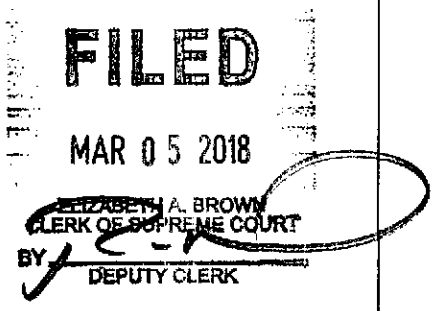
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TANYA WALLACE,
Appellant,
vs.
SHAFER C. SMITH,
Respondent.

No. 70574



ORDER OF AFFIRMANCE

Tanya Wallace appeals from district court orders denying a motion for reconsideration and granting a motion for determination of good faith settlement.[1] Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

David Wallace, appellant's former husband, sued respondent Shafer C. Smith, now professionally known as "Ne-Yo," for damages under a talent management contract. While litigation was pending, Wallace divorced his wife, Tanya, and the divorce decree awarded Tanya one-half of the proceeds from any future judgment in the lawsuit. The district court later dismissed the case and while Wallace's appeal was pending he passed away. The Nevada Supreme Court subsequently reversed the district court, *see Wallace v. Smith*, Docket No. 60456 (Order Affirming in Part, Reversing in Part and Remanding, September 26, 2014), and upon remand Wallace's

[1]Tanya also gave notice of appeal of district court orders granting Smith's motion to supplement the record, and denying Tanya's motion to bifurcate. However, Tanya does not address those orders in her opening brief, and thus, this court does not consider those appeals. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court need not consider arguments not adequately briefed, not supported by relevant authority, and not cogently argued).

two daughters, as administrators of the estate, proceeded with the case. Tanya continued to monitor the case.

Smith moved the district court for summary judgment against Wallace's Estate. During the hearing, Tanya orally moved to intervene, which was granted. Tanya then requested a continuance to oppose Smith's motion for summary judgment, but the district court denied her request and granted partial summary judgment on an issue that was unopposed by Wallace's Estate.

Tanya moved the district court for reconsideration of its order granting partial summary judgment, but the district court denied Tanya's motion. Thereafter, Smith and Wallace's Estate settled the case and filed a motion for a determination of good faith settlement, which was granted over Tanya's objections.[2]

On appeal, Tanya argues that the district court abused its discretion by denying her motion to reconsider the granting of partial summary judgment and granting Smith's and Wallace's Estate's joint motion for determination of good faith settlement.[3] We disagree.

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[2]We do not recount the facts except as necessary to our disposition.

[3]Our colleague believes we should dismiss this appeal without reaching the merits on grounds that Tanya does not have standing to maintain this appeal. While we agree with our concurring colleague that appellate courts generally may sua sponte question jurisdiction on appeal, we conclude that in this case we are constrained by the Nevada Supreme Court's ruling that Tanya has standing to appeal. *See Wallace v. Smith*, Docket No. 70574 (Order Regarding Motions, September 5, 2017) (denying respondent's motion to dismiss, which was based in significant part on Smith's contention that Tanya lacked standing to appeal, and concluding this court has jurisdiction to consider the appeal). We also note that Smith, during oral argument, conceded that Tanya has standing to appeal. Accordingly, we must address this case on the merits.

Tanya first argues that the district court abused its discretion by denying her motion to reconsider the granting of partial summary judgment because she provided new issues of fact, rendering partial summary judgment inappropriate. Despite the fact that Tanya retained the same counsel that filed the lawsuit and was monitoring the case, she never filed a written motion to intervene, nor a written opposition to the motion for summary judgment. Thus, by failing to intervene sooner and oppose Smith's motion for summary judgment, she consented to the court's decision to grant the motion. *See* EJDC 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same."). Further, under these facts, the district court properly granted partial summary judgment because Wallace's Estate agreed with Smith and did not oppose the issue within in its opposition. Substantively, Tanya's motion for reconsideration did not provide substantially different evidence or show that the district court's decision was clearly erroneous. *See Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."). Accordingly, the district court did not abuse its discretion by denying Tanya's motion for reconsideration.

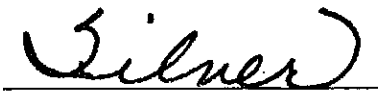
Next, Tanya contends that the district court abused its discretion by granting Smith's and Wallace's Estate's motion for determination of good faith settlement because the settlement was unreasonable. She further contends that Wallace's Estate did not adequately represent her interests and that Wallace's Estate and Smith colluded to keep her out of settlement negotiations. We review a district

court's determination of good faith for an abuse of discretion. *Velsicol Chem. Corp. v. Davidson*, 107 Nev. 356, 360, 811 P.2d 561, 563 (1991). We will uphold the district court's decision so long as it is supported by substantial evidence: "that which a reasonable mind might accept as adequate to support a conclusion." *Otak Nev., LLC v. Eight Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (internal quotation marks omitted). "This standard of review vests the district court with considerable discretion." *Doctors Co. v. Vincent*, 120 Nev. 644, 652, 98 P.3d 681, 687 (2004).

Our review of the record reveals the district court properly considered the relevant factors and determined the settlement was made in good faith, was reasonable, and its decision is supported by substantial evidence. *See Otak*, 129 Nev. at 805, 312 P.3d at 496 (holding that factors such as "[t]he amount paid in settlement, the allocation of the settlement," the defendant's financial condition, and the existence of fraud or collusion are relevant though not exclusive factors for determining a good faith settlement (alteration in original) (internal quotation marks omitted)). Here, Wallace's Estate had every incentive to recover the greatest amount of money in the settlement as 50 percent of the judgment would be turned over to Tanya. Further, Tanya's opposition to the good faith settlement was without merit because Tanya failed to present any evidence of collusion or

lack of prosecution in this case. Thus, the district court did not abuse its discretion by granting the motion for good faith settlement. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., concurring:

Tanya Wallace doesn't possess legal standing to maintain this appeal, and I would just dismiss it without reaching the merits.

I.

This case seems to have the trappings of a classic morality tale of right, wrong, and redemption. It involves, on the one hand, a local kid who made good and against all odds became an internationally famous singer, songwriter, and producer; on the other hand, the manager he once signed a contract with when young and who claims to have been callously left behind on the road to fame and fortune, and who tragically died before justice could be done, leaving his heirs to see things through. It seems imbued with its own built-in drama. So it may seem a buzz-kill for me to object on grounds of something like "standing." Structural questions about "standing" don't make for interesting reading, whether in story-telling or

even in judicial opinions whose readability is generally pretty low to begin with. But they may be the most legally important thing about this entire case.

During oral argument, the parties represented that they mutually agreed to "stipulate" that Tanya possessed legal standing to bring this appeal. But whether a party has standing is a question that goes to the court's jurisdiction, and questions of jurisdiction can never be waived or stipulated away by the parties. Furthermore, they may be raised at any time, even *sua sponte* by the court for the first time on appeal. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964-65, 194 P.3d 96, 105 (2008); *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002). This is so because questions of jurisdiction go to whether the court has the fundamental power to grant the requested relief and enforce its own judgment. If the court has no power to grant relief—either because it lacks jurisdiction over the subject matter, an indispensable party is absent from the litigation, the dispute is moot or not yet ripe, or a party does not have the legal right to seek or receive the requested relief—then its ruling is legally void and not much more than a meaningless advisory opinion whether or not any party raised a timely objection below. *See State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) ("There can be no dispute that lack of subject matter jurisdiction renders a judgment void."). A failure of subject matter jurisdiction cannot be waived because parties cannot artificially invest a court with a power it does not constitutionally have by ducking their heads and pretending the problem doesn't exist. *Vaile*, 118 Nev. at 276, 44 P.3d at 515-16 ("subject matter jurisdiction cannot be waived"); *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (subject matter jurisdiction "cannot be conferred by the

parties"). Consequently, whether raised and briefed by the parties or not, Tanya's standing, or lack thereof, is a critical matter that must be addressed before we even get to the merits, if any, underlying her arguments.

II.

Tanya isn't a signatory to the contract that is the basis of this lawsuit. She was merely married to someone who was. She asserts that she has an interest in the outcome of the litigation because the marriage was domiciled in Nevada, a community-property state, and Nevada's community property laws entitle her to 50% of anything that her now-deceased ex-husband earned during the marriage, and the proceeds of this contract constitute income earned during the marriage.

All of that is correct, as far as it goes. But Tanya takes it much too far. It's true that Nevada's community property laws entitle her to a 50% interest in anything her ex-husband earned while alive. But that doesn't make her a signatory to his business contracts. It doesn't give her an interest in the contract itself. It only gives her an interest in any proceeds that might be collected under it. Those are two different things. The difference lies in the question of who has privity with whom. Tanya has a relationship of privity with her ex-husband by virtue of her marriage to him, and therefore has a right to recover a share of proceeds from him. But marriage to one contracting party creates no privity with the other. Merely because Tanya was married to Wallace does not mean she has any sort of legal privity with Ne-Yo entitling her to sue him.

Thus, Nevada's community property laws entitle her to any money collected under the contract by her ex-husband's estate, but no legal right to sue other parties to enforce the contract itself. As a non-party to the contract, she couldn't have sued Ne-Yo herself for breaching the

contract. So the question here is: can she file an appeal seeking to overturn a judgment regarding the same contract that she couldn't have sued to enforce in the first place?

I think the answer is no. There may be some hypothetical instances where something like that might be possible; maybe one can imagine some situations in which a party can acquire standing to appeal something that it didn't have standing to sue on initially. But this isn't one of those cases.

III.

Tanya was never named as a party to the initial complaint filed by her ex-husband's estate, and Ne-Yo's answer never asserted any counterclaims or third-party claims against her. Tanya, then, wasn't a party to the lawsuit, in any capacity, for much of the early stages of the litigation. Then, deep into the district court proceedings, Ne-Yo filed a motion for summary judgment that the husband's estate chose not to oppose. At that point, on the date the motion was supposed to be decided, Tanya suddenly made a last-minute oral request for leave to intervene.

Rather than do the easy and obvious thing that courts usually do with last-minute oral requests unaccompanied by moving papers setting forth legal analysis and properly noticed and served on any opposing party, the district court decided to grant Tanya's request. It did so despite two glaring problems. First, Tanya's request didn't meet the requirements of NRCP 24. Rule 24 permits a non-party to intervene in "an action," not in a single event such as a motion. NRCP 24 ("Upon timely application anyone shall be permitted to intervene in an action"). Here, Tanya sat on the sidelines and let her ex-husband's estate handle the entirety of the litigation. She had her attorney attend every hearing in order to keep an

eye on things, and was apparently satisfied with everything she saw right up until the moment that the summary judgment motion went unopposed. At that point, she sought to intervene at the last moment in order to oppose a motion that the other parties in the action chose not to.

But that's not how Rule 24 intervention is supposed to work. A party may intervene in "an action" only when it meets certain criteria. Among them is that the party must possess an interest in the outcome of the litigation that is not "adequately represented by existing parties." NRCP 24(a). But that standard is tested by whether the intervenor's interests in the outcome of the case diverge from those of existing parties, not whether the intervenor agrees with every tactical move that the current parties might want to make during the course of the suit. "If an applicant for intervention and an existing party share the same ultimate objective," then courts presume that the party adequately represents the interests of the non-party.[4] *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011); *see Texas v. United States*, 805 F.3d 653, 661 (5th Cir. 2015) ("when the would-be intervenor has the same ultimate objective as a party to the lawsuit," then the party is presumed to adequately represent the interests of the non-party). This presumption may only be overcome by a "compelling showing" that the non-party's interests are not being adequately represented. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

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[4]Where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this court in applying the Nevada Rules. *See Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

Here, Tanya shares, under community property law, a 50% interest in any proceeds collected from the litigation. Her interest in the ultimate outcome of the litigation is therefore identical to that of her husband's estate: she gets half of what the estate wins, and nothing if the estate gets nothing. There is no "divergence" in their interests in any sense of the word, and thus she shouldn't have been permitted to intervene in the case at all, much less permitted to interject herself into the middle of a pending summary judgment motion that didn't target her.

Indeed, there's some indication that Tanya seemed to be aware of this problem throughout the early stages of the litigation, as she instructed her attorney to attend every relevant proceeding and yet chose to do nothing more than watch, apparently satisfied to let the estate safeguard her interests until the day of the summary judgment hearing came about and Ne-Yo's motion stood unopposed. Only then did she seek to intervene for the first time in order to file her own opposition. But disagreeing with the tactical choices made by other parties in responding to a single motion isn't a "divergence of interests" in the outcome of the entire "action." It's just a disagreement on tactics by a non-party possessing the same interest in the overall outcome of the case. And a disagreement regarding tactics has nothing to do with NRCP 24.

IV.

Whether or not Tanya's request met the standards of NRCP 24 when made, the second and more fundamental problem here is that Tanya lacks standing to appeal anything that happened during the case because of how she handled the litigation after intervening.

After entering the case, Tanya participated in some motion practice, including filing a motion seeking reconsideration of the summary

judgment motion. Later, she filed a motion seeking leave to amend the complaint and file her own complaint-in-intervention adding allegations of unjust enrichment, fraud, breach of fiduciary duty, and punitive damages. However, the district court denied leave in a written order, partly because Tanya's request was belatedly filed only a week before trial was scheduled to commence, and partly because Tanya's new causes of action went beyond her status as an intervenor to assert allegations unrelated to the underlying action. Tanya does not now appeal from this denial, so the question of whether she ought to have been allowed to assert any claims in district court is not before us and is now closed. (Tanya did file a petition seeking emergency interlocutory relief from the Nevada Supreme Court which the court summarily denied without reaching the merits, and Tanya does not re-assert those issues in this appeal so any challenge to them is waived).

The bottom line is that Tanya never asserted any claims against any other party in the action, and no other party asserted any claims against her. So, Tanya is neither a named plaintiff nor a named defendant on any claim pending in the lawsuit. Why does that create a standing problem? Because no appealable final judgment has ever been entered for or against her on any claim in which she is actually either a plaintiff or defendant.

"This is a court of limited appellate jurisdiction. Specifically, this court has jurisdiction to entertain an appeal only where an appeal is authorized by statute or court rule." *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994). Thus, "this court has jurisdiction to entertain an appeal only where the appeal is brought by an aggrieved party. NRAP 3(a) limits the right of appeal to 'parties aggrieved' by a district court's decision." *Id.* at 446, 874 P.2d at 734 (italics and internal

brackets omitted). Moreover, "[t]his court has consistently taken a restrictive view of those persons or entities that have standing to appeal as parties." *Id.*

A party does not have standing to appeal when "it was never named as a party to the lawsuit." *Id.* at 447, 874 P.2d at 734. Here, though weirdly permitted to enter the case as a free-floating intervenor, Tanya is not a party to any claim on which a final appealable order was entered either for or against her. She therefore has no right to appeal because there is nothing for her to appeal on her own behalf, and she has no right to appeal any judgment entered on claims that did not involve her on behalf of parties other than her. Consequently, I would dismiss the entire appeal without reaching the merits of any argument raised in the briefing.

V.

Tanya's lack of standing isn't merely a minor technical glitch that the parties can stipulate away in order to get to arguing about the merits. It's a constitutional defect. Fundamentally, the doctrine of "standing" is a structural limitation on judicial power, inimical to the preservation of liberty, that operates to ensure that courts act like courts and not like legislatures by preventing them from issuing advisory opinions on questions of general policy that have not been raised or litigated by an injured party possessing a concrete stake in a pending lawsuit. *See Camreta v. Greene*, 563 U.S. 692, 717 (2011) (Kennedy, J., dissenting) ("the judicial Power is one to render dispositive judgments, not advisory opinions" (internal quotation marks omitted)). It's what keeps courts from becoming involved in generalized political grievances best left to the other representative branches of government. *See Schwartz v. Lopez*, 132 Nev. ___, ___, 382 P.3d 886, 894 (2016) (to establish standing, a party must show

the occurrence of an injury that is "special," "peculiar," or "personal" to him and not merely a generalized grievance shared by all members of the public); *see also* James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 Brit. J. A. Leg. Stud. 85, 92 (2017) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), for the proposition that "standing imposed constitutional limits on Congress's power to authorize individuals to pursue generalized grievances, especially where the suits in question were seen as interfering with the executive branch primacy in law enforcement and thus threatening the separation of powers"); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229-30 (1993) ("By properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution.").

Indeed, issuing purely advisory opinions to address generalized political grievances is the very definition of legislating from the bench. *See In re Phandanouvong*, No. DG 08-10058, 2009 WL 3635877, at *1 (Bankr. W.D. Mich. Oct. 2, 2009) ("The court must decide issues presented for the purposes of resolving individual, concrete controversies, not to correct systemic wrongs by legislating from the bench."). If courts have the power to issue advisory opinions without needing to wait for a question to be raised by a party with standing, then they have legislative power that rightfully belongs to the Legislature. *See* Nev. Const. art. 4, § 1; *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). Courts would also possess executive power that rightfully belongs to the Governor, as the standing requirement is supposed to "ensure[ ] that the court is carrying

out its function of deciding a case or controversy, rather than fulfilling the executive's responsibility of taking care that the laws be faithfully executed." Roberts, Jr., *Article III Limits on Statutory Standing*, *supra*, at 1230. *See* Nev. Const. art. 5, § 7 (the Governor "shall see that the laws are faithfully executed"); *Galloway*, 83 Nev. at 20, 422 P.2d at 242 ("The executive power extends to the carrying out and enforcing the laws enacted by the Legislature."). As Chief Justice John Marshall warned, "[i]f the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision . . . [and] almost every subject on which the executive could act." *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984)). A world in which courts aren't confined by limitations of standing is one in which the judiciary is no longer just one branch of a co-equal and tripartite system of checks-and-balances, but rather the modern reincarnation of the judicial tyranny of the Sanhedrin Court of ancient Israel, possessing combined legislative, executive, and judicial authority over all the people. *See* Exodus 18:21–22; Numbers 11:16–17; Numbers 11:24–25; Deuteronomy 1:15–18; Deuteronomy 17:9–12.

VI.

In the federal courts, standing is a constitutional requirement originating in the "case or controversy" clause of Article III of the United States Constitution, and which also contains a second "subconstitutional 'prudential' element" as well. *In re Amerco Derivative Litigation*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011). The Nevada Constitution doesn't contain a "case or controversy" clause. *See* Michael W. Bowers, *The Nevada State Constitution: A Reference Guide* 84 (Greenwood Press 1993) ("The

Nevada Constitution does not include the 'cases and controversies' language of the U.S. Constitution"). It does, however, contain a superficially similar clause stating that courts have jurisdiction over civil and criminal "cases." Nev. Const. art. 6, § 4. This clause has been interpreted to prohibit courts from ruling on matters not yet ripe for review or that have been rendered moot.. *See Boulet v. City of Las Vegas*, 96 Nev. 611, 613, 614 P.2d 8, 9 (1980) (mootness: license revocation appeal was rendered moot when appellant permitted license to expire before decision; courts cannot "render opinions on moot or abstract questions"); *State v. Viers*, 86 Nev. 385, 386, 469 P.2d 53, 53-54 (1970) (mootness: striking down, as violating both Nev. Const. art. 6, § 4 and the state's double jeopardy clause, a statute that authorized the judiciary to decide moot questions of criminal law after a defendant had already been acquitted at trial); *City of North Las Vegas v. Cluff*, 85 Nev. 200, 452 P.2d 461 (1969) (ripeness: "The question here is whether or not the validity of a proposed legislative act can be ruled upon in advance of its enactment. The answer is that it cannot.").

"Although state courts do not have constitutional Article III standing, Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief." *In re Amerco Derivative Litigation*, 127 Nev. at 213, 252 P.3d at 694 (internal quotation marks omitted), *citing Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). The basis for this is a little murky, though; I myself have called it a doctrine that we must follow, but in the end nothing more than a judicially created doctrine of convenience with no constitutional foundation. *See Schulte v. Fafaleos*, No. 68685, 2017 WL 2591346 (Nev. App. June 9, 2017) (Tao, J., concurring) ("in the courts of Nevada, the doctrine of standing is not a constitutional command but rather merely a judicially-created doctrine of

convenience"); *Padilla Constr. Co. v. Burley*, No. 65854, 2016 WL 2871829 (Nev. App. May 10, 2016) (same).

But, upon reflection, that may not be correct. Though the Nevada Supreme Court has not expressly grounded the doctrine of standing in the "case" requirement of the Nevada Constitution, it may well be rooted either there, or alternatively in the separation-of-powers clause of Nev. Const. art. 3, § 1 ("The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution."). This may be so because standing is, at heart, a separation-of-powers issue. *See Allen v. Wright*, 468 U.S. 737, 750 (1984) (the federal case or controversy requirement "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society.").

Thus, while the Nevada Constitution doesn't have a case or controversy requirement, it does have an express separation-of-powers clause that the federal Constitution does not. The concept of separation of powers is only implied in the structure of the federal Constitution, though very strongly and clearly implied. *See* Eleanore Bushnell & Don W. Driggs, *The Nevada Constitution: Origin and Growth*, 78 (Univ. of Nev. Press, 5th Ed. 1980) ("The Constitution does not expressly announce that the national government is dedicated to the theory of separation of powers, but the intention of the framers clearly emerges from the language they used"). In

contrast, it's much more explicit in the Nevada Constitution. *See id.* ("Nevada attempts a distinct separation"); *cf. Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1027, 1103-04 (2009) (discussing other differences between Nevada Constitution and U.S. Constitution). That the state Constitution has such an express clause while the federal Constitution does not suggests that the framers of the state Constitution took the concept of separation of powers more seriously than perhaps even the federal founders did. They may even have thought that the decades of experience between the adoption of the federal Constitution in 1788 and the drafting of the Nevada Constitution in 1864 showed that the federal articulation of the concept didn't go quite far enough, or at least wasn't clear enough. It seems rather odd, therefore, that at the same time the state founders omitted the "case or controversy" clause that gives rise to the federal "standing" doctrine. This makes little sense—unless it's possible that they thought that its purposes were already served by another provision which made it unnecessary. That provision could only be the separation-of-powers clause of art. 3, § 1 of the Nevada Constitution.

If I am wrong about that, let's think through what it means to say that standing is nothing more than a judge-made prudential doctrine. A doctrine of judicial convenience is one that rests on a weak foundation: it's just what the court prefers to do in a given case even though the power exists to do much more. Such a doctrine stands very low on the totem pole of rules that a court must obey. As I noted in *Padilla Construction*, "in the hierarchy of sources of law in which the United States Constitution stands at the top and pre-empts everything that conflicts with it, judicially-created doctrines of prudence are at the bottom and yield to all other superior sources of authority that conflict with them."

Judge-made rules can be overruled by statutes, regulations, or any other source of law superior to a mere common law judicial invention. *See Holliday v. McMullen*, 104 Nev. 294, 296, 756 P.2d 1179, 1180 (1988) ("The legislature has chosen to preempt the common law by enacting [a contradictory statute]"); *Orr Ditch & Water Co. v. Justice Court*, 64 Nev. 138, 164, 178 P.2d 558, 571 (1947) (in interpreting a statute, "where the intention to alter or repeal [a judge-made common-law rule] is clearly expressed, it must be given effect by the courts"). Consequently, if standing is a mere judicial creation with no other basis in law, then its requirements can be conferred, amended, or removed by the other branches of government without limitation through the enactment of superseding statutes or regulations.

That's a troubling proposition that, to me, seems to raise all sorts of potential constitutional problems. The doctrine of standing is supposed to be what confines courts to their traditional role of adjudicating disputes between injured parties seeking judicially cognizable relief. *See Daimler-Chrysler Corp.*, 547 U.S. at 341. But if judicial standing can be legislatively overruled, then the Legislature could, if it wanted, enact a statute requiring courts to hear and address generalized grievances even without an injured plaintiff seeking any relief the court could traditionally grant. But that comes perilously close to allowing the Legislature to confer legislative power upon the judiciary. Similarly, if an executive-branch agency can do the same thing through agency regulation, then that confers executive power upon the judiciary. If both branches can do that, then all governmental power, or at least much of it, could then be vested in a single branch. That strikes at the very heart of the tripartite structure of our state government and effectively abolishes the concept of checks-and-balances

"essential to the preservation of liberty" in favor of "a gradual concentration of the several powers in the same department." The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961), quoted in *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 640 (1952) (Jackson, J., concurring) ("the Constitution diffuses power the better to secure liberty . . . ."; "The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.").

One might think that, as a practical matter, the Legislature and the Governor would be unlikely to give away their power, and perhaps I'm just hypothesizing about things they'd never consent to. But is their consent needed? The real constitutional concern isn't whether or not the other branches might want to give away their constitutional powers by expanding the concept of standing; it's that the judiciary can simply expand its constitutional powers all by itself.

Judicially created rules of convenience are waivable by the courts that created them. A judge-made rule of convenience is simply that: a rule that courts apply when they want to, and don't apply when they don't want to. For example, in Nevada there's a judicial rule that arguments raised for the first time in a reply brief need not be fully considered. *See Moon v. McDonald Carano & Wilson*, 129 Nev. 547, 553 n.3, 306 P.3d 406, 410 n.3 (2013); *Francis v. Wynn Las Vegas*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011). The Nevada Supreme Court follows this rule, unless it chooses not to "in the interests of justice." *Bertsch v. Eighth Judicial Dist. Court*, 133 Nev. ___, ___, 396 P.3d 769, 772 (2017) ("Issues not raised in an appellant's opening brief are deemed waived unless this court, in its discretion, determines that consideration of those issues is in the interests

of justice" (quoting *Powell v. Liberty Mutual Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (internal quotation marks omitted)). There are plenty of other judicial rules that courts must follow, unless they conclude that the "interests of justice" permits them not to be followed. *See, e.g., Harte v. State*, 132 Nev. ___, ___, 373 P.3d 98, 101 (2016) ("in the interests of justice, a district court may deviate from the traditional order of evidence presentation" (citing *State v. Harrington*, 9 Nev. 91, 94 (1873)).

But as Oliver Wendell Holmes, Jr. observed, the phrase "interests of justice" is just a fancy (and highly subjective) way of permitting courts to do what they want without having to offer an actual reason based in law to explain why: "I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms." Michael Herz, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 Va. L. Rev. 111, 113 (1996).

If standing is nothing more than a judicial convenience with no more of a constitutional foundation than the rule that arguments raised for the first time in reply briefs need not be considered, then it's a rule that need not always be followed. Without a constitutional foundation, standing is simply whatever courts say it is. And that strikes me as a dangerous thing. If standing is nothing more than a self-imposed but entirely voluntary restraint—as opposed to an externally imposed structural constitutional restraint—then the only thing that keeps courts from acting as legislative bodies is simply a matter of will: a preference not to do so for the time being, but the power to do so any time it's deemed to be "in the interests of justice." It's true that there have been, and are, responsible judges sitting on our courts who take their judicial duties seriously and would never dare dream of abusing their power to its absolute limits. I

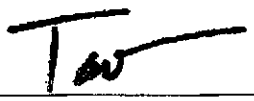
suggest nothing to the contrary. But who can speak for future occupants of the court? Just as ancient Rome was sometimes ruled by responsible Emperors, it was also sometimes ruled by terrible ones: for every Caesar Augustus there was a Caligula; for every Marcus Aurelius, a Nero. Whether our three branches of government can permanently remain separate and independent ought not depend on a question of mere personality, but rather on a question of fixed structure. *See* Benjamin M. Flowers, *An Essay Concerning Some Problems with the Constitutional-Doubt Canon*, 74 Wash. & Lee L. Rev. Online 248, 249 (2018) ("Members of the founding generation . . . understood that all mortals, even well-meaning ones, will tend to aggrandize their power, exercising authority they do not have").

In the end, "the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case." *Morrison*, 487 U.S. at 731 (Scalia, J., dissenting). "[T]he Framers considered structural protections of freedom the most important ones . . . The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *Nat'l. Fed. of Indep. Businesses v. Sebelius*, 567 U.S. 519, 707 (2012) (Scalia, J., dissenting). If the only source of "standing" recognized under Nevada law is the goodwill and convenience of the judiciary, there are no such structural rules or limitations on the exercise of judicial power in Nevada. We're no longer co-equal in power to the legislative branch. Rather, our power is far superior because it's unbounded by structural limits, and we can engage in legislative as well as judicial functions whenever we choose. We just choose not to. At least for now. But that could change in a heartbeat. All of which is why I'd much prefer that, in a future case, the Nevada Supreme Court

finally explore the relationship of the doctrine to, and its possible basis in, Nev. Const. art. 3, § 1 of the Nevada Constitution.

VII.

For the foregoing reasons, I would simply dismiss this appeal for lack of standing and jurisdiction over the subject matter without reaching the merits of any arguments raised by the parties.



_____, J.
Tao

cc: Hon. Linda Marie Bell, District Judge
Lansford W. Levitt, Settlement Judge
David Lee Phillips & Associates
JH Freeman Law
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk