

IN THE SUPREME COURT OF THE STATE OF NEVADA

Consolidated Appeals

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO. 88629

CASE NO. 89007

SONG SPENCER & JAMES

SONG SPENCER

SPENCER

Appellant,

Appellants,

v.

v.

CITY OF HENDERSON,

CITY OF HENDERSON,

Respondent.

Respondent,

District Court Case No. A-23-879188-C
Eighth Judicial District Court

**Motion for Leave to File Amici Curiae Brief
Pursuant to NRAP 29**

American Civil Liberties Union of Nevada (ACLU of Nevada) and Nevada Attorneys for Criminal Justice (NACJ) request leave to file an amici curiae brief in support of Appellant's Opening Brief pursuant to NRAP 29(a). The proposed brief of amici curiae is submitted along with this motion.

ARGUMENT

A motion for leave to file an amicus brief must state “(1) the movant’s interest; and (2) the reasons why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.”

I. Amici interest in submitting this brief.

The issues presented in this case include issues regarding the impact of civil asset forfeitures on individuals and whether an individual can recover attorney fees as special damages in civil asset forfeiture proceedings. Both amici organizations have an interest in how these issues are resolved.

The American Civil Liberties Union of Nevada is a nonprofit, nonpartisan organization dedicated to defending the principles embodied in the United States and Nevada Constitutions and our nation’s civil rights laws. The ACLU of Nevada advocates on behalf of Nevadans and their constitutional rights. That includes contributing amicus support on the topic of civil asset forfeiture when a case arises. The ACLU of Nevada, its civil rights clients seeking justice, and its members and donors have a material interest in the outcome of the instant petition. As one of the few nonprofit legal organizations operating in Nevada, the ACLU of

Nevada has an interest in encouraging more private attorneys to take up civil rights issues.

Nevada Attorneys for Criminal Justice is a state-wide non-profit organization of criminal defense attorneys in Nevada. Nevada Attorneys for Criminal Justice has an interest in this case because its members represent individuals charged with crimes that serve as the basis for civil forfeiture, and often represent individuals in their civil forfeiture proceedings.

II. Desirability of Amici Curiae Participation

“There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful or otherwise desirable to the court.” *California v. U.S. Dep’t of Interior*, 381 F. Supp. 3d 1153, 1163–64 (N. Cal. 2019), *citing Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). The “classic role of amicus curiae” is to assist in a case of “general public interest, supplementing the effort of counsel, and drawing attention to law that escaped consideration.” *Miller-Wohl Co. v. Com’n of Labor and Industry*, 694 F.2d 203, 204 (9th Cir. 1992). An amicus brief should be allowed “when the amicus has an interest in some

other case that may be affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court beyond the role that the lawyers for the parties are able to provide.” *Ryan v. Commodity Futures Trading Com’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers) (citations omitted).

The brief meets these purposes. Amici are committed to defending the civil liberties of all individuals within Nevada including the rights of those suffering unlawful civil seizures and forfeitures, and therefore have a significant interest in the issues presented. Also, as practitioners in civil rights litigation, Amici offer unique perspectives on the impact of Nevada’s civil asset forfeiture process and the incentives inherent to the process. Specifically, the proposed amicus brief focuses on how (1) the civil asset forfeiture process incentivizes abuse and (2) Nevada law supports the recovery of attorney fees in cases where an agency unlawfully seized an individual’s assets. Amici are experienced in providing insight into civil asset forfeiture proceedings and have previously filed amicus briefs on the topic of civil asset forfeitures before this Court. *E.g. Las Vegas Metro. Police Dep’t v. Eighth Judicial Dist. Court of Nev.*, 508 P.3d 417 (Nev. 2022); *e.g. Fred v. First Judicial Dist.*

Court, 537 P.3d 891 (Nev. 2023). Amici have also provided legislative testimony on the topic of civil forfeiture reform. *See e.g.* Minutes, Assemb. Comm. on Judiciary, Page 6–7 (Nev. 81st Session Apr. 5, 2021).

III. Conclusion

Accordingly, amici request that the Court grant their motion to file an amicus brief in support of appellant.

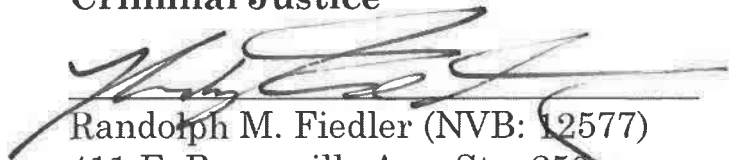
Dated: September 26, 2024.

**American Civil Liberties
Union of Nevada**



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CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with the formatting requirements of NRAP 27(d) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) as this brief is in proportionally spaced Century Schoolbook 14-point font and is double spaced.

I certify that this Motion complies with page or type-volume limitations of NRAP 27(d)(2) because it is proportionally space, has a typeface of 14 point, and contains less than 3,000 words.

Dated: September 26, 2024.




Jacob Smith
Staff Attorney
ACLU of Nevada

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2024, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system and I served a true and correct copy of the same via the Court's e-service system.

Dated: September 26, 2024.

A handwritten signature in black ink, appearing to read 'Jacob Smith', is written over a horizontal line.

Jacob Smith
Staff Attorney
ACLU of Nevada

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Consolidated Appeals

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SONG SPENCER & JAMES
SPENCER
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**Brief of Amicus Curiae American Civil Liberties Union of
Nevada and Nevada Attorneys for Criminal Justice
in Support of Appellant's Opening Brief**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

American Civil Liberties Union of Nevada Foundation, Inc. (ACLU of Nevada), is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership in it. This amicus curiae is represented by Jacob Smith and Christopher Peterson, of ACLU of Nevada.

Nevada Attorneys for Criminal Justice, Inc. (NACJ), is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership in it. This amicus curiae is represented by Randolph M. Fiedler of NACJ.

No other law firms have appeared for the amici in this case or are expected to appear for the amici in this Court.



**American Civil Liberties
Union of Nevada**
Jacob Smith (16324)

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OTHER

- ABA Profile of the Legal Profession 2023 (available at <https://www.abalegalprofile.com/demographics.html#bystate>) (last visited September 20, 2024) 7
- Institute for Justice, “Policing for Profit, The Abuse of Civil Asset Forfeiture,” at 117 (3d ed. Summer 2020) (available at <https://ij.org/report/policing-for-profit-3/>) (last visited September 20, 2024)..... 4, 6
- Nevada Attorney General, “2022-2023 Aggregate Forfeiture Report” (available at https://ag.nv.gov/uploadedFiles/agnv.gov/Content/Issues/2022-2023_Aggregate_Forfeiture_Report.pdf) (last visited September 20, 2024) 3, 4, 5
- Nevada Attorney General, “Annual Forfeiture Reporting” (available at https://ag.nv.gov/Hot_Topics/Annual_Forfeiture_Reporting/) (last visited September 20, 2024) 3
- Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. Legal Stud. 189, 211 (2019) 5

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The American Civil Liberties Union of Nevada is a nonprofit, nonpartisan organization dedicated to defending the principles embodied in the United States and Nevada Constitutions and our nation's civil rights laws. The ACLU of Nevada advocates on behalf of Nevadans and their constitutional rights. That includes contributing amicus support on the topic of civil asset forfeiture when a case arises. The ACLU of Nevada, its civil rights clients seeking justice, and its members and donors have a material interest in the outcome of the instant petition. As one of the few nonprofit legal organizations operating in Nevada, the ACLU of Nevada has an interest in encouraging more private attorneys to take up civil rights issues.

Nevada Attorneys for Criminal Justice is a state-wide non-profit organization of criminal defense attorneys in Nevada. Nevada Attorneys for Criminal Justice has an interest in this case because its members represent individuals charged with crimes that serve as the basis for civil forfeiture, and often represent individuals in their civil forfeiture proceedings.

No other party has authored or contributed to this Amicus.

ARGUMENT

Like any other circumstance where private citizens are asserting their rights against the government, Nevadans need attorneys to successfully challenge unlawful civil asset forfeitures. However, without an incentive for private attorneys to represent people making these challenges, individuals with valid claims will go unrepresented as there are no non-profit or civil rights organizations with the resources to consistently represent people subject to civil asset forfeiture. Establishing that individuals who successfully challenge a civil asset forfeiture can recover attorney fees in civil asset forfeiture cases would serve as a significant check to the otherwise perverse incentives an agency may have to abuse the civil asset forfeiture process to pad out agency budgets.

I. Nevada's civil asset forfeiture process creates a perverse incentive structure that invites abuse.

The civil asset forfeiture process in Nevada encourages law enforcement agencies to abuse it because civil asset forfeiture (1) directly funds law enforcement agencies' budgets; (2) targets cash instead of property specifically related to criminality; and (3) targets those who cannot defend themselves.

Nevada’s law enforcement agencies have regularly engaged in and clearly benefited from civil asset forfeiture having seized approximately three million dollars a year in reported civil asset forfeitures.¹ This trend continued during the 2022–2023 reporting period.²

Law enforcement agencies directly profit from these forfeitures, with the proceeds from forfeitures typically going back to the law enforcement agency that initially seized the property. *See* NRS 179.118(2)(b). While a Nevada law enforcement agency must transfer seventy percent of all money over \$100,000 left in the law enforcement agency’s forfeiture account at the end of the fiscal year to the school district, if the agency spends the money before then, no transfer must occur. *See* NRS 179.1187(2). Thus, law enforcement agencies are incentivized to not only seize assets and then seek forfeiture, but to quickly spend the forfeited money.

¹ Nevada Attorney General, “Annual Forfeiture Reporting” (available at https://ag.nv.gov/Hot_Topics/Annual_Forfeiture_Reporting/) (last visited September 20, 2024)

² Nevada Attorney General, “2022-2023 Aggregate Forfeiture Report” (available at https://ag.nv.gov/uploadedFiles/agnv.gov/Content/Issues/2022-2023_Aggregate_Forfeiture_Report.pdf) (last visited September 20, 2024)

Nevada law enforcement agencies are engaging in precisely this strategy.³ Of the half million dollars seized, for example, Henderson Police Department distributed a total of \$175,656.46 in civil asset forfeiture funds between July 1, 2022, to June 30, 2023, and of that \$175,656.46 only \$1,558.19 was distributed to the school district. Henderson Police Department spent or retained the remaining funds.⁴

Nationwide, cash seizures comprise almost 70% of all civil asset forfeitures.⁵ Nevada police departments exceed the national average with cash forfeitures comprising 92% of all Nevadan forfeitures.⁶ And the

³ Nevada Attorney General, “2022-2023 Aggregate Forfeiture Report” (available at https://ag.nv.gov/uploadedFiles/agnv.gov/Content/Issues/2022-2023_Aggregate_Forfeiture_Report.pdf) (last visited September 20, 2024) (Of the over \$400,00 North Las Vegas Police Department collected the agency spent over \$350,000 and kept the rest, contributing none to the school district).

⁴ Nevada Attorney General, “2022-2023 Aggregate Forfeiture Report” (available at https://ag.nv.gov/uploadedFiles/agnv.gov/Content/Issues/2022-2023_Aggregate_Forfeiture_Report.pdf) (last visited September 20, 2024)

⁵ Institute for Justice, “Policing for Profit, The Abuse of Civil Asset Forfeiture,” at 14 (3d ed. Summer 2020) (available at <https://ij.org/report/policing-for-profit-3/>) (last visited September 20, 2024)

⁶ Institute for Justice, “Policing for Profit, The Abuse of Civil Asset Forfeiture,” at 117 (3d ed. Summer 2020) (available at

Henderson Police Department goes further: 100% of civil asset seizures from 2022 to 2023 by HPD were cash seizures, totaling almost half a million dollars in cash.⁷ Even though the popularity of cash seizures may be due to other reasons, it is likely that this popularity is motivated by how easily a department can incorporate the cash into its budget. Other forms of property require more difficult storage and often require a third-party sale to convert the property to cash. At least one study found that civil asset forfeitures and particularly cash forfeitures increase during periods of “fiscal distress” for law enforcement agencies, leading the researchers to believe that cash civil asset forfeitures are driven by a need for revenue as opposed to an effort to deter crime.⁸

<https://ij.org/report/policing-for-profit-3/>) (last visited September 20, 2024)

⁷ Nevada Attorney General, “2022-2023 Aggregate Forfeiture Report” (available at

https://ag.nv.gov/uploadedFiles/agnv.gov/Content/Issues/2022-2023_Aggregate_Forfeiture_Report.pdf) (last visited September 20, 2024); Nevada Attorney General, “2022-2023 Aggregate Forfeiture Report” (available at https://ag.nv.gov/uploadedFiles/agnv.gov/Content/Issues/2022-2023_Aggregate_Forfeiture_Report.pdf) (last visited September 20, 2024)

⁸ Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. Legal Stud. 189, 211 (2019)

Civil asset forfeitures are rarely challenged. This is in part due to who is most often targeted by civil asset forfeitures and the barriers these individuals have that prevent them from seeking justice. The Institute for Justice estimates it costs at least \$3,000 for an individual to fight a relatively simple state forfeiture case.⁹ In Nevada, the median value of forfeitures is \$908.¹⁰ From 2016 through 2018, half of Nevada’s forfeitures were worth less than that amount.¹¹ Because most forfeitures concern less than \$3,000, there is often no practical recourse for the recovery of the property especially for indigent individuals. As a result, most civil forfeiture proceedings end up in a default judgment in favor of the law enforcement agency.

⁹ Institute for Justice, “Policing for Profit, The Abuse of Civil Asset Forfeiture,” at 117 (3d ed. Summer 2020) (available at <https://ij.org/report/policing-for-profit-3/>) (last visited September 20, 2024)

¹⁰ Institute for Justice, “Policing for Profit, The Abuse of Civil Asset Forfeiture,” at 117 (3d ed. Summer 2020) (available at <https://ij.org/report/policing-for-profit-3/>) (last visited September 20, 2024)

¹¹ *Id.*

II. After resisting abuse individuals should be able to recover attorney fees as special damages in successful civil asset forfeiture challenges pursuant to existing Nevada law.

Nevada has a civil asset forfeiture problem and in order to address this problem Nevada needs attorneys to challenge unconstitutional civil asset forfeitures.¹² But Nevada also has an attorney deficit, and with no incentive for Nevada attorneys to address unconstitutional civil forfeitures, Nevada can only expect law enforcement to continue engaging in questionable forfeitures.¹³ Fortunately, Nevada jurisprudence already allows individuals to recover attorney fees as special damages, and this precedent applies to civil asset forfeiture proceedings when a victims assets were seized unlawfully.

Traditionally Nevada adheres to the American Rule which states that unless a statute, rule, or agreement dictates otherwise, the damages a party may recover typically do not include attorney fees. *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 174, 444 P.3d 423, 424 (2019). An

¹² Id. (giving Nevada a D- for its civil forfeiture laws)

¹³ ABA Profile of the Legal Profession 2023 (available at <https://www.abalegalprofile.com/demographics.html#bystate>) (last visited September 20, 2024) (Ranking Nevada in the bottom ten for attorney availability and pointing out the Nevada has slightly over half of the National average amount of attorneys per 1,000 residents)

exception is that party may be able to recover attorney fees as special damages when hiring an attorney is absolutely necessary for remedying of a harm. *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 155-56, 321 P.3d 875, 880 (2014). For a party to be awarded attorney fees as special damages in this way they must comply with NRCP 9(g), plead special damages in their claim or counterclaim, and prove the special damages with competent evidence at trial. *Pardee Homes v. Wolfram*, 135 Nev. 173, 177. When attorney fees are awarded as special damages they are not awarded “as a cost of litigation” and are instead awarded “as an element of damage[s].” *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass’n*, 117 Nev. 948, 955, 35 P.3d 964, 968-69 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007), and *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 321 P.3d 875 (2014).

There is no defined test to determine when a party may plead attorney fees as special damages instead, when “fairness requires the plaintiff to have some recourse against the intentional malicious acts of the defendant,” attorney fees as special damages may be justified. *See e.g. Horgan v. Felton*, 123 Nev. 577, 585, 170 P.3d at 987-88 (2007) (quoting

Rorvig v. Douglas, 123 Wn.2d 854, 873 P.2d 492, 497 (Wash. 1994)). Among the examples offered, *Sandy Valley* recognized that a party would be entitled to fees as special damages “in recovering real or personal property acquired through the wrongful conduct of the defendant or in clarifying or removing a cloud upon the title to property.” *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass’n*, 117 Nev. 948, 957, 35 P.3d at 970. This is precisely what happens when the government seizes a person’s “real or personal property” and forfeits that property for the government’s benefit without a lawful basis to do so.

This Court has previously held that in actions regarding a cloud upon the title of property, the conduct must not only be wrongful, but it must also be intentional before attorney fees may issue as special damages. *Horgan v. Felton*, 123 Nev. 577, 585. Even if this limitation applied to civil forfeitures, misconduct is a mixed question of fact and law, *Garman v. State, Employment Security Dep’t*, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986), and intent is a question of fact left in the hands of a jury and not a district court judge. *Abbott v. City of Henderson*, 542 P.3d 10, 14 (2024). Therefore when someone properly pleads a claim for

attorney fees as special damages, their claim should not be dismissed without a finding of fact.

The Henderson Police Department took money from Ms. Spencer's nightstand on Ms. Spencer's side of the bed in the home Ms. Spencer co-owned with Mr. Spencer. The department clearly knew or should have known that the assets belonged to Ms. Spencer, who had committed no crimes. In fact, Henderson Police Department officers were caught on camera discussing how to best make up a justification to take Ms. Spencer's assets. Henderson's actions, which forced Ms. Spencer to litigate to recover her property, at a minimum established a question of fact for a jury to decide whether this is a case of misconduct.

Despite this, the district court dismissed Ms. Spencer's request for attorney fees as special damages without a finding of fact. In fact, the district court did not analyze Henderson's intent or whether Henderson had engaged in misconduct at all.

Amici respectfully requests that this Court find that a party may seek attorney fees as special damages pursuant to *Sandy Valley* after a finding that the government seized the party's property and sought forfeiture unlawfully. Such a ruling would ensure that people subject to

wrongful forfeiture like Ms. Spencer can secure counsel and ensure that courts hold agencies accountable who engage in questionable forfeiture practices.

CONCLUSION

Sandy Valley and its progeny allow aggrieved parties to recover attorney fees in actions to recover property taken through the misconduct of the government. This Court can recognize this and send this case back to the district court to determine whether Henderson engaged in misconduct. In doing so, the Court will not only clear up the record and complete a full judgment on Ms. Spencer's claims but this Court will also encourage private attorneys and law enforcement agencies from engaging in unlawful forfeiture practices in Nevada.

Dated: September 26, 2024.

Respectfully submitted,



**American Civil Liberties
Union of Nevada**

Jacob Smith (16324)



**Nevada Attorneys for
Criminal Justice**

Randolph M. Fiedler (12577)

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) as this brief is in proportionally spaced Century Schoolbook 14 point font and is double spaced. This brief complies with page or type-volume limitations of NRAP 32(a)(7) because other than those parts exempted by NRAP 32(a)(7)(c) because it is proportionally space, has a typeface of 14 point, and contains less than 3,000 words. I have read this brief and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose. Lastly, I certify that this brief complies with all other applicable rules of the Nevada Rules of Appellate Procedure including NRAP 28(e) and I understand that I may be subject to sanctions if the this brief fails to comply with the requirements outlines within the Nevada Rules of Appellate Procedure.

Dated: September 26, 2024.



Jacob Smith
Staff Attorney
ACLU of Nevada

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2024, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system and I served a true and correct copy of the same via the Court's e-service system.

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Jacob Smith
Staff Attorney
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