IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF SPARKS, a Municipal Corporation,

Appellant,

vs.

RENO NEWSPAPER, INC., a Nevada Corporation,

Respondent.

Supreme Court Case No. 69749

District Case No. CV15-01871

On Appeal from an Order Granting Petition for Writ of Mandamus from the Second Judicial District Court of the County of Washoe in the State of Nevada

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

On January 28, 2016, the Second Judicial District Court entered its Order Granting Petition for Writ of Mandamus in the above-captioned matter. The Order is a final judgment and is subject to review by this Court. NRAP 3A(b)(1). The City filed its Notice of Appeal on February 8, 2016, which is within the 30 days allowed by NRAP 4(a)(1).

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because the questions presented are matters of statewide public importance and issues of first impression. *See* NRAP 17(a)(13) and NRAP 17(a)(14). First, this case requires a determination regarding the proper procedural path and remedy under Nevada law for resolving disputes concerning restrictions on access to public records promulgated as part of the Nevada Administrative Code. Second, this case presents the first opportunity for judicial scrutiny of NAC 453A.714 which deals with the confidentiality of names and personal information of certain participants in Nevada's newly-established medical marijuana industry. These issues are best resolved by the Supreme Court in order to avoid inconsistent application and interpretation by lower courts and to afford certainty to those industry participants who rely on the state-adopted guarantee of anonymity.

QUESTIONS PRESENTED

The instant proceeding concerns a petition for writ of mandamus seeking the release of names of individuals who hold city-issued business licenses to operate medical marijuana establishments as public records under NRS 239.010. NAC 453A.714(1) requires that:

> Except as otherwise provided in this section and NRS 239.0115, the Division shall maintain the confidentiality of and shall not disclose the name or any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS. Except as otherwise provided in NRS 239.0115, the name and any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS is confidential, not subject to subpoena or discovery and not subject to inspection by the general public.

The district court concluded that the phrase "delivers services" is not sufficiently clear as to classify NAC 453A.714 an unambiguous legislative declaration of confidentiality as required by *Reno Newspapers v. Sheriff*, 234 P.3d 922 (Nev. 2010). JA206:16-207:3. The questions presented are:

1. Whether NRS 233B.110 prescribes the mandatory procedural and remedial vehicle for resolving disputes arising under Nevada's Public Records Law that contest the applicability or validity of a state regulation; and

2. Whether NAC 453A.714 protects the names and personal information of persons licensed to operate medical marijuana establishments in Nevada from disclosure pursuant to requests made under NRS 239.010.

I.

STATEMENT OF THE CASE

On August 20, 2015, the Reno Gazette Journal (the "Newspaper") requested that the City of Sparks (the "City" or "Sparks") provide it with "copies of the business licenses of medical marijuana establishments in Sparks, including the names of the applicant/licensees." JA018. Subject to a list of exceptions or "unless otherwise declared by law to be confidential," the Nevada Public Records Law requires that the records of a governmental entity be made available for inspection and reproduction by the public. NRS 239.010(1). Citing NAC 453A.714(1), the City produced the business licenses sought by the Newspaper but redacted the personal names and identifying information of the licensees from the documents. JA015-016. The corporate names, locations, and contact information of the businesses at issue remained unaltered on the produced documents.[1] JA020-026. The Newspaper renewed its demand for the personal names of the licensees operating medical marijuana establishments in Sparks and the request was denied once more.

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[1] The City interprets the declaration of confidentiality contained in NAC 453A.714(1) as applicable only to individual persons involved in Nevada's medical marijuana industry and not the corporate identity of similarly involved organizations. *See FCC v. AT&T Inc.*, 562 U.S. 397 (2011) (concluding that exemptions from disclosure requirements of the Freedom of Information Act governing law enforcement records which "could reasonably be expected to constitute an unwarranted invasion of personal privacy" does not protect information related to corporate privacy).

JA004:4-6. As a result, the Newspaper filed a petition for writ of mandamus to compel the City to disclose the redacted information.[2] JA004:7.

In granting the Newspaper's Petition, the district court concluded that the Newspaper is not required to utilize the legislatively-prescribed process for challenging the application or validity of state regulations set out in the Administrative Procedure Act when pursuing a claim arising under the Public Records Law [JA205:5-12] and that the phrase "delivers services" contained in NAC 453A.714(1) is ambiguous due to the regulation's "silence... regarding who exactly" is entitled to its guarantee of anonymity. JA207:22-25. On that basis, the district court ruled that the regulation was not an express declaration of confidentiality as required by *Reno Newspapers v. Sheriff*, 234 P.3d 922 (2010), and was therefore unenforceable. JA207:25-208:2. The City now appeals. JA222.

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[2] The Newspaper asserts that the personal identity of individuals who operate medical marijuana establishments in Nevada has been "expressly pronounced" as a matter of public interest by the Nevada Legislature. JA002:20-003:15. Actually, the Legislature's statement of purpose in NRS 453A.320 is just an invocation of the state's general police power. *See generally In re Boyce*, 75 P. 1 (Nev. 1904). Whatever "public interest" may exist in the information sought by the Newspaper is abrogated by the Legislature's direction to the Division to "protect the identity" of individuals who receive, facilitate, or deliver medical marijuana services [NRS 453A.370(5)] and the Division's resultant declaration that the names and identifying information of such persons are "confidential, not subject to subpoena or discovery and *not subject to inspection by the general public*." NAC 453A.714(1) (emphasis added).

II.

STATEMENT OF FACTS

On November 7, 2000, Nevada voters approved Ballot Question 9, amending the state constitution to provide for lawful medical use of marijuana. *See* Nevada Constitution, Art. 4, § 38. The law took effect on October 1, 2001, and removed state-level criminal penalties on the use, possession, and cultivation of marijuana by patients who have written documentation from their physician stating that marijuana may alleviate the patient's condition. *Id*. As a result of the constitutional change, the state established a confidential patient registry that issues identification cards to qualifying patients. *See* JA055-062 (Assembly Bill ("AB") 453, 71st Nevada Legislature (2001) §§ 14 - 25; now codified at NRS 453A.200-453A.310). What Nevada's early medical marijuana laws did not provide for, however, was a legal avenue to obtain the drug for medical consumption. In 2013, the 77th Nevada Legislature addressed this issue by passing Senate Bill ("SB") 374. JA077-124.

Generally speaking, SB 374 established the medical marijuana industry in Nevada. The bill amended NRS Chapter 453A to include the parameters within which marijuana could be cultivated, processed, and distributed for medical purposes and added the framework governing the licensure of *commercial* participants in the newly-legitimized economy. JA084-105 (§§ 3.5-20). But SB 374 was only the foundation; as part of the bill, the Legislature directed the Division of Public and

Behavioral Health of the Department of Health and Human Services to adopt regulations that the Division determined "to be necessary or advisable to carry out the program of dispensing marijuana." JA079; JA103-105 (§20).

The Division promulgated a comprehensive scheme of regulations - codified at NAC Chapter 453A - concerning both the application process for a state-issued medical marijuana establishment registration certificate and the actual operation of medical marijuana establishments in Nevada.[3] Because the Legislature limited the number of establishments that could be registered in each county [NRS 453A.324] and delineated the contents of an application for a registration certificate [NRS 453A.322] the Division was charged with determining how to best resolve the surplus of applications against the restricted number of available licenses. The Division's adopted method ranks the applicants within each local jurisdiction based on four distinct criteria [NAC 453A.310] and then grants medical marijuana establishment registration certificates "to the highest ranked applicants" until the pre-designated number of licenses, by type of establishment and jurisdiction, are issued. NAC

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[3] Properly adopted provisions of the Nevada Administrative Code "have the force of law." NRS 233B.040(1)(a).

453A.312.[4] The medical marijuana establishment may not commence operations until it demonstrates compliance "with all applicable local governmental ordinances and rules," and secures a business license.[5] NAC 453A.316(1).

Included in the Legislature's direction to the Division concerning the adoption of regulations related to the operation of medical marijuana establishments is a clear mandate: that the regulations "must, without limitation... As far as possible while maintaining accountability, protect the identity and personal identifying information of each person who receives, facilitates or delivers services" under the authority of

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[4] In that way, local jurisdictions were not *originally* allowed to select the operators of medical marijuana establishments within their municipal boundaries - only the best qualified candidates were licensed by the state, and only candidates who were licensed by the state were eligible for a local business license. In 2015, however, the Legislature passed SB 276 which afforded greater local control to the process by essentially creating a race to licensure: now, if a local government so chooses, it may issue a business license to a potential medical marijuana establishment operator without regard for the operator's ranking on the state list, and so long as the state has not previously issued all of the statutorily allocated medical marijuana establishment certificates for the local jurisdiction, the state must issue a certificate. *See* SB 276, 78th Nevada Legislature (2015) §§ 3-4. The City of Sparks has intentionally avoided this issue by requiring applicants for a business license to operate a medical marijuana establishment in Sparks to first obtain the state issued registration certificate. Sparks Municipal Code § 5.80.050(F).

[5] If a local government does not issue business licenses or utilize some other form of authorizing a medical marijuana establishment, the state-issued registration certificate serves as the approval to begin operations. NAC 453A.316(2).

NRS Chapter 453A. NRS 453A.370(5); *see also* JA104. The Division responded by declaring:

> Except as otherwise provided in this section and NRS 239.0115, the Division shall maintain the confidentiality of and shall not disclose the name or any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS. Except as otherwise provided in NRS 239.0115, *the name and any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS is confidential, not subject to subpoena or discovery and not subject to inspection by the general public.* NAC 453A.714(1) (emphasis added).

The parties dispute whether NAC 453A.714(1) prohibits the disclosure of the names and personal information of persons who hold local business licenses to operate medical marijuana establishments as an exception to the Public Records Law and the proper procedure by which the argument should be resolved under Nevada law.

III.

SUMMARY OF ARGUMENT

Mandamus is an extraordinary remedy that is unavailable when a petitioner has a "plain, speedy, and adequate remedy in the ordinary course of law." *Aspen Financial Services, Inc. v. Eighth Judicial District Court*, 313 P.3d 875, 877-78 (Nev. 2013); *see also* NRS 34.170. The Newspaper complains that NAC 453A.714(1) does not apply to the circumstances of the immediate action and that the Division's adoption of the regulation exceeded the authority conferred upon the Division by the Legislature. JA007:1-21; JA007:25-009:6. These arguments are fatal to the Petition

itself: an action for declaratory relief under NRS 233B.110 is the legislatively prescribed remedy governing disputes related to the applicability or validity of administrative regulations. Extraordinary writ relief is unavailable due to the existence of a plain, speedy, and adequate remedy at law, and the judgment of the district court is void for failure to join an indispensable party.

NAC 453A.714(1) declares that the names and personal information of "any person" who "deliver services" under the authority of NRS Chapter 453A are confidential, not subject to disclosure, subpoena or public inspection. The district court's determination that the phrase "deliver services" is not sufficiently specific as to effectively confer confidentiality on the aforementioned class of information is erroneously based on an improper application of Nevada's public records jurisprudence. JA207:3-208:3. The term "deliver" is both defined in statute and included in the statutory definitions for every single type of medical marijuana establishment allowed by Nevada law. *See* NRS 453A.060; NRS 453.051; NRS 453A.116; NRS 453A.056; NRS 453A.105; NRS 453A.115. Moreover, the inclusion of the phrase "any person" in NAC 453A.714(1) clearly answers the district court's inquiry concerning "who is included" in the regulation's protective grasp. JA207:21. The plain language of NAC 453A.714(1) is an express and unequivocal declaration of confidentiality and exception to NRS 239.010 and the judgment of the district court should be reversed.

IV.

STANDARD OF REVIEW

In considering a writ petition, the Court gives deference to the factual determinations of the district court, but reviews matters involving the construction of a statute or an administrative regulation, which are questions of law, *de novo*. *Gonski v. Second Judicial Dist. Court*, 245 P.3d 1164, 1168 (Nev. 2010); *Kay v. Nunez*, 146 P.3d 801, 804 (Nev. 2006); *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 482 (Nev. 2000).

V.

ARGUMENT

A. The Administrative Procedure Act is the "Sole Remedy" for Challenging the Applicability or Validity of NAC 453A.714(1).

1. The Petition is Procedurally Deficient and Nonjusticiable.

The district court's conclusion that the provisions of NRS 233B.110 are a "permissive" remedy in cases that challenge the applicability of the Nevada Administrative Code rather than mandatory procedural requirements is erroneous. *See* JA205:5-12. In *Southern California Edison v. First Judicial District Court*, this Court considered the proper method by which decisions of the Nevada Tax Commission concerning refund claims may be challenged. 255 P.3d 231, 232 (Nev. 2011). There, Edison's claims for multiple tax refunds accruing over a two-and-a-half year period

were denied by the Department of Taxation, the denials were consolidated and upheld by an administrative law judge, and denied on appeal once more by the Tax Commission. *Id*. at 233. Relying on NRS 372.680,[6] Edison filed a complaint in district court seeking a trial *de novo* on the refund claims. *Id*. In response, the Department of Taxation moved for dismissal of the suit on the grounds that the Nevada Administrative Procedure Act [NRS Chapter 233B] required Edison to initiate the suit as a petition for judicial review rather than a complaint. *Id*. The district court concluded that despite the competing nomenclature, the suit would proceed under the standards set out in the Administrative Procedure Act. *Id*. Edison filed a petition for writ of mandamus with the Supreme Court requesting that the district court be ordered to treat the originally filed complaint as an independent civil action. *Id.*

Recognizing that two applicable statutes appeared to govern the nature of an action for tax refund (and that those statutes seemed to require different types of proceedings) the Court held that because NRS 372.680 "does not define the nature

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[6] NRS 372.680 provides that "[w]ithin 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant *may* bring an action against the Department on the grounds set forth in the claim in a court of competent jurisdiction... for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed." (Emphasis added). As a general observation, statutes governing the commencement of a legal action are always permissive; the law allows - but does not require - lawsuits to be filed. *Compare e.g*., NRS 30.170; NRS 41.010; NRS 326.010.

of the action to be brought" against the Department of Taxation and because neither the Department of Taxation, the Tax Commission, nor the statutory framework within which the rights of Edison arose in that case were exempted from the reach of the Administrative Procedure Act by NRS 233B.039, that the Administrative Procedure Act was the controlling statutory scheme and the "sole remedy" for challenging sales and use tax refund decisions by the Tax Commission.[7] *Id*. at 234-35; 237. The Court explained: "NRS 372.680 permits a taxpayer to challenge the Commission's decision by filing an action; pursuant to NRS 233B.130, that action must be a petition for judicial review." *Id*. at 233.

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[7] That holding notwithstanding, the Court granted Edison's petition for writ of mandamus on the basis of judicial estoppel because of the Department of Taxation's apparent history of taking inconsistent positions with regard to the proper procedure concerning taxpayer challenges to denials of refund claims by the Department. *Edison*, 255 P.3d at 237-38.

The immediate case presents a unique circumstance: the law relied on by the City in denying the Newspaper's public records request is a state regulation rather than a state statute.[8] JA015-016. The Nevada Legislature has explicitly defined the method by which a party may challenge the applicability or validity of a provision of the Nevada Administrative Code. *See* NRS 233B.110. Thus, like *Edison*, the facts of this case are apparently governed by two applicable statutes: on the one hand, NRS 239.011 (providing that when a governmental agency denies a public records request that the requester "*may* apply to the district court... for an order" permitting the inspection or requiring the provision of a copy of the record) and on the other, NRS 233B.110 ("[t]he validity or applicability of any regulation *may* be determined in a proceeding for declaratory judgment in the district court in and for Carson City, or in and for the county where the plaintiff resides, when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff"). As in *Edison*, NRS

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[8] Properly adopted provisions of the Nevada Administrative Code "have the force of law." NRS 233B.040(1)(a). This Court has held that both rules promulgated by the Court and federal regulations are sufficiently authoritative to confer confidentiality upon records that would otherwise be subject to disclosure under the NRS 239.010. *See Civil Rights for Seniors v. AOC*, 313 P.3d 216, 219 (Nev. 2013) (rules established by Supreme Court of Nevada governing state foreclosure mediation program); *City of Reno v. Reno Gazette-Journal*, 63 P.3d 1147, 1150 (Nev. 2003) (federal regulation). However, the Court has not yet decided a case in which the Nevada Administrative Code was the basis for a claim of confidentiality.

239.011(1) does not define the nature of the action to be brought, it simply affords a right to judicial intervention.[9] Put another way, the Public Records Law establishes the right sought to be enforced by the Newspaper, but because the legal basis for the City's position is a state regulation (as opposed to a statute, court rule, or a balancing of the parties' respective interests) the Administrative Procedure Act prescribes the remedy. In this situation, because the Nevada Department of Health and Human Services - the agency that oversees the administration and enforcement of NRS Chapter 453A and NAC Chapter 453A - is not exempted from the requirements of NRS Chapter 233B, the proper procedural path to adjudication is through the Administrative Procedure Act. *See Edison*, 255 P.3d at 237; NRS 233B.039.

The Newspaper's failure to comport with the proper legal process is a serious substantive error: NRS 233B.110(1) specifically prohibits the Court from rendering judgment in cases concerning the applicability of the Administrative Code until "after the plaintiff has first requested the agency to pass upon the validity of the regulation in question." A party's failure to exhaust all available administrative remedies before initiating a lawsuit generally renders the controversy nonjusticiable. *Allstate Ins. Co. v. Thorpe*, 170 P.3d 989, 993 (Nev. 2007). In that way, the Newspaper's rush to

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[9] Which, as a practical matter, is why mandamus is available as a remedial vehicle in typical public records cases at all: the existence of a legal duty in the *absence* of a plain, speedy, and adequate remedy at law. *See* NRS 34.170; *see also Aspen Financial Services, Inc. v. Eighth Judicial District Court*, 313 P.3d 875 (Nev. 2013); *Kay v. Nunez*, 146 P.3d 801 (Nev. 2006).

litigation and resultant circumvention of the statutory process specifically designed and enacted by the Nevada Legislature to resolve the precise category of dispute now before the Court precludes access to the extraordinary relief granted by the district court. *See Aspen Financial Services, Inc.*, 313 P.3d at 877-78. NRS 233B.110 affords the Newspaper a plain, speedy, and adequate remedy in the ordinary course of law that cannot be ignored simply because the Newspaper believes a different process to be more expedient. The judgment of the district court that a petitioner is free to disregard the Administrative Procedure Act as one of many choices on a remedial menu is contrary to this Court's holding in *Edison* and should be reversed and remanded for proceedings consistent with the requirements of the Administrative Procedure Act. *See* JA205:5-12.

2. The District Court's Order is Void for Failure to Join an Indispensable Party.

In all cases concerning a challenge to the validity or applicability of a provision of the Nevada Administrative Code, "[t]he agency whose regulation is made the subject of the declaratory action *shall* be made a party to the action." NRS 233B.110(1) (emphasis added).[10] Under Nev.R.Civ.P. 19(a), a party must be joined

[10] Similarly, Nevada law requires that in every action to determine the validity or applicability of an administrative regulation, "the plaintiff shall serve a copy of the complaint upon the Attorney General, who is also entitled to be heard." NRS 233B.110(3). The Newspaper, again, has not complied with this directive.

to an action if that party claims an interest "in the subject matter of the action and adjudication of the action in the individual's absence may inhibit the individual's ability to protect a claimed interest," or when the absence of an individual who has claimed an interest in the subject matter of the action could subject an existing party "to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." *Anderson v. Sanchez*, 131 Nev.Adv.Op. 51, 4 (July 23, 2015). By requiring that the state agency which promulgated a contested regulation be named as a party in litigation concerning the same, the Nevada Legislature has inherently claimed - on behalf of the State - an interest in all litigation concerning the applicability and validity of the Nevada Administrative Code.

The district court's broad conclusion that the term "deliver services" is too ambiguous to protect the identities of licensed operators of medical marijuana establishments from disclosure in response to requests made under NRS Chapter 239 effectively strikes down NAC 453A.714(1) as wholly unenforceable by any agency - including the State of Nevada. *See* JA207:25-208:2. When determining the validity of an administrative regulation, courts generally afford "great deference" to an agency's interpretation of a statute that the agency is charged with enforcing, and a court will only "declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious." *State, Div. Of Ins.*

v. State Farm Mut. Auto. Ins. Co., 995 P.2d 482, 485 (Nev. 2000). By failing to follow the legislatively mandated procedure for challenging the application or validity of a state regulation, the Newspaper has stripped the Department of Health and Human Services of both the deference owed to the agency's interpretation of the regulation and the opportunity to defend NAC 453A.714 that is guaranteed by the Administrative Procedure Act. *See* NRS 233B.110. Because the failure to join indispensable parties invalidates a judgment, the district court's Order should be reversed and remanded for proceedings consistent with the requirements of the Administrative Procedure Act. *See Schwob v. Hemsath*, 646 P.2d 1212 (Nev. 1982) ("Failure to join an indispensable party is fatal to a judgment"); *Johnson v. Johnson*, 572 P.2d 925, 927 (Nev. 1977) (relief granted in an indispensable party's absence is essentially nugatory).

B. NRS 453A.370(5) is an Explicit Grant of Authority.

The Newspaper explains that the Nevada Legislature "in enacting NRS Chapter 453A, knew how to impose confidentiality for the identities of specific classes of persons who would be involved in the medical marijuana industry." JA008:24-26. That premise is, of course, correct: the Legislature is presumed to understand the reach of its declarations of confidentiality. *See Reno Newspapers v. Sheriff*, 234 P.3d 922, 926 (Nev. 2010) ("If the Legislature had intended post-application information about a permit's status to be confidential, it could and would have stated that, but it

did not."). On that basis, the Newspaper argues that the statutory grant of confidentiality - and with it the Division's regulatory authority - extends only to "attending physicians" and persons who hold "registry identification cards." JA008:3-23. That analysis is wrong: when the legislature enacts a statute, it is presumed to have done so "with full knowledge of existing statutes relating to the same subject." *City of Boulder v. General Sales Drivers*, 694 P.2d 498, 500 (Nev. 1985).

Had the 77th Nevada Legislature intended for regulations based on NRS 453A.370(5) to be limited to a restricted class of participants in the state's medical marijuana industry as the Newspaper supposes, it could have relied on its *already existing* declarations of confidentiality by using identical language or by doing nothing at all. *See* NRS 453A.610(1) (materials generated as part of the University of Nevada's research related to the medical use of marijuana) *and* NRS 453A.700(1) (names and identifying information of patients who use medical marijuana and their attending physicians). But it did not. Instead, the Legislature directed the Division of Public and Behavioral Health to adopt a regulation which "protect[s] the identity and personal identifying information of *each person* who receives, facilitates or *delivers* services in accordance with [NRS Chapter 453A]." NRS 453A.370(5) (emphasis added).[11] A statutory definition of the word "deliver" was adopted in 2001 as part of

[11] In the context of NRS Chapter 453A, the term "deliver" means "the actual, constructive or attempted transfer from one person to another of a controlled substance." NRS 453A.060; NRS 453.051

the same bill that enacted NRS 453A.610(1), NRS 453A.700(1) and defined the terms "attending physician" and "registry identification card," JA054-055 (§§ 4; 7; 14); JA064-065 (29; 30.2). The Legislature's subsequent and specific inclusion of the term "deliver" in NRS 453A.370(5) and the statutory definitions of every type of medical marijuana establishment permitted under Nevada law [*compare* NAC 453A.714(1); NRS 453A.060; NRS 453.051; NRS 453A.056; NRS 453A.105; NRS 453A.115] shows that the linguistic variation between NRS 453A.370(5) and the previously-adopted confidentiality provisions contained in NRS Chapter 453A is an intentional and meaningful expansion of the class of individuals whose names and personal information are protected from public disclosure in connection with their participation in Nevada's medical marijuana industry. NRS 453A.370(5) is an obvious grant of authority from the Legislature to the Division concerning the adoption of a regulation that shields the identities of individuals who operate medical marijuana establishments from public disclosure.[12]

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[12] Moreover, NAC 453A.714 was approved by the Legislative Commission on March 28, 2014 - which means that the Commission had an opportunity to object to the regulation as nonconforming to the statutory authority bestowed by the Legislature or as not carrying out the intent of the Legislature. NRS 233B.067(5)(b)-(c); *see also* Div. of Pub. & Behavioral Health R004-14. But, again, it did not. That the Newspaper openly questions the scope of the Division's authority to grant confidentiality beyond physicians and patients who prescribe and use medical marijuana without joining the state agency as a party underscores the procedural failings of this case. *See* JA008:3-23.

C. NAC 453A.714(1) is not Ambiguous in its Application.

The Newspaper wrongly contends that the first sentence of NAC 453A.714(1) imposes the duty of confidentiality on the Division alone, and that the second sentence "merely injects confusion and ambiguity into the regulation." JA007:11-21. A statute is only ambiguous when its language "lends itself to two or more reasonable interpretations." *State v. Catanio*, 102 P.3d 588, 590 (Nev. 2004). Through the lens of ordinarily accepted canons of statutory construction, the regulation in question is not ambiguous.

Statutes are generally construed "to give meaning to all of their parts and language, and [a] court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation," *Coast Hotels v. State, Labor Comm'n*, 34 P.3d 546, 550 (Nev. 2001), and no part of a statute should be rendered meaningless. *Banegas v. State Indus. Ins. System*, 19 P.3d 245, 249 (Nev. 2001). The first and second sentences of NAC 453A.714(1) act as autonomous declarations of confidentiality:

> Except as otherwise provided in this section and NRS 239.0115, the Division shall maintain the confidentiality of and shall not disclose the name or any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS. Except as otherwise provided in NRS 239.0115, the name and any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS is confidential, not subject to subpoena or discovery and not subject to inspection by the general public.

The first sentence is self-limiting, applicable only to the Division and its designees, while the second is a generally applicable declaration of confidentiality. The Newspaper would disregard the entirety of the second sentence as redundant of the first. JA007:11-20. But statutory interpretations which render portions of the law redundant and with no meaning or effect are disfavored and typically rejected. *See National Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 669 (2007) ("[W]e have cautioned against reading a text in a way that makes part of it redundant."); *Singer v. United States,* 323 U.S. 338, 344 (1945) ("[W]e would be reluctant to give a statute that construction which makes it wholly redundant. Only a clear legislative purpose should lead to that result here."); *Rogers v. State*, 773 P.2d 1226, 1227 (Nev. 1989) (assuming that statute's use of distinct terms was intentional and refusing to interpret the terms as redundant). Had the Division intended for NAC 453A.714(1) to apply exclusively to the records of the state, the second sentence would have been completely unnecessary; the presence of the exception to confidentiality under NRS 239.0115 in both sentences underscores that the sentences apply independently of each other.

Finally, even if the manner in which NAC 453A.714(1) applies was ambiguous, the language should be interpreted in accordance with "what reason and public policy would indicate the legislature intended," *McKay v. Board of Sup'rs of Carson City*, 730 P.2d 438, 442 (Nev. 1986), and not "read to produce absurd or

unreasonable results." *Glover v. Concerned Citizens for Fuji Park and Fairgrounds*, 50 P.3d 546, 548 (Nev. 2002), *overruled in part on other grounds by Garvin v. Ninth Judicial Dist. Court ex rel. Cnty. of Douglas*, 59 P.3d 1180 (Nev. 2002). It is unlawful for a medical marijuana establishment to operate prior to the issuance of a local business license. NAC 453A.316(1)(b); *see also* NRS 453A.326(3)(b) (instructing that state-issued registration certificates are "provisional" until a local business license is acquired).[13] On that basis, it is impossible to *legally* "deliver" medical

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[13] In cases where no business license issues, the Newspaper's interpretation results in inconsistent application of the law amongst identically situated operators: the identities of those individuals who operate a medical marijuana establishment in a jurisdiction that requires a business license would be public information, while those operating in jurisdictions which do not issue a business license would remain confidential. *See* NAC 453A.316(2).

marijuana in Nevada without first obtaining a local business license.[14] The Newspaper's position reduces the second sentence of NAC 453A.714(1) to surplusage by interpreting the issuance of a local business license - which the Legislature requires as a mandatory component of the regulatory scheme governing the legal delivery of medical marijuana in Nevada - as simultaneously bestowing confidentiality on state records *and* stripping the information in question of that protection at the local level. This absurdity renders the entirety of the regulation

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[14] Legally delivering medical marijuana versus illegally delivering medical marijuana is an important distinction: in the context of taxation on illegal drug sales, the Legislature has protected the "name, address or other identifying information" of dealers of controlled substances. NRS 372A.080(1). In Nevada, marijuana is a schedule I controlled substance [NAC 453.510(4)] and prior to the 2013 changes to NRS Chapter 453A, it was impossible to legally deliver medical marijuana under state law. SB 374 imposed a new tax on *legally-delivered* medical marijuana and removed the same from the Fifth Amendment protection of NRS 372A.080; most likely because the licensed sale of medical marijuana no longer violated Nevada Law. JA119-121 (§§ 24.4-24.5). The possession and sale of medical marijuana does still violate federal law, however, and there is a legitimate public safety issue in publishing the names and identifying information of people involved in the all-cash business of manufacturing and distributing exceptionally potent strains of common street drugs. To that end, the Legislature's direction that the identities of those involved in Nevada's medical marijuana industry be "protected," is an easily understood mandate. *See* NRS 453A.370(5). That the Newspaper disagrees with the policy is a political question that cannot be resolved in this forum. *See N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 310 P.3d 583, 587 (Nev. 2013) ("Under the political question doctrine, controversies are precluded from judicial review when they 'revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.'").

unworkable and wholly meaningless; information that is protected from subpoena, discovery, or inspection by the general public in the files of the state but public record on the forms of a local government is not confidential at all. The Court should interpret NAC 453A.714(1) in accordance with long-accepted canons of statutory construction by giving meaning to all of the statutory language. The regulation protects a class of information, not a specified document; for NAC 453A.714(1) to be effective, it must apply with equal force to the records of the state and local governments related to the operation of a licensed medical marijuana establishment regardless of which agency collected the details.

D. The Plain Language of NAC 453A.714 is an Express and Unequivocal Declaration of Confidentiality.

In *Reno Newspapers v. Sheriff*, 234 P.3d 922 (Nev. 2010) the Court resolved a public records dispute over concealed firearms permits. There a local government denied a request for documents related to the concealed firearms permits issued to former Governor Gibbons on the basis that NRS 202.3662 - as it existed at the time - made applications for concealed firearms permits confidential and therefore the resultant permits (which contained much of the same information as the applications) were confidential as well. *Sheriff*, 234 P.3d at 923-24. Based on the Nevada Public Records Law's requirement that legislatively enacted restrictions on the dissemination of public records be subject to narrow interpretation favoring disclosure, the Court determined that the scope of the statutory exception creating

confidentiality within NRS 202.3662 did not extend to the requested information in its post-permit form because the Legislature's distinction between an applicant and a permittee within the broader statutory scheme governing concealed firearms permits did not amount to an explicit declaration that the information was so protected. *Id*. at 926. In short, the Court examined the plain language of the confidentiality provision within the broader statutory scheme while explaining that exceptions to the NRS 239.010 must be explicit, not implied. The district court in this case took a far more restrictive approach, completely ignoring the phrase "any person" contained in NAC 453A.714(1), the statutory definition of the term "deliver" and the inclusion of "deliver" in the statutory definitions for every single type of medical marijuana establishment when it concluded that because NAC 453A.714(1) *itself* does not define "who exactly" the phrase "delivers services" applies to, that the regulation is not sufficiently clear as to be an unambiguous legislative declaration of confidentiality. JA207:16-208:3. The district court's failure to consider the broader statutory scheme is contrary to long-standing principles of statutory construction and a misapplication of the holding in *Sheriff*.

When interpreting a statute, a court's first point of examination is the plain meaning of the language used. *Arguello v. Sunset Station, Inc.*, 252 P.3d 206, 209 (Nev. 2011). "When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *City of Reno*

v. Reno Newspapers, Inc., 784 P.2d 974, 977 (Nev. 1989). In drawing conclusions under the plain meaning doctrine, the meaning a court gives to a statute should be reasonable and harmonize different statutory provisions where possible. *Rose v. First Federal Savings & Loan*, 777 P.2d 1318, 1319 (Nev. 1989) (citing *Board of School Trustees v. Bray*, 109 P.2d 274, 278 (Nev. 1941)). The Newspaper complains that because NAC 453A.714 does not define or identify "the persons or entities who are intended to be included" in the regulation's guarantee of confidentiality to any person who facilitates or delivers services under the authority of NRS Chapter 453A, that it is improper for the City to read the statute as applicable to municipal business licenses. JA007:1-10. But that argument presupposes that the Legislature intended to impose such a restriction, which is a difficult conclusion to reach given the Legislature's explicit direction that the Division "protect the identity and personal identifying information of *each* person who receives, facilitates or delivers" services related to the lawful use of medical marijuana in Nevada,[15] and the Division's resultant use of the word "any" in the code provision now at issue.[16] *Compare* NRS 453A.370(5) *with* NAC 453A.714(1). The Newspaper takes further issue with the fact that NAC 453A.714(1) "makes no reference to [medical marijuana establishments] at all, let alone the names of the owners or licensees of those establishments."

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[15] "Each" means "every." *See* Black's Law Dictionary 597 (rev. 4th ed. 1968).

[16] "Any" means "every." *See* Black's Law Dictionary 120 (rev. 4th ed. 1968).

JA007:1-2. This pedantic argument is wholly without merit. NAC 453A.714(1) refers to the provision of services under the authority of NAC Chapter 453A and NRS Chapter 453A, both of which regulate the consumption and distribution of medical marijuana in Nevada.

In the context of NRS Chapter 453A, the term "deliver" means "the actual, constructive or attempted transfer from one person to another of a controlled substance." NRS 453A.060; NRS 453.051. The term "medical marijuana establishment" is defined as an independent testing laboratory, a cultivation facility, a facility for the production of edible marijuana products or marijuana-infused products, a medical marijuana dispensary, or a business that has registered as more than one of the foregoing. NRS 453A.116. A "cultivation facility" is a business that "acquires, possesses, cultivates, *delivers*, transfers, transports or sells marijuana and related supplies" to other medical marijuana establishments. NRS 453A.056 (emphasis added). Similarly, a "facility for the production of edible marijuana products or marijuana-infused products" is a business that "acquires, possesses, manufactures, *delivers*, transfers, transports, supplies, or sells edible marijuana products or marijuana-infused products to medical marijuana dispensaries." NRS 453A.105 (emphasis added). Finally, a "medical marijuana dispensary" is a business that "acquires, possesses, *delivers*, transfers, transports, supplies, sells or dispenses marijuana or related supplies and educational materials to the holder of a valid

registry identification card." NRS 453A.115 (emphasis added).[17] As a matter of law, every type of medical marijuana establishment allowed by Nevada law "delivers" services under the authority of NRS Chapter 453A. Logically presuming consistent usage of the term "deliver" within Chapters 453A of the Nevada Revised Statutes and the Nevada Administrative Code, the names of individuals licensed to operate medical marijuana establishments - and thereby "deliver" services under the authority of NRS Chapter 453A - fall decidedly within the grasp of NAC 453A.714(1) and its declaration of confidentiality. *See Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 97 P.3d 1132, 1135-36 (Nev. 2004) (explaining that "[w]hen a legislature adopts language that has a particular meaning or history, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language"). The information sought by the Newspaper is protected from public disclosure under Nevada law and the judgment of the district court should be reversed.

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[17] By way of extension, the term "dispense" - as in dispensary - "means to *deliver* a controlled substance to the ultimate user..." NRS 453.056 (emphasis added).

VI.

CONCLUSION

This dispute arises over a class of information that the State of Nevada has plainly made confidential [NAC 453A.714(1)] has assured the individuals operating under the authority of NRS and NAC Chapters 453A *is* confidential [JA114] and the meaning of a term that is so frequently used throughout the statutory scheme creating the industry that *it has a statutory definition*. NRS 453A.060; NRS 453.051. At the explicit direction of the Legislature, the Division unequivocally declared the names and identifying information of every person who delivers medical marijuana under the auspices of Nevada law "confidential, not subject to subpoena or discovery and not subject to inspection by the general public." NAC 453A.714(1). That guarantee of anonymity is wholly abrogated by the approach pressed by the Newspaper and the blind eye turned by the district court; even the narrow reading of the regulation compelled by the Public Records Law is required to be reasonable, and a complete erosion of the stated purpose of the law surely does not meet that standard. To make such a sweeping change to the regulatory framework of a burgeoning industry without following the procedural requirements of the Administrative Procedure Act is error, and the judgment of the district court should be reversed.

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Respectfully submitted this 7th day of June 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface and type style requirements of NRAP 32(a)(5) and NRAP 32(a)(6) because the Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word Perfect for Windows, version X6, in 14 point Times New Roman font.

2. I further certify that this Opening Brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the document is comprised of 28 pages containing 7,195 words.

3. Finally, I certify that 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. I further certify that this Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event

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that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th of June, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(d), I hereby certify that I am an employee of the Sparks City Attorney's Office, Sparks, Nevada, and that on this date, I am serving the foregoing document(s) entitled **APPELLANT'S OPENING BRIEF** on the person(s) set forth below by placing a true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Sparks, Nevada, postage prepaid, following ordinary business practices to:

Scott Glogovac
Glogovac & pintar
427 West Plumb Lane
Reno, Nevada 89509

DATED this 7th day of June 2016.

/s/ Kember Murphy
Kember Murphy