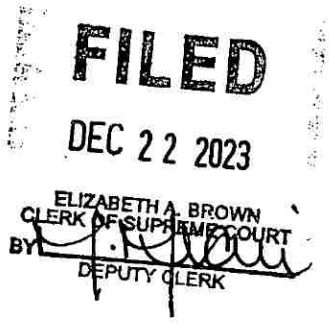
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF THE COLLEGE OF SOUTHERN NEVADA, GREAT BASIN COLLEGE, TRUCKEE MEADOWS COMMUNITY COLLEGE, UNIVERSITY OF NEVADA-LAS VEGAS, UNIVERSITY OF NEVADA-RENO, AND WESTERN NEVADA COLLEGE,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE SCOTT N. FREEMAN, DISTRICT JUDGE,
Respondents,
and
REBECCA OSTRANDER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Real Party in Interest.

No. 84859



ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This original petition for a writ of mandamus or prohibition challenges a district court order denying a partial motion to dismiss under NRCP 12(b)(1).

The State Board of Regents of the Nevada System of Higher Education (NSHE) oversees the administration of the University of Nevada, Las Vegas (UNLV), and other public universities and colleges in Nevada.

23-41582

In March 2020, NSHE directed its constituent institutions to move all in-person class instruction online following the Governor's COVID-19 Emergency Directives. Real party in interest Rebecca Ostrander—a student at UNLV during the 2020 spring semester—sued NSHE, alleging breach of contract and unjust enrichment and seeking refunds of tuition and fees on behalf of a "tuition class" and a "fee class."[1] Ostrander brought the complaint both in her individual capacity and on behalf of all students who attended UNLV and other NSHE-supervised state universities and colleges (the unattended schools) during that timeframe.

NSHE moved to dismiss under NRCP 12(b)(5), asserting, among other things, that Ostrander failed to plead a valid contract between herself and NSHE as to tuition or fees and, in addition, that Ostrander failed to state a claim related to the unattended schools. The district court denied the motion. It found that several issues required discovery and so were not ripe for review and, further, that Ostrander sufficiently pleaded a breach of contract claim against NSHE to survive a motion to dismiss.

NSHE answered Ostrander's complaint. After receiving what it deemed burdensome written discovery requests directed at the unattended schools, it filed a second motion to dismiss, this time under NRCP 12(b)(1). In this motion, NSHE argued that Ostrander lacked standing to assert—and the district court lacked subject-matter jurisdiction over—the claims involving the unattended schools because Ostrander had not enrolled at them. Drawing on the Ninth Circuit's "class certification approach" outlined in *Kirola v. City & County of San Francisco*, 860 F.3d

---

[1]After this writ petition was filed, the parties stipulated to dismiss the other named plaintiff, Kelsie Ballas, who had attended the University of Nevada, Reno; therefore, she is not a party to this writ proceeding.

1164 (9th Cir. 2017), the district court found that, since Ostrander had sufficiently alleged a breach of contract claim against NSHE and contended that "the class suffered the same injury [she did] when classes were moved online," she had standing to proceed. As a result, the district court denied this motion as well. The district court emphasized that its analysis was based solely on the pleadings and that, "[w]hile the injuries suffered by the different members of the alleged class might differ, that is a factual finding that this Court reserves for when discovery is completed upon the matter." In conclusion, the district court stated that its findings were "not conclusive" but "solely based upon the pleadings to determine standing sufficient to defeat Defendants' motion to dismiss at this time."

NSHE now petitions this court for a writ of mandamus and/or prohibition to preclude the district court's exercise of jurisdiction over the claims of students from the unattended schools. NSHE acknowledges that Ostrander has standing to assert her contract claims against it in respect to her dealings with UNLV but contends that Ostrander failed to plead standing sufficient to assert claims related to the unattended schools, because those schools provided a different "product" than the one NSHE promised Ostrander at UNLV. NSHE contends writ relief is appropriate to clarify this important issue of law. Further, NSHE argues that our extraordinary intervention is warranted because waiting to address standing until class certification is problematic for three reasons: (1) "individual standing is an important threshold jurisdictional question focused on the named plaintiff[ ]," (2) the unattended schools would be forced to comply with needless discovery and legal process, and (3) the class-certification process would become "inordinately complex."

A writ may issue to compel an act the law requires, *see* NRS 34.160 (mandamus), or arrest unlawful proceedings, *see* NRS 34.320 (prohibition). Writ relief is not a substitute for an appeal and historically is limited "to correct[ing] a district court's usurpation of power." *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017) (internal quotations omitted); *see also Daane v. Eighth Judicial Dist. Court*, 127 Nev. 654, 655, 261 P.3d 1086, 1087 (2011) (addressing writs of prohibition). A party who seeks writ relief must show they have no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; NRS 34.330. And generally, an appeal from the final judgment is an adequate remedy. *Archon*, 133 Nev. at 820, 407 P.3d at 706.

Rarely—where traditional writ relief is unavailable—an advisory writ may be appropriate to clarify an important issue of law if the matter will ordinarily elude appeal and is likely to recur, sound judicial economy weighs in favor of a writ, and the writ will not subvert the final judgment rule and invite delay and expense. *Id.* at 820-23, 407 P.3d at 706-08 (mandamus); *see also Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 250-51 464 P.3d 114, 119 (2020) (prohibition). "[L]egal positions fully argued by the parties and a merits-based decision by the district court judge" are prerequisites for efficient and thoughtful resolution of legal questions, and allegations of error that fall short of this measure generally will not warrant advisory mandamus. *See Archon*, 133 Nev. at 823, 407 P.3d at 708-09. Whether traditional or advisory, writ relief is an extraordinary remedy that lies entirely within our discretion, *id.* at 821, 407 P.3d at 707, and policy considerations weigh against employing writ relief lightly, *id.* at 820, 407 P.3d at 707.

In its petition contesting the denial of its second motion to dismiss, NSHE argues that the class claims should have been immediately dismissed under caselaw holding that a named plaintiff does not have standing to pursue claims on behalf of a class where the plaintiff and members of the class suffer injuries from distinct "products." But as the district court found, NSHE fails to establish that the contract claims Ostrander alleged against NSHE with respect to the unattended schools involve sufficiently distinct "products" from the UNLV product as to require dismissal for lack of standing without further factual development. Also, NSHE may challenge any decision ultimately allowing Ostrander to pursue class claims in an appeal from the final judgment, and it fails to demonstrate that granting its petition at this time is necessary to remedy any violation of a clear right to have the class claims dismissed pre-discovery or to clarify an important, fully developed legal issue, our resolution of which would promote judicial economy and administration.

The district court did not commit clear legal error or manifestly abuse its discretion by deferring the issue of class standing and/or representative status until further discovery could occur. Although the Nevada Constitution imposes justiciability requirements through its separation-of-powers doctrine, *see Nat'l Ass'n of Mut. Ins. Cos. v. State, Dep't of Bus. & Indus., Div. of Ins.*, 139 Nev., Adv. Op. 3, 524 P.3d 470, 476 (2023), once a named plaintiff establishes individual standing and the pleadings do not show that the plaintiff's claim substantially differs from the claims the plaintiff alleges on behalf of others, the action may proceed to discovery and class certification, if appropriate. *Cf. D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 457-59, 215 P.3d 697, 703-04 (2009) (allowing an HOA to sue on behalf of its members after establishing standing if NRCP

23 requirements for bringing a class action are met); *see* NRCP 23(d)(1) (providing that a class certification order "may be conditional, and may be altered or amended before the decision on the merits"). This is mainstream law. *See* 1 William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 2:6, at 135-36, 148-49 (6th ed. 2022) (noting that most courts agree that, while individual standing requirements present a threshold inquiry, so long as individual standing is met, the district court may proceed to a Rule 23 analysis to determine the extent to which that plaintiff may represent the class); *see also Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015) (recognizing that most federal courts have adopted this approach). Deferral was especially appropriate here, given that the case is at the pleading stage and the district court determined that it lacked the information needed to assess whether the UNLV "product" Ostrander contracted with NSHE to obtain was substantially similar to the unattended schools' "products," as Ostrander alleged, or so different that standing and/or representative status should be denied, as NSHE maintains. *See GMS Mine Repair & Maint., Inc. v. Miklos*, 798 S.E.2d 833, 843-44 (W. Va. 2017) (recognizing the majority rule allowing district courts "discretion to defer class certification pending the court's ruling on a dispositive motion"); *In re Toyota RAV4 Hybrid Fuel Tank Litig.*, 534 F. Supp. 3d 1067, 1124-25 (N.D. Cal. 2021) (exercising discretion against ruling on the named plaintiffs' standing on behalf of the putative class at the pleadings stage where that "issue would be better addressed at a later juncture, such as at class certification"); *see*

also Johnson-Jack v. Health-Ade LLC, 587 F. Supp. 3d 957, 977-78 (N.D. Cal. 2022) (similar).[2]

In denying NSHE's first motion to dismiss, the district court found that Ostrander had "adequately plead[ed] [her] claims against [NSHE], which is the standard in the motion to dismiss stage." *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (explaining that dismissal is warranted only where it appears beyond a doubt that the plaintiff can prove no facts that, if true, would entitle them to relief). NSHE does not challenge this earlier ruling in its petition to this court. Since NSHE is, for present purposes, a proper party defendant to Ostrander's individual claims, it follows that, without more to differentiate Ostrander's claims vis-a-vis NSHE's UNLV "product" from NSHE's other "products," she has standing to proceed against NSHE, at least until further facts are developed in discovery to show otherwise. The district court did not commit clear legal error or manifestly abuse its discretion when it so held.

Nor has NSHE shown that writ relief would serve judicial economy. As NSHE concedes, resolving the petition would not resolve the claims that Ostrander is bringing on behalf of herself and other UNLV students. Additionally, it appears that the burden of responding to discovery can be mitigated by focusing discovery on the "products" NSHE's

---

[2]*DiMuro v. Clinique Laboratories, LLC*, 572 F. App'x 27 (2d Cir. 2014), on which NSHE relies, is distinguishable. *Dimuro* addressed consumer fraud claims respecting seven unique cosmetic products, each of which had different ingredients and involved different and specific misrepresentations. While the operative complaint in this case acknowledges some differences in NSHE's fee class offerings, its allegations respecting the tuition class allege substantially similar "products" for purposes of the breaches of contract alleged: in-person v. online education.

campuses offer and the differences, if any, among them. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008). NSHE "will have further opportunity to present its full legal argument to the district court at summary judgment, [during class certification,] or to this court on appeal or, even, in another writ petition, depending on discovery and the eventual substantive motion practice that may ensue." *Archon*, 133 Nev. at 825, 407 P.3d at 710. Because the district court made a non-final determination—deferring final decision as to the scope of the claims in this case until discovery yields more precise information—NSHE's petition is, at best, premature and, depending on future discovery, perhaps not eligible for writ relief at all. *Cf. id.* at 823, 407 P.3d at 708-09 (holding that "[a]dvisory mandamus on a legal issue not . . . resolved in district court does not promote sound judicial economy and administration," and thus does not warrant our extraordinary intervention).

Because NSHE fails to demonstrate that extraordinary relief is warranted, we decline to intervene and deny the petition without prejudice.

It is so ORDERED.

Stiglich, C.J.
Stiglich

Cadish, J.
Cadish

Pickering, J.
Pickering

Herndon, J.
Herndon

Lee, J.
Lee

Parraguirre, J.
Parraguirre

Bell, J.
Bell

cc: Hon. Scott N. Freeman, District Judge
Ballard Spahr LLP/Las Vegas
Ballard Spahr LLP/Philadelphia
Matthew L. Sharp, Ltd.
Washoe District Court Clerk