discuss all major litigation decisions, including but not limited to: (i) which defendants to sue; (ii) what claims to allege; (iii) whether to opt out of any class certified in federal court; (iv) retention of experts; and (v) whether to proceed to trial. It is expressly understood that the Attorney General will have final and exclusive authority over all aspects of this case, including settlement decisions. The Attorney General and Contractor agree that the Attorney General may settle all or part of the related Litigation over the objection of Contractor when in the Attorney General's opinion it is in the best interest of the State of Nevada to do so. (Contract ¶ 1.1, P.A. Vol. I, LPS079).
>
> The retention of Contractor is intended to aid the Attorney General in representing the State in a major matter. The Attorney General will be actively involved in all stages of this matter and deciding all major issues, including whether to file suit, when to file suit, who to file suit against, approval of the asserted claim or claims and whether and on what basis to settle or proceed to trial. The Contractor shall acknowledge and defer to the Attorney General for direction and decisions. (*Id.* ¶ 8.1, P.A. Vol. I, LPS085).
>
> Review of all documents is required to assure the Attorney General's approval of the information, content and completeness. Documents for review shall include all pleadings, petitions, findings and any other document produced in the pursuit of this matter. All draft deliverables and other materials developed by the Contractor as part of this project shall be reviewed and approved in writing by the Attorney General prior to finalizing the material. (*Id.* ¶ 8.3, P.A. Vol. I, LPS085).

> Notices of depositions shall not be sent by Contractor without prior written authorization from the Attorney General. (*Id.* ¶ 10, P.A. Vol. I, LPS085).

In approving this contract on December 8, 2009, the State Board of Examiners was required to find, and did find, that "sufficient authority exists to expend the money required by the contract" and that the service could not be provided by a state agency "in a more cost-effective manner." NRS 333.700(9)(a), (b).

Under this contract, CMST assisted the State in litigation against Bank of America over its lending and loan servicing practices. The Bank of America litigation was complex – in part because the Bank itself is a vast entity; its servicing activities were carried out by many thousands of Bank employees, contractors and sub-contractors working at a number of locations throughout the United States. The Bank of America litigation, moreover, moved between the state and federal court systems; CMST helped secure an important ruling from the Ninth Circuit Court of Appeals, which held that State enforcement actions seeking consumer restitution cannot be removed to federal court as class actions. In addition to relief secured as part of a national settlement, Nevada secured the Bank's commitment to providing at least $750 million for principal reduction and short sales for struggling Nevada homeowners, a special outreach program to enable Nevada homeowners to seek and obtain relief, a $30 million payment to the State, and the State's participation in the national committee overseeing compliance with the settlement.[8]

CMST also assisted the State in its resolution of a settlement with one of the nation's largest homebuilders – Pulte – for the conduct of its mortgage financing arm. And CMST assisted the State in its investigation of Wachovia (over its role in originating a particularly deceptive and risky mortgage product, the payment-option adjustable rate mortgage) and investment bank Morgan Stanley (for its role in

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[8] Press Release, Office of the Nevada Attorney General, Attorney General Masto Announces Two Historic Mortgage Servicing Foreclosure Settlements (Feb. 9, 2012), http://ag.state.nv.us/newsroom/press/ 2012/2historicsettlements.pdf.

financing and purchasing fraudulent home mortgages). The State's investigations against these banks led to settlements worth approximately $100 million.[9]

The State's Investigation of and Suit Against LPS

Prompted by news reports that a subsidiary of LPS, DocX, had engaged in widespread robo-signing of fraudulent mortgage documents, the Nevada Attorney General's Office issued a subpoena to LPS on October 15, 2010. Figueroa Aff. ¶ 9, P.A. Vol. I, LPS127. Over the course of its 14-month investigation, the State reviewed 900,000 pages of documents related to LPS's business practices, contacted dozens of witnesses – including former LPS employees and LPS's servicer clients, and examined Nevada foreclosure records affected by LPS's deceptive conduct. State's Compl. ¶ 15, *State v. LPS*, No. A-11-653289-B (Clark Cnty. Dist. Ct. Dec. 15, 2011), P.A. Vol. I, LPS004-005. As laid out in the State's Complaint, filed in the District Court for Clark County on December 15, 2011, the Attorney General discovered an even broader range of unlawful conduct, extending to other LPS subsidiaries and tens of thousands of additional documents and filings, as well as to LPS's role in managing, disclosing, and profiting from the foreclosure-related work of its affiliated attorneys and trustees.[10]

LPS is the nation's dominant provider of mortgage default services, processing more than fifty percent of all foreclosures nationwide annually. As of 2010, default management services comprised the largest part of LPS's business and 43 percent of the company's total 2010 revenue of $2.456 billion. State's Compl. ¶ 9, P.A. Vol. I,

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[9] Press Release, Nevada Attorney General, Attorney General Announces Filing of Assurance of Discontinuance with Morgan Stanley (Sept. 27, 2011), http://ag.state.nv.us/newsroom/press/archived/2011pr.pdf at 87-88; Press Release Nevada Attorney General, $78 Million Pay Option ARM Agreement with Wells Fargo Secured For Nevada Homeowners (Oct. 6, 2010), http://ag.state.nv.us/newsroom/press/archived/2010pr.pdf at 111-112.

[10] The State named Fidelity National Information Services, Inc. ("FIS"), the former parent company of Lender Processing Services, Inc., as a defendant, too. State's Compl. ¶ 19., P.A. Vol. I, LPS006. For purposes of this Brief, "LPS" includes FIS.

LPS003. LPS achieved its dominant market share by offering mortgage servicers a product that seems too good to be true: managing key aspects of the foreclosure process for free. LPS promised servicers that it could reduce their costs and shorten foreclosure timelines. State's Compl. ¶ 10, P.A. Vol. I LPS003. Then, LPS arbitrarily compressed foreclosure timelines well below industry standards, directing its employees and affiliated law firms to churn out documents faster than they could be meaningfully reviewed or verified. *Id.* The mortgage-related documents created by LPS appear to be signed and notarized, but many were not actually signed by the person whose name appears on the signature line. LPS regularly and officially used "surrogate signers" who signed documents using the names of other LPS employees; these surrogate signers did not review the documents and did not check the accuracy of the information contained in the documents. State's Compl. ¶¶ 34-40, P.A. Vol. I, LPS009-10. In turn, the documents were notarized by LPS employees who knew that the surrogate signers had signed the documents without proper review; the notarizations, then, also were false. State's Compl. ¶¶ 68-76, P.A. Vol. I, LPS014-15. Ultimately, LPS misrepresented the authenticity, accuracy and validity of tens of thousands of legal documents transmitted to loan servicers and consumers and filed with courts and county recorders in connection with Nevada foreclosures. *Id.* ¶ 15(a), P.A. Vol. I, LPS004.

LPS moved to dismiss the State's Complaint on January 30, 2012. Before the State's opposition was due, the litigation was stayed at the request of the parties to allow for settlement discussions. When the parties were unable to reach a settlement, the stay was lifted in April 2012. A hearing on LPS's motion to dismiss was set for June 19, 2012. The hearing was subsequently rescheduled for July 19, 2012 and, after hearing argument from both sides, the district court ruled from the bench, denying LPS's motion in large part. The Court held that the State's claims regarding surrogate signing, false notarizations, and LPS's practice

of improperly passing off its fees as attorneys' and trustees' fees in foreclosure proceedings may proceed under NRS 598.0915(15) and NRS 598.092(8). July 19, 2012 Hr'g Tr. 41, P.A. Vol. II, LPS276.

This case will demand substantial resources. Formal discovery is not even underway and nearly a million pages of documents have been produced by LPS and third-parties. The State anticipates that between 20 and 30 depositions will be needed to develop the State's case; the majority of these depositions will involve LPS employees and contractors located in Georgia (LPS's headquarters), Minneapolis and California (two of LPS's signficant locations), as well as Nevada. LPS is a well-heeled defendant. LPS has been represented by three law firms, as well as lobbyists, in the investigation and litigation to date and on any given motion lists five lawyers as counsel of record. Its litigation style has been uncommonly aggressive – marked by procedural maneuvering, intense motions practice and the creation of satellite litigation tracks. Simply keeping pace with the motions practice that LPS is generating, let alone pressing the State's claims, requires the efforts of more lawyers than the Bureau of Consumer Protection currently employs.

LPS's Objections to the State's Use of Outside Counsel

On June 26, 2012, in anticipation of the hearing on LPS's motion to dismiss the State's Complaint, the State filed a Motion to Associate Counsel under Nevada Supreme Court Rule 42, seeking permission to associate a lawyer from CMST as co-counsel. On June 27 – more than six months after the State filed its Complaint in state court against LPS and nearly two years after the State's investigation began – LPS initiated a separate federal case against the Attorney General, alleging that the use of contingency fee counsel violates NRS 228.110 and LPS's due process rights. *See* LPS's Compl., Federal Proceeding, P.A. Vol. I, LPS062-077. At the same time, LPS filed in the state court proceeding its Opposition to the State of Nevada's Motion

to Associate Counsel, opposing the application of the Office's outside counsel for admission *pro hac vice* on the same grounds that are presented in its Federal Complaint.[11] Opp'n to Associate Counsel 2-3, P.A. Vol. 1, LPS057-58.

The Federal Complaint sets forth conclusory allegations asserting that the Attorney General's Office delegated control of the case to outside counsel – but few pertinent facts. LPS asserts that outside counsel: "conducted the underlying investigation forming the basis for the Attorney General's Complaint;" reviewed documents and information produced by LPS in response to the State's subpoena; "formed the conclusions that became the basis for the Attorney General's Complaint;" and "drafted the Attorney General's Complaint." LPS's Compl. ¶ 15-17, Federal Proceedings, P.A. Vol. I, LPS068. LPS has not alleged in its Complaint that CMST made decisions during the investigation or litigation (beyond the most ministerial of matters) without the guidance, direction and approval of the Attorney General's Office. Specifically, LPS has not alleged that the Attorney General's Office: did not control settlement discussions or decisions; ever refused – categorically or in response to a particular inquiry – to speak or correspond directly with LPS or required LPS to communicate exclusively with or through CMST; or has been uninformed about or detached from the investigation or the litigation. While LPS alleges that outside counsel is motivated by the prospect of a contingency fee to "maximize[ ] the amount of monetary penalties recovered from [LPS] rather than focusing on the public interest," *Id.* ¶ 33, P.A. Vol. I, LPS070, LPS has not alleged that the State's Complaint differs, in seeking statutory penalties, from other

[11] LPS subsequently amended its Federal Complaint on August 16, 2012. Amended Complaint, Federal Proceeding, Aug. 16, 2012, ECF No. 12. The Amended Federal Complaint is not part of the district court record below.

enforcement actions brought by the Office without the assistance of outside counsel.[12]

At the June 28, 2012, hearing on the Motion to Associate Counsel, the district court directed the State to respond to LPS's Opposition and scheduled a second hearing for July 19, 2012. Hr'g Tr. 3:25-4:21, P.A. Vol. I, LPS094-95. In its response, the State explained how the Office has exercised complete control over the direction and day-to-day handling of the LPS investigation and litigation. Resp. to LPS Opp'n to Associate Counsel 4-5, P.A. Vol. I, LPS102-103. The Office instructed LPS to provide the Office with copies of all documents and narrative answers it produced in response to the October 2010 subpoena and subsequent discovery requests. *Id.* Senior attorneys from the Office – Chief Deputy Attorney General Ernest Figueroa and Senior Deputy Attorney General Binu Palal – have participated personally in or have supervised every decision in this case, including but not limited to, the scope and manner of the investigation, negotiations over the scope and timing of extensive pre-complaint discovery, the decision to file a lawsuit and the drafting of the State's Complaint, multiple settlement meetings, and communications with LPS regarding briefing schedules and stipulations in this Court. *Id.* In addition to communications and meetings involving outside counsel, Attorney General Masto personally has conducted at least three additional

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[12] LPS also fails to acknowledge that its conduct has been the subject of: a consent order with the Office of Comptroller of Currency and other federal agencies that required remediation of its document execution process; investigations by other attorneys general, and; an expose by the television news show, 60 Minutes, featuring former LPS robo-signers. *See, e.g., 60 Minutes: The Next Housing Shock* (CBS television broadcast Apr. 3, 2011); Consent Order, *In re LPS*, OCC AA-EC-11-46 (OCC Apr. 13, 2011), http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47f.pdf; Ruth Simon and Nick Timiraos, *California and Illinois Expand Foreclosure Probes*, Wall St. J., May 26, 2011 (announcing investigations into LPS by the Illinois and California attorneys general).

settlement discussions,[13] other in-person meetings, and telephone conversations with LPS's Chief Operating Officer and LPS's government lobbyists – without the participation of the State's outside counsel. *Id.* at 4, P.A. Vol. I, LPS103. Attorney General Masto and her staff have invited LPS to contact the Office directly, rather than requiring LPS to contact the Office through its outside counsel. *Id.*

At the hearing on July 19, 2012, the State argued that the retention of outside counsel comports both with Nevada law and due process. Hr'g Tr. of July 19, 2012 2-9, P.A. Vol. II, LPS237-244. LPS argued that the Office's retention of outside counsel violates NRS 228.110, but urged Judge Gonzalez not to "reach the issues of due process and otherwise that are raised in the Federal Court complaint." *Id.* at 13:14-16, P.A. Vol. II, LPS248. At the conclusion of oral argument, Judge Gonzalez held that "the AG has the authority to associate with counsel under appropriate circumstances as long as appropriate procedures are followed and the Attorney General continues to direct the litigation" and granted the State's Motion to Associate Counsel. *Id.* at 13:24-14:2, P.A. Vol. II, LPS248-249.

The State filed a timely motion to dismiss the Federal Complaint on July 30, 2012, arguing that the federal court should abstain from deciding the questions asserted by LPS, under the *Younger* doctrine, because LPS's concerns were considered by the Clark County District Court and LPS's claims should have been presented in the ongoing state court proceeding. Mot. to Dismiss LPS's Compl. 9-10, Federal Proceeding, July 30, 2012, ECF No. 6. The State also argued, in the alternative, that the federal court should dismiss LPS's claims on the merits because

[13] While settlement discussions ordinarily are confidential, LPS's Federal Complaint contends that the Attorney General's Office improperly delegated control of this case to private counsel and thereby violated LPS's due process rights. In order to rebut its allegations, the State asserts facts relating only to the schedule of and the State's participation in settlement discussions, and not the content of those settlement discussions.

the facts alleged by LPS do not support cognizable claims. *Id.* at 9. The following day, LPS filed the instant Petition, asking this Court to issue a *writ* of *mandamus* directing the Clark County District Court to deny the State's motion to associate counsel.

ARGUMENT

I. LPS HAS NO BASIS FOR ASKING THIS COURT TO INTERVENE IN THE DISTRICT COURT PROCEEDING

Before the merits of the questions presented in LPS's petition can be addressed, LPS must demonstrate that a *writ* is the proper vehicle for seeking the relief it requests and that LPS has standing to demand such relief. It is clear from LPS's Federal Complaint that LPS is asserting challenges related to due process and public integrity. But rather than challenge the State's authority directly in the Clark County District Court, LPS has elected to present these concerns obliquely – on a motion to associate counsel in state court – and to file a separate federal lawsuit. LPS's approach has created a complicated tangle of proceedings – involving this Court, the district court for Clark County and the federal district court for Nevada. Notwithstanding the procedural and substantive variations in the presentation of LPS's arguments, it is indisputable that in the ordinary course of the state district court proceedings, LPS has had, and will have, opportunities to fully air its due process claim against the State. Because LPS's challenge ultimately boils down to a question of monetary penalties, a remedy at law is fully adequate. The question of whether LPS has standing to challenge the State's conduct under NRS 228.110 is distinct; for the reasons explained below, LPS has no standing to enforce NRS 228.110.

A. LPS Cannot Establish that a *Writ* of *Mandamus* or Prohibition Is Warranted Under the Circumstances Presented Here

A *writ* is an exceptional form of relief. LPS has not demonstrated that this

extraordinary remedy is necessary or appropriate to determine whether the State's outside counsel satisfies the requirements of Supreme Court Rule 42 to be admitted *pro hac vice*.

1. LPS Has Failed To Demonstrate That *Mandamus* Or Prohibition Are Available Remedies

Both *mandamus* and prohibition are "extraordinary" remedies, *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 678, 818 P.2d 849, 875 (1991), and are not available if the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law," NRS 34.170; NRS 34.330. The right to appeal after a final judgment is entered will generally constitute an adequate and speedy legal remedy precluding *writ* relief. *See Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224-25, 88 P.3d 840, 841 (2004). The interests of judicial economy "will remain the primary standard by which this court exercises its discretion." *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). LPS's right to appeal after final judgment is an adequate remedy, and entertaining LPS's petition will harm, rather than promote, the interests of judicial economy.

LPS argues that "writ relief is the only remedy" because "[w]ithout this Court's intervention . . . the State will be permitted to violate Nevada law during the entire pendency of this action." LPS Pet. for *Writ* of *Mandamus* at 10, July 31, 2012 ("LPS Pet."). But every decision a trial court makes will influence the course of the litigation in a case. The relevant question is whether the decision can be reviewed and effectively corrected on appeal.

LPS fails to demonstrate that it would suffer any prejudice in waiting until after final judgment to appeal outside counsel's participation. First, the record evidence demonstrates that this case will proceed with or without the participation of

outside counsel. Figueroa Aff. ¶ 26, P.A. Vol. I, LPS130.[14] Thus, LPS will face the same claims and penalties, whether or not the Attorney General can make use of outside counsel. Outside counsel possesses no powers that the Attorney General lacks, so its involvement does not change, in any way, the underlying proceeding. Further, even if NRS 228.110(2) bars the Attorney General from engaging outside counsel, as LPS asserts, the only remedy under that statute is to "void" all claims for legal services. *See* NRS 228.110(3). Under the contingency fee agreement, any claim for payment would not be presented to the State until after the case is over. Contract ¶ 3.5.5, P.A. Vol. I, LPS083. Because the remedy permitted by statute would only be available at the end of the case, interlocutory relief would be particularly inappropriate. Finally, LPS's own conduct in this action proves there is no urgency or issue of law of such importance that warrants the Court's immediate and extraordinary attention. LPS knew of CMST's involvement in the State's investigation in 2010, but waited 18 months to challenge outside counsel's participation in this matter. *See* Facts section *supra*. Accordingly, *mandamus* and prohibition are not appropriate remedies.

LPS's petition seeks to delay the trial court proceedings and have this Court waste its valuable resources addressing an issue now that not only will have no effect on LPS's position as a defendant in a State law enforcement proceeding, but can be, and would be, more adequately addressed after final judgment. For these reasons, this Court should decline to entertain LPS's petition.

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[14] LPS's effort to "analog[ize]" this situation to a challenge arising from a district court order disqualifying counsel, LPS Pet. 10, is unavailing. This Court has recognized that a *mandamus* petition may be appropriate to challenge an order disqualifying counsel. *Liapis v. Second Jud. Dist. Ct.*, 128 Nev. __, __ P.3d __, 2012 Nev. LEXIS 86, at *2 (Aug. 9, 2012). The Court's intervention under such circumstances is premised on irreparable harm – the harm inherent in depriving a party of the counsel of his choosing for the duration of his case – which cannot be undone on appeal. But LPS has cited no case adopting a parallel rule – where a district court *declines* to disqualify counsel.

2. Even If *Mandamus* Or Prohibition Were Available, LPS Has Not Met The High Standard For Such Extraordinary Relief

Authority cited by LPS clearly states that "[m]andamus will not lie to control discretionary action unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *Round Hill*, 97 Nev. at 603-04, 637 P.3d at 536 (citations omitted), cited in LPS Pet. 8. A *writ* of prohibition may likewise issue only to arrest the performance of an act that is outside the trial court's discretion. *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 123 Nev. 468, 473, 168 P.3d 731, 735-36 (2007). The district court's decision to grant the Attorney General's motion to associate outside counsel was discretionary and LPS has failed to demonstrate a manifest abuse of that discretion.

Although LPS asks this Court to determine the enforceability of the State's contract with CMST under NRS 228.110, the question before the district court was presented on a motion to associate counsel under Supreme Court Rule 42. Under the Rule, a lawyer who is not licensed to practice law in Nevada is permitted to appear in a Nevada court if she: (1) is not a resident of Nevada and does not conduct business regularly in Nevada; (2) is a member of good standing in the jurisdictions where she is barred, and (3) is associating with counsel barred in Nevada who will act as counsel of record in the case.[15] SCR 42(2)(a)-(f). LPS did

[15] Because LPS waited until the eve of the hearing on its Motion to Dismiss to object to outside counsel's participation in the case, the district court reasonably could have deemed LPS's objection waived. Courts are especially willing to regard the failure to timely move to disqualify opposing counsel as a waiver of the right to raise that challenge. *See Trust Corp. of Mont. v. Piper Aircraft Corp.*, 701 F.2d 85, 87-88 (9th Cir. 1983) (finding that defendant waived its objection when it knew of opposing party's choice of counsel for more than two years before objecting); *Wild Game NG, LLC v. Wong's Int'l (USA) Corp.*, No. 05-CV-635-LRH (RAM), 2006 U.S. Dist. LEXIS 86913, at *10-13 (D. Nev. Nov. 29, 2006) (denying defendant's motion as untimely, the court noted its disbelief that the

not assert that the State's associated counsel fails to meet the requirements for *pro hac vice* admission under Rule 42. LPS's Opp'n to Associate Counsel 2 n.1, P.A. Vol. I LPS057. The district court concluded that outside counsel was well-qualified to appear. June 28, 2012 Hr'g Tr. 2-3, P.A. Vol. I, LPS093-94. Thus, LPS's petition is tethered to a trial court ruling that even LPS must concede was proper under the relevant rules of court.

B. LPS Lacks Standing to Challenge the State's Use of Outside Counsel under NRS 228.110

LPS has no standing to challenge the Attorney General's hiring of outside counsel because it has no statutory injury under Nevada law and no injury under the Constitution. LPS could have challenged the Attorney General's authority to engage outside counsel by filing a motion to quash the State's October 2010 *subpoena* under NRCP 45(c), or by filing a declaratory judgment action under NRS 30.010, *et seq.* LPS's decision – to instead oppose a routine motion to associate counsel – reflects the justiciability problem inherent in LPS's objections. LPS does not have a cognizable injury, does not have statutory standing to bring a claim against the State, and ultimately, has advanced no legitimate legal or equitable grounds for objecting to the State's use of outside counsel.

Nevada courts have long required "an actual justiciable controversy as a predicate to judicial relief." *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225-26 (2006).[16] Nevada generally has used the rule followed by federal courts and requires plaintiffs

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motion "could not have [been] made . . . earlier"); *Conley v. Chaffinch*, 431 F. Supp. 2d 494 (D. Del. 2006) (nine month delay); *In re Modanlo*, 342 B.R. 230 (D. Md. 2006) (five month delay). Here, LPS had the opportunity to present its best arguments and the district court considered them on the merits.

[16] *Stockmeier* has been clarified on other grounds by *State ex rel. Bd. Of Parole Comm'rs v. Morrow*, 225 P.3d 224 (Nev. 2011), and abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

asserting claims for declaratory relief and constitutional claims to meet "increased jurisdictional standing requirements." *Id.* These requirements are:

> (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Doe v. Bryan, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (citation omitted).[17] Standing has also been characterized in terms of a requisite injury: that a plaintiff must demonstrate an injury that can be fairly traced to the conduct complained of and redressed by the relief requested. *Kirkpatrick v. Eighth Jud. Dist. Ct.*, 118 Nev. 233, 241, 43 P.3d 998, 1004 (2002), *withdrawn on other grounds*, 119 Nev. 66, 64 P.3d 1056 (2003); *Elley v. Stephens*, 104 Nev. 413, 416-17, 760 P.2d 768, 770-71 (1988). Where the Legislature has expressly created a statutory right for its citizens, Nevada courts require only that plaintiffs seeking to vindicate such a right meet the standing requirements set forth in the statute.[18]

There is no private right of action that would confer standing on LPS to challenge the Attorney General's hiring of outside counsel. Nevada Revised Statutes 228.110 establishes the exclusive remedy for the unauthorized hiring of

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[17] *But see Heller v. Nev. State Legislature*, 120 Nev. 456, 461 n.3, 93 P.3d 746, 749 n.3 (2004) (noting "[s]tate courts are not bound by federal standing principles").

[18] The Court has explained, "In instances where we have found that the Legislature has provided citizens with certain statutory rights, we 'have examined the language of the statute itself to determine whether the plaintiff had standing to sue.'" *Citizens for Cold Springs v. City of Reno*, 125 Nev. __, __, 218 P.3d 847, 850-51 (2009) (holding that right set forth under NRS 268.668 – allowing "*any* person . . . *claiming* to be adversely affected" to challenge the city's land-use decision – established requirements for standing that supplant traditional constitutional standing requirements) (emphasis added).

outside counsel, which is that claims for such legal services shall be declared void. NRS 228.110(3). Even if Section 228.110 could be read to bar the Attorney General from hiring outside counsel to assist her Office in carrying out her statutory and inherent functions – which it cannot, *see infra* Section II.B – neither Section 228.110 specifically nor Chapter 228 generally establishes a private right of action to seek such a declaratory judgment. *See generally* NRS ch. 228. The absence of an expressly stated right of action strongly suggests that the Legislature intended none. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 959, 194 P.3d 96, 101 (2008). This omission, moreover, distinguishes NRS 228.110 from other sections of the Nevada Revised Statutes that expressly create a right of action allowing citizens to stop or compel a government action even where they have not been injured by the government's conduct.[19]

Absent a statutory grant of standing, LPS must demonstrate prudential standing, which it cannot do. LPS has no legally protectable interest in obtaining a judgment that the Attorney General exceeded the Office's authority under NRS 228.110. Put another way, LPS does not have a legal interest in preventing outside counsel from obtaining payment for its services – the remedy allowed by statute.

Nor can LPS establish an injury caused by the Attorney General's alleged violation of NRS 228.110. LPS has no right to be free from prosecution for violations of Nevada law by State law enforcement. *See, e.g., Philip Morris, Inc. v. Graham*, No. 960904948 CV, slip op. at 2 (Utah 3rd Jud. Dist. Ct. Feb. 13, 1997), P.A. Vol. I, LPS149.[20] LPS has claimed that the Office's conduct "results

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[19] *See, e.g., Stockmeier*, 122 Nev. at 393-94, 135 P.3d at 226 (holding that violations of State's open meeting law could be vindicated under statutory authority by citizen without a showing of injury resulting to him from the violations).

[20] *See also Albright v. Oliver*, 510 U.S. 266, 274 (1994) (reiterating that "the accused is not 'entitled to judicial oversight or review of the decision to prosecute'"); *see also Dumans v. Fort Bend Cnty., Tex.*, No. 4:08-cv-01359, 2009

in a deprivation of [LPS's] property, in the form of monetary penalties, without due process of law, including, but not limited to, a fair and ethical investigation and litigation before an impartial tribunal." LPS's Compl. ¶ 58, Federal Proceeding, P.A. Vol. I, LPS074. This alleged injury is entirely speculative. Not only has LPS not suffered any deprivation of property, it has failed to demonstrate that the investigation and litigation have been less than fair and ethical and that the tribunal has not been impartial. A lapse in due process cannot be predicated simply upon the participation of outside counsel in the prosecution of the case; a deprivation of due process would occur only if the Office failed to control the litigation and the Nevada courts' abdicated their duty to provide an impartial forum. *See* Section II.B.2 *infra*. The record evidence here demonstrates that the Attorney General's Office, not CMST, is directing this litigation and has made all key decisions about the nature and conduct of this investigation and lawsuit. *See* Facts section, *supra*, at 11-12.

Finally, this case will proceed – with or without outside counsel's participation. Figueroa Aff. ¶ 26, P.A. Vol. I, LPS130. Therefore, the remedy LPS seeks – the ouster of outside counsel – will have no impact on the existence of the State's case against LPS or the relief sought by the State in its case. LPS seeks only to obtain a tactical advantage by depriving the State of additional resources to fully litigate this case and to address LPS's injury to the integrity of the State's housing market and justice system, as well as its systematic deception of Nevada homeowners. Generally, because of this significant possibility of abuse, courts

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U.S. Dist. LEXIS 126695, at *12 (S.D. Tex. June 29, 2009) ("there is no right under the *due process clause of the Fourteenth Amendment* to be free from criminal prosecution except upon probably cause"). *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601-02 (1975) (noting that the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution was not the type of injury that could justify federal interference").

have viewed motions to disqualify opposing counsel warily. *See Deboles v. Nat'l R.R. Passenger Corp*, No. 2-11-cv-00276-JCM-CWH, 2012 U.S. Dist. LEXIS 79102, at *3 (D. Nev. June 7, 2012) (describing disqualification as a "drastic measure," disfavored because of its use "to create delay or harassment."); *Kabins Family Ltd. v. Chain Consortium*, No. 2:09-cv-1125-EMN-RJJ, 2011 U.S. Dist. LEXIS 40852, at *9 (D. Nev. Mar. 31, 2011) (noting that courts must use "[p]articularly strict judicial scrutiny" for such a motion because "there is a significant possibility of abuse for tactical advantage"). As a matter of law, the relief LPS seeks – to disqualify CMST – is not only unavailable, but improper.

A state trial court faced with a similar challenge to the Utah Attorney General's hiring of contingency fee counsel concluded that the complaining tobacco companies likewise lacked standing. *Graham*, No. 960904948 CV, slip op. at 1-2, P.A. Vol. I, LPS148-50. The court observed that standing depended on a minimum of two facts: "[w]hether a plaintiff has the requisite personal stake to challenge a governmental action turns on (1) the existence of an adverse impact on the plaintiff's rights, and [2] the likelihood that the relief requested will redress the injury claimed." *Id.* at 2, P.A. Vol. I, LPS149. The court held that engagement of contingency fee counsel did not intrude upon a protected right because the tobacco companies had no right not to be sued. *Id.* Further, the court found that even if the contingency fee contract were impermissible, the State's right to maintain the suit would survive; thus, the element of "actual redress of the threatened harm [through plaintiff's challenge] is also missing." *Id.* These conclusions are equally pertinent here.

II. THE ATTORNEY GENERAL HAS NOT VIOLATED NRS 228.110 IN HIRING OUTSIDE COUNSEL

Before the district court, LPS argued that the State's hiring of outside counsel violates NRS 228.110 and LPS's constitutional due process rights. LPS

has presented these arguments in its federal lawsuit as well. LPS withheld the due process question from the instant Petition and asks this Court only to determine whether the Attorney General's contract with outside counsel is "illegal and in violation of NRS 228.110(2)." LPS Pet. 3.

As explained below, the Attorney General has broad authority and significant discretion in carrying out the functions of her office. The powers of the Office include the ability to hire a variety of professionals to work with the Office on a contract basis under the supervision of the Attorney General or one of her deputies. Absent a specific prohibition barring the type of arrangement that exists between the Office and CMST, there is no basis for circumscribing the Office's discretionary authority to make arrangements that the Office deems necessary or helpful to carry out its responsibilities. NRS 228.110, read fairly, contains no such prohibition.

A. The Attorney General's Use of Outside Counsel Is Consistent with the Powers and Responsibilities of Her Office under Nevada's Constitution, Statutes and Common Law

Nevada's Constitution, statutes and common law provide the Attorney General (and, on consumer protection matters, the Consumer's Advocate) with the power to hire outside counsel. The Attorney General's constitutional and statutory responsibility to serve as the State's chief legal officer and to protect the State's interests through both defensive and affirmative litigation allows her to take the steps reasonably necessary to carry out those duties. Further, her authority under common law to carry out the functions traditionally associated with and inherent in her Office supports her statutory powers and independently establishes the authority to engage counsel when she deems it appropriate. While there is no case law in Nevada addressing this specific issue, state supreme courts across the country have affirmed their attorneys generals' inherent power to hire outside counsel in similar circumstances.

1. The Nevada Attorney General's Authority Should Be Interpreted Broadly, Consistent with Her Role as the State's Chief Legal Officer

The Attorney General's power to engage outside counsel is rooted in her authority under the State Constitution. The Attorney General is one of six constitutional officers in the State of Nevada, elected statewide by Nevada voters. *See* Nev. Const. art. V, §§ 17, 19. She is the State's chief law enforcement officer and is charged with providing legal services to the executive branch of state government, as well as ensuring that the laws of the State are vigorously and fairly enforced. The Attorney General: represents the people of Nevada before trial and appellate courts of Nevada and the United States in criminal and civil matters; serves as legal counsel to state officers, most boards, commissions and departments; and assists the district attorneys of the State. *See id.*; NRS 228, *et seq*. In addition to her authority to enforce the State's criminal laws, several civil statutes vest the Attorney General with the sole responsibility to enforce their provisions or pursue certain remedies.[21] The powers of the Attorney General's office, accordingly, should be interpreted broadly to give effect to her constitutional and statutory role as the chief legal officer of the State. *See, e.g., Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 474 (R.I. 2008) (noting, in upholding Rhode Island attorney general's authority to hire contingency fee counsel, "this Court has historically tended, whenever appropriate, to give deference to the strategic and tactical decisions made by those who hold that high office" and recognizing that the attorney general "is entitled to act with a significant degree of autonomy, particularly

[21] *See, e.g.*, NRS 598.0963(3), 598.0985, 598.0999(1), (2) (giving the Attorney General the exclusive right to seek temporary restraining orders, preliminary or permanent injunctions, and civil penalties if she believes a person is engaging in a deceptive practice); NRS 645B.620(2), 645B.800 (giving the Attorney General exclusive authority to seek an injunction against mortgage brokers for unlawful behavior and to seek an administrative fine or to revoke the broker's license).

since the Attorney General is a constitutional officer and is an independent official elected by the people of Rhode Island").

2. Specific Nevada Statutes Establish the Attorney General's Authority to Hire Outside Counsel

The power of the Attorney General and her Consumer's Advocate to hire counsel is necessarily implied by her duty to represent the State in litigation and enforce the State's consumer protection laws.

Nevada Revised Statutes 228.170 provides that "when, in the opinion of the Attorney General, to protect and secure the interest of the State it is necessary that a suit be commenced or defended in any federal or state court, the Attorney General shall commence the action or make the defense." Critical to carrying out that statutory duty is the power to take the steps necessary to prosecute and defend such suits, including enlisting outside counsel in litigation when the Attorney General believes such assistance is required. No specific statute, for example, grants the Attorney General the right to hire experts, take or defend depositions, or file briefs in litigation, yet she undoubtedly has those powers; the same is true of the power to hire counsel to assist in litigation.

The Consumer's Advocate, who serves within the Office of the Attorney General, has similarly broad powers within the field of consumer protection, which likewise extend to the hiring of outside counsel. The Consumer's Advocate is charged with, among other things, enforcing the State's consumer protection laws and exercising the powers of the Attorney General in consumer protection. NRS 228.360, 228.380. Section 228.330(5) of the Nevada Revised Statutes empowers the Consumer's Advocate to "make such other arrangements as may be necessary to carry out his or her duties and the functions of his or her office." Pursuant to this authority, the Consumer's Advocate entered into a contract to retain the legal

services of CMST to assist in cases related to mortgage lending practices in 2009. *See* Contract, P.A. Vol. I, LPS078-90.

Nevada Revised Statutes 333.700 provides the mechanism for exercising the powers of the Attorney General and Consumer's Advocate to engage outside counsel. *See* NRS 333.700(1) ("a using agency may contract for the services of a person as an independent contractor").[22] The statute makes clear that the authority to hire independent contractors includes the authority to hire outside counsel. NRS 333.700(10) ("If the services of an independent contractor are contracted for to represent an agency of the State in any proceeding in any court, the contract must require that the independent contractor identify in all pleadings the specific state agency which he or she is representing.").[23] CMST was hired as an independent contractor under NRS 333.700. *See, e.g.*, Contract ¶ 20, P.A. Vol. I, LPS088 ("The officers, agents and employees of Contractor, in performing the services required by this Contract, shall be independent contractors").

Like all state purchasing contracts, the Attorney General's contract with CMST was submitted to and approved by the State Board of Examiners. Figueroa Aff. ¶ 5, P.A. Vol. I, LPS127. The State Board of Examiners is an independent body, charged with reviewing and approving certain state purchasing contracts. *See* NRS 333.700(7) (directing the Board to review and approve certain contracts);

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[22] NRS 284.173, which is cited in the State's contract with CMST, was combined with other provisions to form the current NRS 333.700 in 2009. *See* Nev. Assemb. B. 463, 2009 Leg., 75th Sess.

[23] The State Administrative Manual ("SAM") also confirms the Attorney General's authority to hire outside counsel. Section 325, titled "State Agencies, Boards, and Commissions with Independent Contracts for Outside Legal or Professional Services," includes attorneys among the list of professionals to be retained for judicial or administrative proceedings. Nev. State Admin. Manual (SAM) at 25-27 (Revised April 27, 2012), P.A. Vol. I, LPS196-198. The SAM also lays out the special rules for contracts with outside lawyers (relating, for example, to conflicts of interest).

353.010, *et seq.* (appointing the Governor, Secretary of State, and Attorney General as members of the Board).

In addition to these express provisions, the Attorney General's broad authority to hire outside counsel to assist the Office is implicit in NRS 41.03435, which places conditions on the Attorney General's discretionary power to hire outside counsel under certain circumstances. Where outside counsel is hired for the purpose of defending the State in litigation – which the statute explicitly recognizes the Attorney General may do without finding or demonstrating a conflict of interest that necessitates the use of outside counsel – the Legislature has directed the Office to fix the compensation for defense work by contract and to pay such compensation from the State's Reserve for Statutory Contingency Account. *See* NRS 41.03435. The specificity of this provision would be unnecessary if it were not commonly understood that the Attorney General's authority to hire outside counsel includes the discretion to determine the terms for payment on a case-by-case basis.[24]

3. The Attorney General's Authority to Hire Outside Counsel Is Independently Derived from Common Law

The Attorney General's statutory authority to hire outside counsel is reinforced by the Office's long-recognized common law authority. *State ex. rel. Fowler v. Moore*, 46 Nev. 65, 79, 207 P. 75, 76 (1922) (affirming the attorney general's common law powers); NRS 1.030 (directing that common law be

[24] The fact that the Legislature placed this limit on contracts for defense work cannot be read as a requirement that all contracts for legal services must be based upon fixed (*i.e.*, hourly or flat fee) compensation. While plaintiffs are very often represented under contingency fee agreements, such arrangements are unusual for defendants. Moreover, contingency fee agreements are prohibited for certain types of legal work under the State Bar's Rules of Professional Conduct. *See* Nev. R. Prof. Conduct 1.5 (prohibiting contingency fee agreements in criminal defense and domestic relations representation).

applied, so long as "not repugnant to or in conflict with" State law). Numerous courts in other states have held that the common law authority traditional to and inherent in the office of attorney general includes the power to engage outside counsel. *See, e.g., Lead Indus.*, 951 A.2d at 480.[25] In *Moore*, the Supreme Court affirmed that the attorney general was vested with common law authority, as well as the duties and powers authorized by statute. *Moore*, 46 Nev. at 79, 207 P. at 76.[26] The Court noted the attorney general's broad formulation of his role:

> The [Attorney General's] duties are so numerous and varied that it has not been the policy of the legislatures of the states of this country to attempt to enumerate them. Where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto at common law. * * * From this it follows that, as chief law officer of the state, [s]he may, in the absence of some

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[25] *See also* note 30 *infra.*

[26] This conclusion is consistent with the rulings of courts in other states, which have found that their attorneys general retain broad common law authority to fulfill their duties. *See State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 273 (5th Cir. 1976) (noting the attorney general retains common law powers); *Lead Indus.*, 951 A.2d. at 473 (Rhode Island attorney general is vested with "broad powers and responsibilities pursuant to the Rhode Island Constitution, several Rhode Island statutes, and the common law"); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 818 (Okla. 1973) ("In the absence of express statutory or constitutional restrictions, the common law duties and powers attach themselves to the office"); *Withee v. Lane & Libby Fisheries Co.*, 113 A. 22, 23 (Me. 1921); *State ex rel. Young v. Robinson*, 112 N.W. 269, 270-71 (Minn. 1907); *State ex rel. Patterson v. Warren*, 180 So. 2d 293, 299 (Miss. 1966); *State ex rel. McKittrick v. Mo. Pub. Serv. Comm'n*, 175 S.W.2d 857, 861 (Mo. 1943); *State ex rel. Ford v. Young*, 170 P. 947, 948 (Mont. 1918); *In re Equalization of Assessment of Natural Gas Pipe Lines*, 242 N.W. 609, 610 (Neb. 1932); *State v. Swift*, 143 A.2d 114, 116 (N.H. 1958); *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987); *State ex rel. Daniel v. Broad River Power Co.*, 153 S.E. 537, 560 (S.C. 1929); *State v. Breeze*, 873 P.2d 627, 634 (Alaska Ct. App. 1994); *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990).

> express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require.

Moore, 46 Nev. at __, 207 P. at __, 1922 Nev. LEXIS 6, at *9. *See also Ryan v. Eighth Jud. Dist. Ct.*, 88 Nev. 638, 643, 503 P.2d 842, 845 (1972) ("assuming, without deciding, that the common law may have granted the attorney general the power he here seeks to exercise [citing *Moore*]," the attorney general could not exercise that power contrary to the express laws of the state); *State ex rel. List v. Cnty. of Douglas*, 90 Nev. 272, 276, 524 P.2d 1271, 1273 (1974) (finding that a statute permitting the Attorney General to bring an action in district or justice courts did not preclude him from bringing suit in the Nevada Supreme Court under his statutory power to bring an action in "any court").

4. States Asked to Decide This Question Have Determined that Their Attorneys General Have the Authority to Hire Outside Counsel

Although the Attorney General's Office has hired outside counsel in both affirmative and defensive cases, for contingency and hourly fees, for decades, its power to retain outside counsel has never, to the State's knowledge, been challenged in or considered by a Nevada court.[27] In the absence of Nevada case law, precedent from other states supports the Attorney General's power to associate counsel in similar circumstances. These out-of-state courts consistently have upheld attorneys generals' authority to hire outside counsel.

The use of outside counsel by state attorneys general is not a new phenomenon. Attorneys general have engaged the assistance of outside counsel in a variety of important cases to assist in the performance of their duties, leverage public

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[27] Lennar Corporation, a target of an earlier State investigation, sued the Attorney General in the federal district court for the District of Columbia, alleging the Office's retention of CMST to assist in its investigation constituted a violation of its due process rights. *See* Complaint, *Lennar Corp. v. Masto*, No. 1:10-cv-378-HHK (D.D.C. filed Mar. 8, 2010), ECF No. 1. This suit was voluntarily dismissed by Lennar with the State's agreement on September 2, 2012. *Id.* at ECF No. 21.

resources, and level the playing field with well-resourced adversaries. Many attorneys general have regarded outside counsel, in appropriate cases, as a cost-effective way to take on the biggest and most complex cases without expanding their staffs or risking public resources. Contrary to suggestions by LPS and other corporate defendants, the contingency-nature of the fee arrangement between a state and outside counsel does not encourage outside counsel to pursue cases with improper zeal. The contingent fee ensures that the best interests of the State – an efficient resolution of a meritorious case – and the interests of outside counsel are aligned throughout the litigation. Indeed, this model is integral to enforcement of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, and numerous state law equivalents like the Nevada False Claims Act, NRS 357.010, *et seq.*

The most prominent example of the use of outside counsel by attorneys general was in the tobacco litigation of the 1990s. Most states hired outside counsel to face the armies of lawyers engaged by each of the major tobacco companies. Nevada hired the firm of Hagens & Berman to represent the State under a contingency fee agreement in 1997. Press Release, Office of the Nevada Attorney General, Board of Examiners Approves Outside Counsel for Tobacco Lawsuit (Aug. 20, 1997), ag.state.nv.us/newsroom/press/archived/1997pr.pdf at 18. At the end of the day, the attorneys general achieved one of the most significant financial settlements in history and injunctive relief that dramatically reduced cancer and smoking rates, particularly among children. Nevada used funds that it received from the tobacco settlement to create the Nevada Millennium Scholarship. NRS 396.911.

This result was not achieved before the tobacco companies unsuccessfully litigated objections to the use of contingency fee counsel in a number of the cases against them. For example, the tobacco companies challenged the Maryland Attorney General's power to retain outside contingency fee counsel, arguing that: (1) the Attorney General lacked the power to pay outside counsel a contingency fee; and

(2) that the fee violated the companies' due process rights. *See Philip Morris v. Glendening*, 709 A.2d 1230, 1234 (Md. 1998). The Maryland Court of Appeals (Maryland's highest court) was not persuaded, holding that the Attorney General had discretion to enter into a contingency fee agreement and that the arrangement did not threaten defendants' due process rights because "outside counsel's interest in the outcome in the tobacco litigation, subject to the oversight of the Attorney General, does not exceed reasonable limits." *Id.* at 1244. Utah, Missouri, New Jersey, and Minnesota courts also upheld their attorneys generals' right to hire outside contingency fee counsel in the face of similar challenges by the tobacco companies.[28]

Since the tobacco litigation, attorneys general have used outside counsel to help pursue important goals in the protection of consumers, the environment, public health and a competitive marketplace. Despite the sound rejection of defendants' objections to outside counsel in the tobacco litigation, corporations have continued to mount similar challenges.[29] In response, several state courts have specifically opined that an attorney general's common law authority alone allows him or her to hire contingency fee counsel. In 2008, the Rhode Island Supreme Court affirmed the

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[28] *Philip Morris Inc. v. Graham*, No. 960904948 (affirming the Attorney General's power to hire outside contingency fee counsel based on his statutory power to provide legal services to state agencies), P.A. Vol I, LPS148-154; *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122 (Mo. 2000) (affirming the attorney general's retention of contingency fee counsel); *Philip Morris Inc. v. Verniero*, No. L 11840-96 (N.J. Super. Ct. Mar. 4, 1997) (same), P.A. Vol. I, LPS160-167; *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143 (Minn. Ct. App. 1999) (same).

[29] In recent years, corporate defendants' attacks on attorneys generals' use of contingency fee counsel have intensified. The U.S. Chamber of Commerce recently released a white paper (drafted by the same law firm that represents LPS in discussions with state attorneys general) instructing defendants on factual and legal arguments to use to seek to disqualify opposing outside counsel. U.S. Chamber of Commerce, Institute for Legal Reform, *Beyond Due Process – A Litigation Primer: Challenging Attorney General and Other Government Contingency Fee Arrangements*, Jan. 2009, P.A. Vol. I, LPS173-193.

attorney general's authority to hire outside counsel on a contingency fee basis following years of litigation in which the attorney general sought to hold lead paint manufacturers and their trade association liable for the costs of remediating lead pollution in residential housing. *Lead Indus.*, 951 A.2d at 468-80.

Rhode Island's high court wrote at length about the attorney general's broad and long-standing powers under the state constitution, statutes and common law, which caused "this court . . . whenever appropriate, to give deference to the strategic and tactical decisions made by those who hold that high office" and recognize that the attorney general "is entitled to act with a significant degree of autonomy, particularly since the Attorney General is a constitutional officer and is an independent official elected by the people of Rhode Island." *Id.* at 474. The court cited with approval the language of the Fifth Circuit Court of Appeals in *Shevin v. Exxon Corp.*, 526 F.2d 266, giving weight to citizens' "satisfaction of knowing that their elected Attorney General has the right to exercise his conscientious official discretion to enter into those legal matters deemed by him to involve the public interest, even though not expressly authorized by statute." *Id.* at 268 n.6. Finding no impediment in constitutional or statutory authority or public policy, the court rejected defendants' argument that the hiring of contingency fee counsel was improper. The Rhode Island Supreme Court neither cited nor had any specific statutory provision expressly giving the attorney general authority to hire outside counsel. *See generally Lead Indus.*, 951 A.2d at 470-74. This approach – which is consistent with the teachings of *Ryan* and *Moore* – has been followed by other courts to consider the question.[30]

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[30] In Utah, for example, a state district court recognized the attorney general's power to hire outside contingency fee counsel after construing his statutory power to assign legal assistants to provide legal services to state agencies. *See Graham*, No. 960904948, slip op. at 6 (citing Utah Code Ann. § 67-5-3), P.A. Vol. I, LPS153. The district court found the lack of a specific statutory prohibition on contingency fee counsel highly persuasive, noting that in the "absence of such a

In short, the authority to engage outside counsel in this matter flows necessarily and reasonably from the Attorney General's power to represent the State in litigation and from her Consumer Advocate's power to enforce the State's consumer protection laws. This authority is, moreover, derived from the various sections of the Nevada Revised Statutes that empower State agencies to hire independent contractors and the Attorney General's Consumer's Advocate to make the arrangements necessary to carry out the functions of their office. Absent a prohibition explicitly barring the Attorney General from entering into a contract with outside counsel, there is no basis – let alone extraordinary grounds – for issuing a *writ* directing the district court to deny the State's Motion to Associate Counsel.

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prohibition or an objection by the branch of government charged with allotting fiscal resources to the State, the legislature, the Attorney General's interpretation is reasonable and ought to be accorded deference." *Id. See also State of North Dakota v. Hagerty*, 580 N.W.2d 139 (N.D. 1998) (holding a constitutional provision requiring state funds to be deposited in the treasury did not prohibit the Attorney General from retaining outside counsel on a contingency fee, which he was empowered to do based on his inherent discretion in fulfilling his constitutional duty to represent the State); *Kinder v. Nixon*, No. WD 56802, 2000 Mo. App. LEXIS 831, at *31 (Mo. Ct. App. May 30, 2000) (finding that the Missouri "Attorney General has common law authority to appoint special assistants"); *Pickering v. Hood*, No. 2010-CA-881-SCT, slip op. ¶ 17 (Miss. May 24, 2012) (agreeing that the Mississippi Attorney General "has common-law 'authority to negotiate and enter into contingency fee agreements with retained counsel for civil litigation on behalf of the State'" if the fee is paid from the statutorily mandated fund), P.A. Vol. I, LPS205. *But see Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997) (finding under Louisiana law, where the Attorney General does not retain common law authority, that retaining outside counsel on a contingency fee was an improper appropriation of state funds absent a specific statutory grant to do so).

B. NRS 228.110 Does Not Prohibit the Attorney General from Engaging Outside Counsel to Assist in an Investigation or Litigation

Contrary to LPS's assertions, no Nevada statute expressly bars the Attorney General from hiring outside counsel. Relying on NRS 228.110(2), LPS argues that the Attorney General, as an officer in the Executive Department of the government, is precluded from retaining outside counsel unless the Attorney General is disqualified or the legislature specifically authorizes the hire. LPS Pet. 11. LPS misreads both the text and intent of that statute.

1. NRS 228.110 Prohibits Executive Department Agencies From Hiring Outside Counsel to Represent Them in Place of the Attorney General

Chapter 228 of the Nevada Revised Statutes sets forth qualifications for the Attorney General and the duties and responsibilities that fall within the Attorney General's Office. Section 228.110 specifically addresses the Attorney General's authority within the Executive Department of the state government:

> NRS 228.110 **Legal adviser on matters arising in Executive Department; limitation on employment of private attorney.**
>
> 1. The Attorney General and the duly appointed deputies of the Attorney General shall be the legal advisors on all state matters arising in the Executive Department of the State Government;
>
> 2. 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 until the Attorney General and the deputies of the Attorney General are disqualified to act in such matter or unless an act of the Legislature specifically authorizes the employment of other attorneys or counselors at

law.

3. All claims for legal services rendered in violation of this section shall be void.

NRS 228.110. The plain language of the statute, its legislative history and the Attorney General's interpretation of the statute all lead to one conclusion: NRS 228.110 was intended to protect, and not limit, the Attorney General's authority as Nevada's chief legal officer.

a. The Plain Language of NRS 228.110 Establishes that Executive Department Agencies Cannot Replace the Attorney General with Independently Hired Counsel of Their Own Selection

LPS quotes selectively from Section 228.110 in asking this Court to limit the Attorney General's authority and discretion to staff the cases her office is handling in the manner she deems efficient, effective and appropriate. Section 228.110 must be read in its entirety to be interpreted properly. *Cable v. State*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006) ("subsections of a statute will be read together to determine the meaning of that statute").[31] This rule of statutory interpretation applies with particular force here, where the statute sets out a general purpose followed by a specific prohibition intended to eliminate the chief obstacle to achieving that general purpose. *Roney v. Buckland*, 4 Nev. 51, 57 (1868) (observing "it is not [i]nfrequently the case that the general object or purpose is perfectly clear, whilst the details and means prescribed for carrying such purpose into execution are crude and contradictory").

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[31] *In re Phillip A.C., II for Adoption of a Minor Child*, 122 Nev. 1284, 1293, 149 P.3d 51, 57 (2006) (instructing "[w]hen construing a specific portion of a statute, the statute should be read as a whole"); *Charlie Brown Constr. Co. v. City of Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990) (stating "[i]t is elementary that statutes [and other enactments] must be construed as a whole"), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

Subsection (1) of NRS 228.110 demonstrates the purpose and defines the reach of the statute: "The Attorney General and the duly appointed deputies of the Attorney General shall be the legal advisers on all state matters arising in the Executive Department of the State Government." The statute *then* in Subsection (2) limits the hiring of outside counsel to instances in which either the Attorney General is disqualified or the Legislature authorizes the hiring. NRS 228.110(2). When the first and second subsections of the statute are read together, it is clear that NRS 228.110 constrains the ability of executive agencies to engage counsel *other than* the Attorney General, not to restrict the Attorney General's own authority to hire outside counsel to work with her on a particular matter. LPS's reading of the statute would narrow the Attorney General's ability to carry out the work of her office without advancing the purpose of the Section: to establish the Attorney General as *the* "legal advisor" to the Executive Department. Related sections of the code – here, Chapter 228 – should be read to harmonize; LPS's interpretation of Section 228.110 fails because it undermines the larger purpose and directives of Chapter 228. *See Rose v. First Fed.*, 105 Nev. 454, 457, 777 P.2d 1318, 1319 (1989) ("It is our duty, so far as practicable, to reconcile the various provisions so as to make them *consistent* and *harmonious*.")[32]

Courts in other states have construed similar statutes as protecting the attorney general from intrusion upon her powers by other state officers, not limiting the attorney general's own powers. *See, e.g., Sec'y of Admin. & Fin. v. Att'y Gen.*, 326 N.E.2d 334 (Mass. 1975) (holding statute appointing Massachusetts's attorney general as state's principal legal representative precluded Massachusetts governor from appointing other counsel to represent state agency when attorney general refused to pursue an appeal). If, however, the Court is

[32] Further, "[t]he court must, if possible, and if consistent with the intention of the legislature, give effect to all the statutory provisions in controversy, and to every part of them." 105 Nev. at 457, 777 P.2d at 1319.

persuaded that both the State and LPS have asserted plausible interpretations drawn from the text of NRS 228.110, the plain meaning rule "has no application" and the Court must turn to the legislative intent that can be derived from the statute's history. *Hotel Empls. & Rest. Empls. Int'l Union v. Nev. Gaming Control Bd.*, 103 Nev. 588, 591, 747 P.2d 878, 880 (1987).

b. Chapter 228's Legislative History Supports The State's Interpretation of NRS 228.110(2)

The legislative branch's revisions and pronouncements related to NRS 228.110 over many years make clear its purpose to protect the role of the Attorney General as the chief legal officer for state government. Moreover, the failure of the Legislature, despite its awareness of the Attorney General's use of outside counsel in affirmative litigation, to take any steps to limit the authority of the Office in this regard indicates the Legislature's acceptance of the Attorney General's engagement of outside counsel.

In 1963, the Legislature amended NRS 228.110 to replace "State of Nevada" with the "Executive Department." Assemb. B. 543, 1963 Legis. (as approved Apr. 26, 1963). At that time, the Legislative Counsel Bureau was created, giving the Legislature its own, independent counsel. This amendment underscores the Legislature's intent to maintain the Attorney General's position as the chief lawyer for the Executive Department as well as the State unless other counsel is designated by statute.

In 1992, certain legislators questioned the Attorney General's authority to hire outside counsel to intervene in a public lands dispute. Figueroa Aff. ¶ 7, P.A. Vol. I, LPS127. The Legislature held a hearing on the issue, where the Attorney General, then Frankie Sue Del Papa, asserted her authority to hire outside counsel and the chairman of the Committee on Public Lands suggested that a bill be introduced to limit the discretion of the attorney general to hire outside counsel.

Id. This issue was raised again fifteen year later, in 2007, when the Nevada Legislature considered a proposed bill requiring the Attorney General to create a written record of her determinations to retain outside counsel. *See* S.B. 89, 2007 Leg., 74th Leg. During hearings on the bill, the Senate Judiciary Committee rejected *as redundant* an amendment to NRS 228.110 that would have asserted the primacy of written opinions by the Attorney General over those by counsel retained by other agencies. Minutes of the Senate Committee on Judiciary Hearing on S.B. 89, March 12, 2007, http://www.leg.state.nev.us/Session/74th2007/Minutes/Senate/JUD/Final/503.pdf. Ultimately, the Legislature did not pass the bill, declining the opportunity to exercise more oversight over the Attorney General's decision-making. Again, 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.

In the course of considering amendments to NRS 41.03435 in 2007, the Legislative Counsel Bureau provided an official summary of the proposed legislation and context, which included a description of NRS 228.110. That official synopsis confirms that the Legislature shared the Attorney General's understanding of the statute's scope: "Under existing law, the Attorney General is the legal adviser on all state matters arising in the Executive Department of State Government and represents all entities in the Executive Department unless the Legislature has enacted legislation specifically authorizing the employment of private legal counsel." S.B. 89, 2007 Leg., 74th Leg. (as introduced by Senate Feb. 13, 2007). This summary supports the Office's interpretation: 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 instead of the Attorney General, not to restrict the Attorney General's power to take the necessary steps, including

enlisting the assistance of outside counsel, to carry out her duties as chief legal officer.

Nevada's Attorneys General have exercised their authority to hire outside counsel repeatedly over at least the last twenty years and the Legislature has not considered, let alone passed, a bill that limits the attorney general's authority to hire contingency fee counsel.[33] In 2010, Senator Raggio filed a bill draft request, announcing his intention to introduce a bill that would enact provisions "regulating contingency fee contracts between certain governmental agencies and private attorneys," but he subsequently withdrew the request and no legislation was ever introduced.[34] The Legislature's decision not to act – then, before, or since – must be interpreted as acquiescence to, if not tacit approval of, the Attorney General's use of outside counsel. *Meridian Gold Co. v. Dep't of Taxation*, 119 Nev. 630, 637, 81 P.3d 516, 520 (2003) (legislature's failure to amend statute to correct administrative interpretation codified in regulation is interpreted as acquiescence); *Dep't of Taxation v. DaimlerChrysler Servs. of N. Am., LLC*, 121 Nev. 541, 548,

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[33] Certainly, model legislation can be found in the handful of states that have taken such action. *See* 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 Dayton L. Rev. 173, 182-83 (2006) (noting that, as of 2006, seven states (Colorado, Connecticut, Kansas, Minnesota, North Dakota, Texas, and Virginia) had adopted legislation that regulates the manner in which attorneys general may enter into contingency fee agreements); Fla. Stat. § 16.0155 (requiring the Florida Attorney General to: make certain findings before hiring outside counsel on a contingency fee, limit any fee to $50 million, and provide copies of retention agreements on the internet); Ariz. Rev. Stat. § 41-191D (limiting outside counsel retained by the Arizona Attorney General to a fee not exceeding $50 per hour). NRS 41.03435, moreover, demonstrates that the Legislature is capable of setting forth particular limits on the employment of outside counsel with clarity.

[34] *See* Bill Draft Request List, 2011 Leg., 76th Sess., BDR 27-70 (Mar. 24, 2010), available at http://www.leg.state.nv.us/Session/76th2011/BDRList/page.cfm?showAll=1 (last visited Sept. 7, 2012).

119 P.3d 135, 139 (2005) (rejecting interpretation offered to resolve statutory ambiguity where legislature could enact a clear provision and has not done so).

c. The Attorney General Has Long and Consistently Interpreted NRS 228.110 to Limit Executive Department Agencies' Ability to Hire Outside Counsel in Place of the Attorney General but Not the Attorney General's Ability to Hire Outside Counsel to Work with the Office

The Attorney General has previously opined that NRS 228.110 limits agencies' ability to seek counsel other than the Attorney General, except in prescribed circumstances. *See, e.g.*, Nevada Industrial Commission, 57-243 Op. Att'y Gen. (Mar. 1, 1957) ("It is the feeling of this office that it was the intent of the Legislature to prevent state departments from hiring their own attorneys unless the Attorney General and his deputies were disqualified or unless the Legislature had specifically authorized the hiring of such attorney by legislative enactment."), P.A. Vol. I, LPS157. As discussed above, the Legislature's failure to correct this interpretation in the many years since it was issued must be interpreted as legislative acquiescence.

As described in the Facts section and Section II.A.2 *supra*, the Office has entered into contracts for legal services with private law firms a number of times during the last two decades years. The Office's conduct in making these arrangements has been uniform and consistent with its understanding of its authority under Chapter 228.

The Office's interpretation of NRS 228.110 is reasonable and therefore entitled to deference – even if the Court believes that the plain language is ambiguous and finds LPS's interpretation equally reasonable. *DaimlerChrysler*, 121 Nev. at 548, 119 P.3d at 139 (affirming that agency's opinion on application of an ambiguous statute deserves deference).

2. NRS 228.110 Does Not Bar the Attorney General from Hiring Outside Counsel to Assist the Office in Litigation Led by the Attorney General

NRS 228.110(2) expressly contemplates the possibility that an Executive Department official might want to "employ any attorney at law or counselor at law *to represent the State*" in place of the State's top lawyer – the elected Attorney General – and forecloses such an action. Even if NRS 228.110 were interpreted to impose the same limits on the Attorney General's Office that it places on other Executive Department agencies, NRS 228.110 would not prohibit the arrangement with outside counsel that exists here. The dispositive fact in determining whether an agency has run afoul of NRS 228.110(2) is whether or not the Attorney General represents the State.[35] The Attorney General represents the State in its litigation against LPS. The Office has not hired outside counsel to replace the Attorney General and the Office. Outside counsel has been hired on a contract basis to assist the Office, and work under the Office's close supervision, on litigation that has been contractually specified by the Office. No genuine dispute regarding the Office's leadership role, and CMST's subordinate role, can be argued here.

In its Federal Complaint, LPS incorrectly, and without any factual basis, asserts that the Attorney General ceded control of this case to outside counsel, resulting in a violation of LPS's due process rights. LPS's Compl. ¶¶ 1, 8-35, P.A. Vol. I, LPS062-070. As explained above, LPS raised the due process violation as grounds for denying the State's Motion to Associate Counsel. LPS Opp'n 3, P.A. Vol. I, LPS219. Under these circumstances, LPS had the burden of offering facts showing that the Office ceded control of the case to CMST. LPS offered no basis for its bald assertions that CMST alone, rather than the Attorney General's Office:

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[35] This interpretation of the Section is supported by the lead exception to the Section's general prohibition. Executive Department agencies may hire outside counsel to represent the State when the Attorney General is "disqualified to act in [the] matter." *Id.*

made document requests to LPS, served subpoenas, "conducted the underlying investigation," directed discovery, formed legal conclusions, and drafted State's Complaint. LPS's Compl. ¶¶ 11-17, P.A. Vol. I, LPS065-068. LPS did not even plead facts that could give rise to such an inference. Indeed, LPS's contentions were undercut by the State's contract with CMST, which LPS attached to its Federal Complaint. Contract, P.A. Vol. I, LPS078-090. In contrast, the State submitted an affidavit in support of its Motion to Associate Counsel, providing a description of the Office's use of outside counsel historically and in its case against LPS. Figueroa Aff., P.A. Vol. I, LPS127-130.

The Nevada Attorney General's Office recognizes and strives to fulfill its duty to serve justice by ensuring a fair outcome in every case that it prosecutes. The Office is particularly cognizant of this obligation in the context of engaging outside counsel and understands that its attorneys must place the public interest above any perceived financial interest that outside counsel may have in the litigation. To do so, the Office "retain[s] complete control over the course and conduct of the case."[36] The Office's control is explicitly set forth in the contract

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[36] This standard of conduct comes from the California Supreme Court's decision in *County of Santa Clara v. Atlantic Richfield Co.*, 235 P.3d 21, 28 (Cal. 2010), *cert. denied*, 131 S. Ct. 920 (2011) – the leading authority on safeguarding due process where outside counsel are retained on a contingency fee basis to represent a public entity. The California Supreme Court held that where the government entity supervises the private lawyers and retains control over the litigation, contingency fee arrangements do not "infringe upon fundamental constitutional rights." *Id.* Supervision and control turn, ultimately, upon whether the government is controlling the overall scope and direction of the litigation and making the critical, discretionary decisions. *Id.* at 39. According to *Santa Clara*, a government agency's contingency fee arrangement is proper where it provides "(1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation." *Id.* at 40; *see also Lead Indus.*, 951 A.2d at 477 (adopting similar guidelines for control of

between the State and outside counsel. *See* Contract ¶ 1.1, P.A. Vol. I, LPS133 (acknowledging the Attorney General's "final and exclusive authority over all aspects of this case, including settlement decisions" even over CMST's objection); ¶ 1.2, P.A. Vol. I, LPS133 (requiring CMST to provide drafts of all court filings to the Attorney General to review before filing and the Office to approve any policy positions); ¶ 8.1, P.A. Vol. I, LPS139 ("[CMST] shall acknowledge and defer to the Attorney General for direction and decisions;" and "the Attorney General will be actively involved in all stages of this matter and deciding all major issues"); ¶ 8.3, P.A. Vol. I, LPS139 (directing the Attorney General to review "all pleadings, petitions, findings and any other document produced in the pursuit of this matter"); ¶ 10, P.A. Vol. I, LPS139 (CMST must receive the Attorney General's approval to notice any depositions, and provide summaries of those depositions to the Attorney General immediately).[37]

In the instant case, there can be no question that the Attorney General's Office has retained and exercised sufficient control and direct involvement to outweigh any concerns over the interest of outside counsel. As laid out in Facts section, *supra*, the Attorney General's Office has, by contract and in fact, controlled every aspect of this case. It made the decision to begin the investigation

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outside counsel). Both *Santa Clara* and *Lead Industries* involved public nuisance theories, which some courts have characterized as a quasi-criminal proceeding that should trigger heightened scrutiny of due process. Whether the same standard should apply to the State's civil enforcement of the Deceptive Trade Practices Act is an undecided question.

[37] The State's contract with CMST has been cited as a model of public integrity by legal scholar David Wilkins of Harvard Law School. *See* David Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The case of 'substitute' attorneys general,* 2010 Mich. St. L. Rev. 423, 464 (Summer 2010) (citing Nevada Attorney General's contract with CMST as a model and noting "the contract lays out in great detail Cohen Milstein's obligation to litigate the case in a manner that allows the Attorney General to ensure that the public's interest is protected – as the Attorney General defines these goals").

against LPS and to file the State's Complaint against LPS. Figueroa Aff. ¶¶ 10, 12-13, 19-20, P.A. Vol. I, LPS128-129. The Office has issued all subpoenas in the case, participated in negotiations with LPS about its compliance, and overseen all filings. *Id.* ¶¶ 10, 12, 15-16, 20, P.A. Vol. I, LPS128-129. LPS has had, and taken advantage of, direct contact with attorneys in the Attorney General's Office, all the way up to the Attorney General herself. *Id.* ¶¶ 13-16, 20-23, 25, P.A. Vol. I, LPS128-130. LPS attorneys and lobbyists have talked by phone and met privately with the Attorney General and her staff, without the participation of outside counsel. *Id.* ¶¶ 23-25, P.A. Vol. I, LPS129-130. The Attorney General herself has been present at every settlement meeting in this case and has overseen all settlement-related decisions in this case. *Id.* ¶¶ 21, 22, 24, P.A. Vol. I, LPS129-130.

LPS is acutely aware of these facts and did not contest their accuracy in the trial court proceeding. As such, LPS cannot argue here that the Attorney General's Office has ceded control of this litigation to outside counsel.[38] The only conclusion that can be drawn from these facts is that the Attorney General hired outside counsel to assist, but not replace, the Office in its investigation and

[38] When presented with due process complaints under similar circumstances, courts uniformly have rejected defendants' claims that the involvement of contingency fee counsel infringes upon defendants' rights. *See, e.g., Santa Clara*, 235 P.3d at 41 (holding that use of outside counsel conforming to principles articulated by the court would not violate due process); *Lead Indus.*, 951 A.2d at 475-77 (finding no deprivation of rights where attorney general retains absolute and total control of the litigation); *Glendening*, 709 A.2d at 1243 (finding that no due process violation exists where the attorney general retained "the authority to control all aspects of outside counsel's handling of the litigation"); Minute Order, *Okla. ex rel. Edmondson v. Tyson Foods*, No. 05-CV-0329 (June 15, 2007 N.D. Okla.), ECF No. 1187 (summarily denying defendant's motion to dismiss, which argued that the Oklahoma Attorney General retention of contingency fee counsel violated due process).

prosecution of the State's case against LPS; such conduct does not run afoul of even the broad interpretation of NRS 228.110 that LPS urges this Court to accept.

CONCLUSION

As a matter of law, the Attorney General has the authority to hire outside counsel. No Nevada statute limits that authority as LPS asserts. Restricting the Office's ability to use outside counsel on a contingency fee basis would set back the Attorney General's ability to carry out her functions and unnecessarily constrain her ability to protect consumers, punish and deter wrongdoing, and, enforce the law, particularly where she has exclusive powers or authority.

For the foregoing reasons, the State respectfully requests that the Court: (1) deny LPS's request for a *writ* of *mandamus*, and; (2) declare that NRS 228.110 does not limit the Attorney General's authority, arising under the Nevada Constitution, Nevada Revised Statutes and common law, to retain outside counsel.

On August 24, 2012, the U.S. Chamber of Commerce requested permission to file an *amicus curiae* brief in support of LPS's Petition; the motion is currently pending. If the motion is granted, the State will request an opportunity to address the arguments presented in this *amicus* brief. The Chamber's brief was filed late and raises different grounds for granting the relief that LPS seeks than LPS presented in support of its own Petition.

Respectfully submitted this 10th day of September 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on September 10, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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

s/ Vicki Beavers
Vicki Beavers, an employee of the office
of the Nevada Attorney General

CERTIFICATE OF COMPLIANCE

Finally, I hereby certify that I have read this appellate 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21.

Dated this 10th day of September 2012.

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