IN THE SUPREME COURT OF THE STATE OF NEVADA

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STATE OF NEVADA ex rel. THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEVADA, Petitioner, vs. THE JUSTICE COURT OF LAS VEGAS TOWNSHIP IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE JUSTICE OF THE PEACE DEBORAH J. LIPPIS, Respondents, and MARIA ESCALANTE; and RAMIRO FUNEZ, Real Parties in Interest.	Supreme Court Case No.: Case No. 16M-03289A-B

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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ROUTING STATEMENT

This matter should be retained by the Nevada Supreme Court because it raises a question of statewide public importance regarding the interpretation of NRS 30.130 and the requirement that the Office of the Attorney General receive notice and the opportunity to be heard in any proceeding challenging the constitutionality of a statute. NRAP 17(a)(14). The Justice Court disagreed that this issue has been resolved by this Court's earlier precedents and, therefore, this matter potentially involves issues of first impression. NRAP 17(a)(13).

ISSUE PRESENTED

1. Interpreting NRS 30.130 in *City of Reno v. Saibini*, 83 Nev. 315, 321, 429 P.2d 559, 563 (1967), this Court held that the statute "requires the attorney general to be *served with a copy of the proceedings* and to be *given opportunity to be heard* in a constitutional attack on any *statute*, ordinance or franchise *in any proceeding* …" (emphasis added). Yet the Justice Court ruled that NRS 30.130 only applies to an extremely limited subset of proceedings: (1) civil cases that are also (2) declaratory relief actions and that (3) involve challenges to municipal ordinances and franchises. Did the Justice Court erroneously interpret NRS 30.130 by concluding that the Attorney General was not entitled to notice and an opportunity to be heard in this criminal matter before the court declared unconstitutional a subsection of the Unlawful Trespass Upon Land Statute (NRS 207.200(1)(a))?

I. INTRODUCTION AND RELIEF SOUGHT

As Nevada's chief law enforcement officer, one of the Attorney General's most solemn duties is to defend state statutes from constitutional attack. To ensure that the Attorney General is aware of such challenges, and has the opportunity to carry out his responsibility before a duly enacted law is struck down, the Legislature enacted NRS 30.130. That provision requires the Attorney General to receive notice of any constitutional assault and be afforded the chance to be heard before a court declares a statute unconstitutional. Because the constitutionality of a statute can be questioned in all types of proceedings, the notice requirement applies in all civil and criminal cases. Any other interpretation of NRS 30.130 would render the statute hollow. It would allow lower courts across the State to invalidate statutes without the Attorney General's knowledge or a proper defense.

That's exactly what the Justice Court did in this case. It declared a subsection of the Nevada's Unlawful Trespass Upon Land Statute unconstitutional, on vagueness grounds, without seeing that the Attorney General was notified. Once the Attorney General became aware of the proceeding and asked to be heard before a final ruling was issued, the Justice Court misread NRS 30.130 and denied his request.

If allowed to stand, the Justice Court's refusal to provide the Attorney General notice and an opportunity to participate will cripple his ability to carry out his profound constitutional mandate to defend state statutes. Any invalidation of a law by a court without notice to the Attorney General is done without jurisdiction. Therefore, this

Court should issue a writ of mandamus or prohibition to correct the Justice Court's erroneous interpretation of NRS 30.130 and to arrest any further proceedings that are in excess of the Justice Court's jurisdiction.

II. THE FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

A. The Attorney General Was Not Notified of the Constitutional Challenge Before the Justice Court Ruled.

On December 15, 2015, Real Parties in Interest Maria Escalante and Ramiro Funez were cited for trespassing upon the land of Red Rock Casino Resort & Spa. (App. 001-002.) They were observed distributing paper fliers under and near hotel room doors in the guest areas. (*Id.* at 001-002, 0028-038.) An Amended Criminal Complaint was filed on February 4, 2016 charging Escalante and Funez each with one count of trespass in violation of NRS 207.200(1)(a) and one count of vagrancy in violation of Clark County Code 12.32.020. (*Id.* at 002.)

On March 18, 2016, Escalante and Funez moved to dismiss both charges. (*Id.* at 003-18.) They argued that the trespass charge should be dismissed "because NRS 207.200(1)(a) is unconstitutionally vague." (*Id.* at 009-12.) Specifically, they asserted that the "vex or annoy" intent requirement of the statute is void for vagueness even though the phrase applies only to the defendants' mental state while committing a

crime, and is not a prohibition on so-called "vexing" or "annoying" conduct. (*Id.* at 009-12.)[1]

Despite the explicit challenge to NRS 207.200(1)(a)'s constitutionality, neither the parties nor the Justice Court notified the Attorney General of Real Parties in Interest's Motion to Dismiss.

On May 6, 2016, the Justice Court issued an Order granting the Motion to Dismiss in part. (*Id.* at 062-76.) It determined "that the reference in NRS 207.200(1)(a) to acting with intent 'to vex or annoy the owner or occupant thereof' is unconstitutionally vague." (*Id.* at 073.) The Justice Court decided that subject phrase could be severed from the remainder of the statute. (*Id.* at 073-75.) In redline format, the Justice Court set out how it would rewrite the statute. (*Id.* at 075.) Only then, *after* declaring part of the statute unconstitutional and rewriting it, did the Justice Court require Defense Counsel to provide notice of the Order to the Attorney General pursuant to NRS 4.235. (*Id.* at 076.)

B. The Justice Court Refused to Allow the Attorney General to be Heard.

Upon being notified of the Justice Court's Order, the Attorney General promptly filed a Notice of Appearance and Motion to Place on Calendar. (*Id.* at 079-81.) The

[1] The Clark County District Attorney opposed the Motion to Dismiss and included a request to file a Second Amended Complaint. (App. at 019-41.) The Justice Court addressed the Motion to Dismiss within the context of the Second Amended Complaint. (*Id.* at 066.)

Attorney General explained the wide-ranging implications of the Justice Court's Order, asked to be heard, and requested a briefing schedule. (*Id.* at 079-81.) Real Parties in Interest objected to the Attorney General's participation and contended that he was not entitled to notice before the Court ruled. (*Id.* at 082-91.)

At a May 13, 2016 hearing on the Attorney General's filing, the Justice Court stayed its Order and requested briefing on the Attorney General's ability to be heard. (*See id.* at 115.) On May 27, 2016, the Attorney General filed his brief setting forth the reasons that he was entitled to notice and an opportunity to be heard before the Justice Court ruled. (*Id.* at 092-98.)

On June 24, 2016, the Justice Court issued a second Order deciding that NRS 30.130 only applies to declaratory relief actions, has no applicability to criminal proceedings, and is only invoked in constitutional challenges to municipal ordinances or franchises—not statutes. (*Id.* at 099-107.) The Justice Court would only permit the Attorney General to participate if he took "exclusive charge of the pending criminal case" under NRS 228.120. Even then, the court would not revisit its ruling on the constitutionality of NRS 207.200(1)(a). (*Id.* at 104-05.)

In light of the Justice Court's erroneous interpretation of NRS 30.130, the Attorney General filed a Motion to Stay the Case pending this Petition, (*id.* at 108-13), and this original proceeding ensued.

III. REASONS FOR GRANTING THE WRIT

A. The Petition Should be Entertained as It Raises an Important Legal Question and the Attorney General Has No Legal Remedy.

The Nevada Constitution empowers this Court to issue writs of prohibition and mandamus. NEV. CONST. art. 6, § 4. Writ relief is an extraordinary remedy and the decision to entertain a writ petition ultimately lies within this Court's discretion. *Cheung v. Eighth Jud. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). In exercising its discretion, this Court considers whether the petition raises an important issue of law that requires clarification, the interests of public policy, urgency, strong necessity, judicial economy, and sound judicial administration. *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 48, 305 P.3d 898, 901 (2013). Writ relief is unavailable if the petitioner has a "plain, speedy, and adequate remedy in the ordinary course of law[,]" such as a direct appeal. *See* NRS 34.170; NRS 34.330; *Bradford v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 60, 308 P.3d 122, 123 (2013).

This Petition raises an important issue of law regarding the interpretation of NRS 30.130 and the requirement that the Attorney General be given notice and an opportunity to be heard before a court declares a statute unconstitutional. The Attorney General is the State's chief law enforcement officer. It is his duty, except in rare circumstances, to defend the constitutionality of all state statutes. *See State v. Moore*, 46 Nev. 65, 207 P. 75, 76 (1922) (acknowledging that attorney general is "the chief law enforcement officer of the state" with all powers belonging to that office at common

law). This is the near universal practice in the states and in the federal system. The latter, for instance, disables a federal judge from invalidating a state law unless the Attorney General is first given notice and a chance to participate in some way. 28 U.S.C. § 2403; FED. R. CIV. P. 5.1; FED. R. APP. P. 44(b).

The Attorney General's ability to defend statutes in Nevada's own courts will be significantly impaired if, as the lower court found, he is not entitled to notice and an opportunity to opine before a lawful act of the Legislature is struck down. The Justice Court's ruling represents an unprecedented interpretation of a Nevada law whose meaning was well-settled not only by the precedents of this Court but the precedents of numerous other states. If confirmed by this Court, the decision below would effect a massive disruption in the orderly working of the Nevada legal system. It would mean, among other things, that two private parties in a civil dispute could furnish the only legal argument as to whether a Nevada statute was constitutional. There are also serious separation-of-powers consequences. A duty to execute a law implies a duty at least to *permit* a defense of the law; for if a law's validity is questioned, a defense may be needed to ensure that there *is* a law to enforce. Even democratic government is implicated. When laws are struck down without a devoted defense presented by the only elected constitutional officer expressly empowered to defend all state statutes, the results of an election or a legislative vote are tossed out without due process. The consequences are largely irreversible. A scenario of non-defense can come very close to a repeal-by-litigation—without the assurance of defense counsel.

The Justice Court's ruling has profound public policy implications beyond this case. Laws enacted by the People's representatives should not be cast aside without a fair fight. The Attorney General is all but exclusively positioned to defend statutes and, in so doing, protect the acts of the Legislature and the will of the People. *See* NEV. CONST. art. 5, §§ 19, 22. The sanctity of duly enacted statutes should not be left in the hands of uninterested (or self-interested) litigants that have no sworn duty to uphold the law.

Additionally, there is an urgency and strong necessity to resolve this legal question as expeditiously as possible. Although the Justice Court's Order has no precedential effect outside its department, it may incorrectly influence other litigants across a wide swath of cases (including in the district courts) to forego giving notice to the Attorney General. This will further undermine the Attorney General's ability to carry out his constitutional duty to defend Nevada's statutes.

Entertaining the Petition at this juncture will further the interests of judicial economy and administration. As explained below, there are jurisdictional consequences to the failure to notify, and hear from, the Attorney General before declaring a statute unconstitutional. Significant resources—public and private—will be wasted if this case (or any future case) proceeds premised upon an erroneous ruling that lacked jurisdiction. If the Justice Court is reversed, this criminal proceeding will effectively have to be restarted to a point before NRS 207.200(1)(a) was struck down. Any action taken after the erroneous ruling would be rendered null and void, and will only have to

be duplicated later. Accordingly, judicial economy and the administration of the lower courts' dockets will be served by resolving this important issue before the case proceeds farther.

Finally, the Attorney General lacks a plain, speedy or adequate legal remedy to correct the Justice Court's ruling. *Cf. Pan v. Eight Jud. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) (ability to appeal is generally an adequate legal remedy precluding writ relief). Even though the State of Nevada—and consequently, its chief legal officer—is aggrieved by the Justice Court's ruling, the Attorney General is not a party to the underlying criminal proceeding and therefore does not have the ability to seek redress through the normal appellate process. *Cf.* NRAP 3A(a)("A *party* who is aggrieved" has standing to appeal)(emphasis added); *see Hairr v. First Jud. Dist. Ct.*, 132 Nev. Adv. Op. 16, 368 P.3d 1198, 1200 (2016) ("Because petitioners are not parties to the underlying action and cannot appeal the district court's order denying intervention, a mandamus petition is an appropriate method to seek review of such an order.").

Moreover, the Attorney General should not need to intervene *after* a statute has been struck, and take "exclusive charge of [a] pending criminal case," just so that he can, at some much later point *on appeal*, defend the statute's constitutionality. Often, the Attorney General may have no interest in prosecuting the underlying criminal case—his only interest is the constitutionality of the statute. Forcing the Attorney General to prosecute every criminal case where a statute is struck just to preserve the

ability to *later* defend the statute on appeal imposes a massive and unreasonable burden on the Attorney General in exercising his statutory duty to defend the law.

This Petition is the only available mechanism for the Attorney General to confirm that NRS 30.130 entitles him to notice and an opportunity to be heard before a statute is declared unconstitutional. This Court should entertain this Petition as it has in similarly important cases arising in a justice court. *See*, *e.g.*, *Woerner v. Justice Court of Reno Twp. ex rel. Cty. of Washoe*, 116 Nev. 518, 523, 1 P.3d 377, 380 (2000) ("We conclude that the request for mandamus is properly before this court because the order of the justice's court sending petitioner to Lake's Crossing to be evaluated is not a final judgment from which an appeal may be taken and there is no other remedy at law available to petitioner.").

B. A Writ of Mandamus Should Issue to Correct the Justice Court's Erroneous Interpretation of Law.

A writ of mandamus "may be issued … to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station," NRS 34.160, "or to control a manifest abuse or arbitrary or capricious exercise of discretion …." *State v. Eighth Jud. Dist. Ct.*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 779 (2011). "A manifest abuse of discretion is a clearly erroneous interpretation of the law

or a clearly erroneous application of a law or rule." *Id.* at 780 (quotation and alteration omitted).[2]

1. The Justice Court Erroneously Interpreted the Statutory Text.

NRS Chapter 30 is Nevada's version of the Uniform Declaratory Judgment Act. *See* NRS 30.010. The same, or similar, language has been adopted by the majority of other states.[3] NRS 30.130 states in full:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. *In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard.*

(Emphasis added.)

While perhaps not a model of draftsmanship, a focused reading of the second sentence indicates that the Attorney General is entitled to notice and an opportunity to be heard in any proceeding challenging the constitutionality of a statute before a court rules. Specifically, the relevant portion of the second sentence provides "[i]n any proceeding …[,] if the *statute*, ordinance or franchise *is alleged to be unconstitutional, the*

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[2] Even in the context of a writ, statutory interpretation is a question of law reviewed *de novo*. *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

[3] H.H. Henry, Annotation, *Construction, Application, and Effect of § 11 of the Uniform Declaratory Judgments Act that All Persons Who Have or Claim any Interest which Would be Affected by the Declaration Shall be Made Parties*, 71 A.L.R.2D 723 (1960) ("[T]he Uniform Declaratory Judgments Act has been adopted, in substance, by a majority of the states, the precise terminology of the act varies somewhat from state to state ….").

Attorney General shall also be served with a copy of the proceeding and be entitled to be heard." (emphasis added). Thus, by its plain terms, NRS 30.130 requires that the Attorney General be "served" and "heard" "[i]n any proceeding" where a "statute" "is alleged to be unconstitutional." This aspect of the statute is clear and unambiguous, as this Court has already held in a case directly on point. *City of Reno v. Saibini*, 83 Nev. 315, 321, 429 P.2d 559, 563 (1967) (holding that NRS 30.130 "is clear and needs no construction").[4]

a. The Attorney General is entitled to notice of any motion asserting a constitutional challenge in all criminal and civil cases.

The Justice Court's ruling strays from the plain language of the statute in multiple respects. *See State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous."). First, the Justice Court concluded that NRS 30.130 only applies to civil actions for declaratory relief and does not apply to criminal proceedings. (App. 102-03.)

To reach this conclusion, the Justice Court placed great weight on the fact that NRS 30.130 is located within the statutory chapter entitled "Uniform Declaratory Judgments Act." (*Id.* at 102.) However, the name of the chapter title is never dispositive. *See Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 841-42, 34 P.3d 546, 551 (2001) ("The title of a statute *may* considered in determining legislative intent.") (emphasis added). Chapter titles are only utilized if the statutory language is otherwise ambiguous. *See Thompson v. First Jud. Dist. Ct.*, 100 Nev. 352, 354,

[4] *See infra* § III(B)(2).

683 P.2d 17, 19 (1984) ("In construing an ambiguous statute, evidence of the legislature's intent may be gleaned from the title of the act by which the statute was enacted."). And, again, the text of NRS 30.130 is itself clear. *Saibini*, 83 Nev. at 321, 429 P.2d at 563.

The Justice Court was further confounded by the lack of a specific reference to criminal cases in NRS 30.130. (App. 102.) But other states that have adopted similar statutory language require notice to their attorney general in criminal cases even though it is not explicitly mentioned in the applicable statute. Kentucky, for example,[5] has enacted a similar statute, KRS 418.075, which states in relevant part:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.
>
> (1) In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

The Kentucky courts have concluded that the notice requirement "must be met in criminal, as well as civil, actions." *Jacobs v. Commonwealth*, 947 S.W.2d 416, 419 (Ky. Ct. App. 1997); *accord Benet v. Commonwealth*, 253 S.W.3d 528, 532 & n.13 (Ky. 2008) (attorney general must receive notice prior to entry of judgment).

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[5] *See* Henry, *supra* note 3 ("Kentucky … has enacted that part of § 11 which is here under consideration, and, therefore, cases from Kentucky in which the provision has been construed or applied will be found herein.").

This is so despite the provision's "awkward place … in a statute concerning declaratory judgments." *Brashars v. Commonwealth*, 25 S.W.3d 58, 65 (Ky. 2000). The Kentucky jurists correctly reasoned that notice to the attorney general is necessary in criminal cases because "the Attorney General is elected by registered voters from throughout the Commonwealth [and] he is in a unique position to defend the constitutionality of an act of the General Assembly." *Jacobs*, 947 S.W.2d at 419. Like in Nevada, local prosecutions in Kentucky are not controlled by the attorney general so it is vital that the attorney general receive notice to defend the statute on behalf of *all* citizens, not just citizens represented by the local prosecutor. *Id.* These arguments apply with equal force to Nevada.[6]

Furthermore, even though Defendants did not style their motion challenging the law as one for declaratory relief, the Justice Court effectively exercised this very power of declaratory relief when it declared a statute unconstitutional. The result, of course, was the same as if the defendants had explicitly moved for declaratory relief—a statute was nullified. *See Gallegos v. State*, 123 Nev. 289, 163 P.3d 456 (2007) (reversing denial of criminal motion to dismiss and declaring NRS 202.360(1)(b) unconstitutionally vague); *see also Lazo v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 690 P.2d 1029, 1031-32 (N.M.

[6] There have even been renewed calls to revisit the issue in states that have previously determined that their statutory notice provision only applies in civil cases. *See, e.g., Ex parte State*, --- So.3d ---, 2016 WL 3364689, at **15-16 (Ala. Crim. App. June 17, 2016) (Burke, J., concurring in result) (stating that Alabama should revisit whether ALA. CODE § 6-6-227 applies to criminal as well as civil proceedings).

1984) (Declaratory Judgment Act requires notice to attorney general of constitutional challenge to statute irrespective of the facial or as-applied nature of the challenge).[7]

b. NRS 30.130 applies to constitutional challenges involving statutes.

Next, the Justice Court erroneously determined that NRS 30.130 only applies to actions involving municipal ordinances and franchises, not challenges to statutes like here. (App. 104.) The Justice Court's interpretation places undue weight on the phrase "municipal ordinance or franchise" and entirely disregards the reference to "statute" in NRS 30.130. (App. 104.) Instead of applying the language of the statute as written, the Justice Court hypothesized that the reference to "statute" may have been "inadvertent." (*Id.* at 102 n.3.)

But where "the plain language of a statute is clear on its face, [courts] will not look beyond that language when construing the provision, unless it is clear that this meaning was not intended." *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1171 (2015) (quotations omitted). There is no "clear" evidence that the reference to "statute" in NRS 30.130 was a scrivener's error or that the Legislature

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[7] The Justice Court also expressed confusion regarding the meaning of NRS 30.130's phrase "a copy of the proceeding …." (App. 102 n.4.) The Justice Court was unclear whether "proceeding" referred to court minutes or the motion itself. (*Id.*) However, this Court has found that a singular motion constitutes a "proceeding." It has said "[a] motion is a proceeding directed to a court's authority to act on a given subject." *Iveson v. Second Jud. Dist. Ct.*, 66 Nev. 145, 153, 206 P.2d 755, 759 (1949). Therefore, the language of NRS 30.130 mandates that the Attorney General should receive notice of any motion asserting a constitutional challenge regardless of the nature of the proceeding—criminal or civil.

intended NRS 30.130 to be limited to municipal legislation. There is nothing unique about municipal legislation that requires the Attorney General's defense that would not apply equally—indeed, with *more* force—to state statutes that impact all Nevadans. As a result, the word "statute" must be given effect. Any other interpretation would render the word "statute" meaningless. *See Barber v. State*, 131 Nev. Adv. Op. 103, 363 P.3d 459, 462 (2015) ("This Court avoids statutory interpretation that renders language meaningless or superfluous….") (quotations and alterations omitted). "Statute" means what everyone thinks it means: a state law.

The Justice Court's sole authority for reading the word "statute" out of NRS 30.130 was an unpublished (and obviously non-precedential) disposition[8] from a *federal* district court, *Nationstar Mortgage, LLC v. Falls at Hidden Canyon Homeowners Association*, No. 215CV01287RCJVCF, 2015 WL 7069298 (D. Nev. Nov. 12, 2015) (Jones, J.). (App. 103.) There, the federal court concluded, in one sentence without analysis, that NRS 30.130 did not apply to that particular foreclosure dispute because the statute "only applies to municipal ordinances or franchises." *Id.* at *4. The court did not discuss the plain text of NRS 30.130 or explain why it does not apply to statutes when it expressly says that it does. *Id.* To the extent the terse statement in *Nationstar* limits the notice requirements of NRS 30.130 to municipal ordinances or franchises, it

[8] The Justice Court did not agree that the decision is unpublished. (App. 103 n.6.) It is. On Westlaw, the decision is labeled "[n]ot reported in F. Supp. 3d."

conflicts with the statutory language, was wrongly decided, is nonbinding, and should not be followed.

Numerous states with analogue provisions hold that notice is not limited to actions involving municipal ordinances or franchises. *See*, *e.g., Lee v. Clark*, 77 S.E.2d 485, 487 (S.C. 1953) ("Where under the Uniform Declaratory Judgments Act an adjudication is sought as to the constitutionality of a *statute*, it is only required that the Attorney General be served with a copy of the proceedings and given a right to be heard.") (emphasis added); *Bollhoffer v. Wolke*, 223 N.W.2d 902, 903 (Wis. 1974) ("Whenever a declaratory judgment action is brought challenging the constitutionality of *a statute or ordinance*, the attorney general must be served with copies of the proceedings ….")(emphasis added); *Tobin v. Pursel*, 539 P.2d 361, 363 (Wyo. 1975) ("Under the Declaratory Judgments Act, where *a statute* is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be given an opportunity to be heard.") (emphasis added); *Lazo*, 690 P.2d at 1032 ("[Notice statute] simply states that when constitutionality o*f a statute* is at issue, the attorney general shall be served and given an opportunity to be heard.") (emphasis added). These other states' interpretation requiring notice in challenges to statutes is consistent with this Court's precedents involving NRS 30.130.

2. The Justice Court Erroneously Interpreted This Court's Precedents.

The Justice Court's misinterpretation is not only at odds with the plain text of NRS 30.130, it is at odds with the plain text of this Court's past, authoritative

interpretations of the provision. In *City of Reno v. Saibini*, 83 Nev. 315, 321, 429 P.2d 559, 563 (1967), this Court unequivocally held that "NRS 30.130 requires the attorney general to be served with a copy of the proceedings and to be given opportunity to be heard in a constitutional attack on any statute, ordinance or franchise in any proceeding."

This Court's holding is in accord with the plain meaning of NRS 30.130. Indeed, the *Saibini* Court found that NRS 30.130 "is clear and needs no construction." *Id.* Under *Saibini*, the Attorney General should have been given notice and a chance to be heard before the Justice Court declared the statutory language of NRS 207.200(1)(a) unconstitutional.

The Justice Court only addressed *Saibini* in two footnotes. (App. at 103.) First, the Justice Court attempted to factually distinguish *Saibini* on the grounds that the case "involved a challenge to a Reno ordinance, rather than a statute …." (*Id.*) But this misreads the case. A fireman in *Saibini* challenged a Reno ordinance, 83 Nev. at 318-19, 429 P.2d at 561-62, yet this Court described the litigation as "seeking a declaratory judgment that Section 4-23 of the Reno City Ordinance No. 1568 was in direct conflict with NRS 286.510(1) and 286.550(3) and therefore in violation of the Nevada Constitution, Art. 1, s 8." *Id.* 317-18, 429 P.2d at 560-61. As such, *Saibini* involved the interpretation and interplay between the ordinance, applicable statutes, and the Constitution. It was not a straightforward constitutional challenge to an ordinance in which statutes were not at issue. Hence, this Court's reference to "statute" in its holding

is perfectly logical and cannot be considered mere dicta. *Id.* at 321, 429 P.2d at 563 ("NRS 30.130 requires the attorney general to be served with a copy of the proceedings and to be given opportunity to be heard in a constitutional attack on any statute, ordinance or franchise in any proceeding."). Moreover, the mere fact that *Saibini* happened to involve a municipal ordinances does not, in any way, restrict the application of NRS 30.130, especially given its reference to "statute."

The Justice Court viewed this Court's description of NRS 30.130 as "clear" as relating "to the fact that the Attorney General need not be made a party to the action …." (App. 103 n.5.) But a fair reading of the Court's statement demonstrates that it was not limited to that aspect. And, as explained above, the language of NRS 30.130 is clear and unambiguous. It requires that the Attorney General receive notice and the opportunity to be heard in constitutional challenges to statutes in all types of cases.

The Justice Court also misinterpreted *Moldon v. County of Clark*, 124 Nev. 507, 188 P.3d 76 (2008). (App. 102-03.) A proper reading of *Moldon* supports the Attorney General's interpretation of NRS 30.130 and refutes the Justice Court's construction. This Court was unequivocal in *Moldon* that NRS 30.130 applies, and notice is required, "when declaratory relief is sought as to the *validity of a statute* …." *Id.* (emphasis added).

Unlike Real Parties in Interest's Motion to Dismiss, *Moldon* did not squarely involve a constitutional challenge to a statute. Instead, it addressed a question about whether a statute, *as applied*, impermissibly condoned an unconstitutional taking of property in violation of the Fifth Amendment. *Id.* at 509-10, 188 P.3d at 78-79. This

Court and the parties were primarily concerned with whether an unconstitutional taking occurred to those particular plaintiffs; the relief sought did not require that the statute be struck down in its entirety. *Id.* at 510, 188 P.3d at 79.[9]

The issue of notice to the Attorney General was only briefly mentioned in the last footnote of the opinion. *Id.* at 516 n.23, 188 P.3d at 82 n.23. The district court had refused to award interest to the plaintiffs due, in part, to their failure to notify the Attorney General, but the Court indicated that notice was not required because the proceeding did not, in actuality, require a ruling on the entire statute's constitutionality. *See id.*; *id.* at 515, 188 P.3d at 81 ("Accordingly, we conclude that former NRS 355.210 *was unconstitutionally applied* to allow Clark County to take the Moldons' earned interest without just compensation.") (emphasis added). In contrast to Real Parties in Interest's facial challenge to NRS 207.200(1)(a), (App. 012), the *Moldon* plaintiffs "were merely seeking to recover the interest earned on the condemnation deposit." *Id.* at 516 n.23, 188 P.3d at 82 n.23. And the Court did not expressly indicate that NRS 30.130 only applied to declaratory judgment actions. (*Cf.* App. 103 (Justice Court's Order).) Thus,

[9] The *Moldon* Court stated that "any statute allowing local governments to keep interest on funds deposited with the court is unconstitutional." 124 Nev. at 509, 188 P.3d at 78. But in the Fifth Amendment takings context, the Court appears to have meant that the statute effectuates a taking for which "just compensation" is owed. The statute is not necessarily unconstitutional unless just compensation in the amount of the interest is not paid. For example, a land regulation that causes a taking is not unconstitutional provided just compensation is paid. The regulation itself is constitutional unless and until compensation is denied.

as in *Saibini*, nothing in *Moldon* supports the argument that NRS 30.130 is limited to actions involving municipal ordinances or franchises.

Because the Justice Court's interpretation of the plain language of NRS 30.130 and its application of this Court's precedents are clearly erroneous, a writ of mandamus should issue.

C. A Writ of Prohibition Should Issue to Stop the Justice Court's Wrongful Exercise of Jurisdiction.

A writ of prohibition is the counterpart to a writ of mandamus. NRS 34.320. It arrests the proceeding of a lower court "when such proceedings are without or in excess of the [court's] jurisdiction …." *Id.* "A writ of prohibition serves to stop a [lower] court from carrying on its judicial functions when it is acting outside its jurisdiction." *Stephens Media, LLC v. Eighth Jud. Dist. Ct.*, 125 Nev. 849, 857, 221 P.3d 1240, 1246 (2009) (quotations omitted).

Regardless of the contexts in which states apply their respective versions of NRS 30.130, the majority rule is that a failure to notify the attorney general and allow him to be heard deprives the court of jurisdiction to invalidate the statute and take any further action. *Tobin*, 539 P.2d at 365-66 ("We think that is the majority rule in this country."); *see also Cummings v. Shipp*, 3 S.W.2d 1062, 1063 (Tenn. 1928) (court was without jurisdiction under Declaratory Judgments Act where attorney general was not given notice of constitutional challenge); *Hydraulic Press Brick Co. v. City of Indep.*, 311 N.E.2d 873, 875 (Ohio Ct. App. 1974) (attorney general need not be made a party but court

cannot acquire jurisdiction unless the attorney general is served with "a copy of the proceedings"); *Plantation Pipe Line Co. v. City of Bremen*, 170 S.E.2d 398, 398 (Ga. 1969) (trial court was without jurisdiction where attorney general was not served with a copy of the proceeding challenging statute as unconstitutional); *Smith v. City of Florence*, 256 So. 2d 893, 894 (Ala. 1971) (same); *Sendak v. Debro*, 343 N.E.2d 779, 781 (Ind. 1976) (same); *Bollhoffer*, 223 N.W.2d at 903 (same).

Under the Declaratory Judgment Act, notice to the Attorney General and the opportunity to be heard are conditions precedent to declaring a statute unconstitutional. *Court St. Parking Co. v. City of Boston*, 143 N.E.2d 683, 685 (Mass. 1957).[10] And the failure

[10] The Justice Court expressed skepticism that the Attorney General is required to receive notice *before* a statute is declared unconstitutional. (App. 101.) It relied upon NRS 4.235, which states "[i]f a justice court holds that a provision of … the Nevada Revised Statutes violates a provision of the Nevada Constitution or the United States Constitution, the prevailing party in the proceeding shall provide a copy of the ruling to the Office of the Attorney General." NRS 30.130 and NRS 4.235 impose different and complimentary notification duties. *See Mineral Cty. v. Bd. of Equalization*, 121 Nev. 533, 535, 119 P.3d 706, 707 (2005) (courts will harmonize statutes, where possible). NRS 30.130 only requires prior notice to the Attorney General so that he may decide whether to participate; the Attorney General is not obligated to participate if, for example, he determines that the challenge is frivolous and the challenger is unlikely to prevail. *See Cummings,* 223 S.W.2d at 917. Even in some rare cases where the challenge is frivolous, and so therefore the Attorney General opts not to participate after notice is given, a court may nonetheless rule against a statute's constitutionality. In that case, it is important the Attorney General be notified again under NRS 4.235 so that he may now intervene if necessary to defend the statute on appeal. NRS 4.235 was enacted as a record-keeping requirement, *see* NRS 228.165, and the two statutes provide dual safeguards to guarantee that the Attorney General is notified. The enactment of NRS 4.235 was not meant to deprive the Attorney General of pre-ruling notice under NRS 30.130. Indeed, the very fact that the Legislature more recently enacted NRS 4.235 as

to notify the Attorney General and allow him to be heard requires the order and judgment to be vacated. *See Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 512 P.2d 1241 (Colo. 1973) (where failure to give notice to the attorney general is discovered for the first time on appeal, the appropriate relief is vacation of the judgment and remand for further proceedings to permit such notice to be given). Any other interpretation of NRS 30.130 effectively nullifies its notice requirement, allowing litigants and courts to ignore it without consequence.

This Court's case law suggests that the failure to notify the Attorney General is a jurisdictional bar to subsequent invalidation. In *In re Candelaria*, 126 Nev. 408, 415, 245 P.3d 518, 522 (2010), the appellant failed to comply with NRAP 44, which—similar to NRS 30.130—requires notice to the Supreme Court Clerk when a party challenges a statute so that the Clerk can, in turn, certify that fact to the Attorney General. The *Candelaria* appellant's failure to notify, this Court said, "is an independent basis upon which to summarily reject her constitutional arguments." *Id.* The same result should obtain when the Attorney General does not receive notice and an opportunity to be heard pursuant to NRS 30.130. *See Bollhoffer*, 223 N.W.2d at 903 ("The record in the case at bar fails to show service of a copy of the proceeding on the attorney general.

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another notice requirement underscores the importance that the Legislature put on notice to the Attorney General of constitutional challenges to statutes.

Therefore, the trial court did not acquire jurisdiction…. We conclude this court is without jurisdiction to entertain this appeal and it must be dismissed.").

Here, the Justice Court's refusal to ensure that the Attorney General received notice and an opportunity to be heard before it declared NRS 207.200(1)(a) unconstitutional divested the court of jurisdiction to proceed. Without notifying the Attorney General, the Justice Court acted in excess of its jurisdiction by declaring NRS 207.200(1)(a) unconstitutional without notice to the Attorney General. The Justice Court continues to act beyond its jurisdiction by proceeding based upon an erroneous ruling. A writ of prohibition is necessary to arrest the Justice Court's actions. The failure to notify the Attorney General requires that the Order be vacated until the Attorney General has the opportunity to be heard.

The jurisdictional repercussions are proportional to the gravity of the Attorney General's duty to defend state statutes. The Attorney General, as the chief legal officer, has a duty to protect the interests of all state citizens in actions where statutory constitutional questions are raised. *Tobin*, 539 P.2d at 365. Courts should not be allowed to proceed when they or parties have—through their silence or inaction—deprived the Attorney General of his unique constitutional duty.

IV. CONCLUSION

Based upon the foregoing, the Attorney General respectfully requests that this Court issue a writ of mandamus correcting the Justice Court's erroneous interpretation of NRS 30.130 or a writ of prohibition to preclude the Justice Court from proceeding without jurisdiction.

Dated: July 14, 2016.

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VERIFICATION

I, JORDAN T. SMITH, ESQ., declare as follows:

1. I am the Assistant Solicitor General of the State of Nevada and counsel for Petitioner in the above-captioned matter.

2. I verify that I have read the foregoing Petition for Writ of Mandamus or Prohibition and that the same is true to my own knowledge, except those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration is executed on the 14th day of July, 2016 in Las Vegas, Nevada.

/s/ Jordan T. Smith
JORDAN T. SMITH, ESQ.

CERTIFICATE OF COMPLIANCE

I hereby 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) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Garamond. I further certify that I have read this brief and that it complies with NRAP 21.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 14, 2016.

ADAM PAUL LAXALT
Attorney General

/s/ Jordan T. Smith
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on July 14, 2016.

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

I further certify that some of the participants in the case may not be registered CM/ECF users. I have emailed and mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within three calendar days to the following non-CM/ECF participants:

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