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. 70795 Case No. 16M-03289A-B

ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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ISSUE PRESENTED

In *Moldon v. Cty. of Clark*, 124 Nev. 507, 516, n.23, 188 P.3d 76, 82 (2008), this Court held that the Uniform Declaratory Judgment Act's requirement that notice be given to the Attorney General when a litigant challenges a law's constitutionality only applies in an action for declaratory relief. State courts in nearly every other jurisdiction that has adopted the Uniform Declaratory Judgment Act agree that declaratory judgment actions are civil in nature and that the requirement of notice to the Attorney General does not apply in criminal proceedings. In Nevada, the Attorney General may exercise direct supervisory authority over district attorneys, including the district attorney who is prosecuting the misdemeanor action against Defendants Escalante and Funez in this case. Given this, did the Justice Court abuse its discretion when it ruled that notice to the Attorney General was not required prior to Defendants' asserting the unconstitutionality of a criminal trespass statute as a defense?

INTRODUCTION

NRS 30.130 is part of the Uniform Declaratory Judgment Act (the "Act"). *See* NRS 30.010. This Court and the courts of nearly every other jurisdiction adopting the Uniform Declaratory Judgment Act have recognized that the Act's provision on "Parties"—including the requirement that the Attorney General be notified when a litigant challenges a law's constitutionality—applies only in a declaratory judgment action, not in a criminal proceeding.

This is clear from the Act's text, but it also makes sense as a practical matter. The Act describes a *civil action* in which private parties may adjudicate their rights in the absence of a breach of contract or a present violation of the law. NRS 30.040; NRS 30.020. The possibility that purely *private* parties might litigate a public law's validity or constitutionality in a declaratory judgment action led the Act's drafters to include NRS 30.130's notice requirement.

But in the context of a criminal proceeding—including *State of Nevada v. Escalante & Funez*—the State is represented and has the requisite interest in defending the constitutionality of the laws it is prosecuting. Reading NRS 30.130 according to its plain language and context—as this Court did in *Moldon* and as other state courts have done in interpreting the Act—does no disservice to the Office of the Attorney General ("OAG"). Its apocalyptic vision of a neutered and defenseless Attorney General bears no relation to reality.

BACKGROUND FACTS

Real Parties in Interest Maria Escalante and Ramiro Funez were each cited for trespassing at the Red Rock Casino Resort and Spa on December 15, 2015. (Pet. App. 001-002.) The citation contained the following explanation of the alleged trespass: "[Defendants] [d]id return to property after warning not to trespass, to wit: Red Rock Casino la[w]yers did warn Culinary Union by certified letter to not allow representatives to distribute or be on the premises." Because this original ground for trespass was factually and legally unsound, the Clark County District

Attorney has attempted a variety of other theories over the course of three complaints to explain how Escalante and Funez are guilty of criminal conduct.

On February 4, 2016, the District Attorney filed an amended criminal complaint, charging Defendants Escalante and Funez each with one count of trespass in violation of NRS 207.200(1)(a)[1] and one count of vagrancy in violation of Clark County Code 12.32.020. Defendants moved to dismiss this amended complaint, arguing—among other things—that both laws were unconstitutional. (Pet. App. 003-018.)

In a well-reasoned decision, the Justice Court agreed that the portion of NRS 207.200(1)(a) invoked against Defendants—which makes it a crime to "[go] upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof"—is unconstitutionally vague.[2] (Pet. App. 66-73); *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) ("We have in the past 'struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'") (internal citation

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[1] NRS 207.200(1)(a) provides, in relevant part: "Unless a greater penalty is provided pursuant to NRS 200.603, any person who, under circumstances not amounting to a burglary: (a) Goes upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof . . . is guilty of a misdemeanor."

[2] The District Attorney withdrew his allegations based on Clark County's vagrancy law, Clark County Municipal Code 12.32.020, in light of this Court's ruling that a similar state statute, NRS 207.00(*i*), is unconstitutional. *See State v. Richard*, 108 Nev. 626 (1992), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 482, 245 P.3d 550, 553 (2010).

omitted); *City of Las Vegas v. Eighth Judicial District Court*, 118 Nev. 859 (2002) (striking down as unconstitutionally vague a statute providing that "a person who annoys or molests a minor is guilty of a misdemeanor"), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478. The Justice Court rejected the District Attorney's argument that this part of NRS 207.200(1)(a) is saved by its intent requirement. (Pet. App. 072); *see Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 933 (9th Cir. 2004) ("A scienter requirement of knowledge as applied to an unknowable element cannot save a provision from constitutional invalidity.").

The District Attorney never asserted that he was incapable of defending NRS 207.200(1)(a)'s constitutionality or that the participation of the Attorney General was necessary. The Justice Court granted Escalante's and Funez's motion to dismiss that portion of the amended complaint relying on 207.200(1)(a)'s "annoy or vex" prong, holding that this prong is "unconstitutionally vague and must be stricken from the Second Amended Criminal Complaint." (Pet. App. 076.) But over the Defendants' objection, the Justice Court permitted the District Attorney to file a further amended complaint. (Pet. App. 076.)[3] Pursuant to NRS 4.235, the Justice

[3] In a proposed amended complaint appended to its brief, the District Attorney made clear that the basis for Escalante's and Funez's prosecution is the content of the flyers they are alleged to have distributed at the Red Rock Casino. (Pet. App. 040 [alleging that Defendants violated NRS 207.200 because they distributed flyers "containing inflammatory and/or damaging information about the Red Rock Hotel and Casino and its parent company Station Casinos."]). Basing criminal liability on the *content of the Defendants' speech* violates bedrock First Amendment principles. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992). Because the Justice Court held that NRS 207.200(1)(a) was facially unconstitutional, it did not address this additional constitutional problem.

Court directed that defense counsel provide a copy of the Court's Order to the Office of the Attorney General. (Pet. App. 076.)

On May 11, 2016, the OAG filed a "Notice of Appearance and Motion to Place on Calendar." (Pet. App. 079.) The OAG filed a brief with the Motion in which it argued that NRS 30.130 required that notice be given to Attorney General prior to adjudication of Escalante's and Funez's defense that NRS 207.200(1)(a) is unconstitutional. (Pet. App. 92-98.) In response, Escalante and Funez pointed to this Court's decision in *Moldon, supra*, 124 Nev. at 516 n.23, holding that the requirement of notice to the Attorney General in NRS 30.130 applies only in an action for declaratory relief. (Pet. App. 085.)

The Justice Court agreed that *Moldon* controlled and that NRS 30.130's plain language did not require notification in this criminal proceeding. (Pet. App. 102-103.) The OAG timely filed the instant writ petition, seeking review of that decision and nullification of the Justice Court's ruling on NRS 207.200(1)(a)'s constitutionality.

REASONS WHY PETITION SHOULD BE DENIED

I. NRS 30.130 applies to actions for declaratory judgment, not to constitutional defenses raised in criminal proceedings.

This Court and the courts of nearly every other jurisdiction that has adopted the Uniform Declaratory Judgment Act agree that the Act describes a civil proceeding for declaratory relief and that notice to the Attorney General is not required in other kinds of actions, including criminal proceedings. This follows from

the NRS 30.130's plain language and context. It also makes sense as a matter of judicial policy. The Act's drafters included the notice requirement because they were concerned that purely private litigants in a declaratory judgment action might not have sufficient interest in the matter to meaningfully litigate a public law's constitutionality. No such concern arises in a criminal proceeding, in which the State is represented and has a strong and immediate interest in defending the constitutionality of the law it is prosecuting.

A. The Uniform Declaratory Judgment Act establishes a mechanism for private parties to bring actions for declaratory relief.

1. NRS 30.130's plain language and context make clear that it applies only to declaratory judgment actions.

The Court begins with the plain language of the statutory provision and its context within the larger statute. "'[R]easonable statutory interpretation must account for both 'the specific context in which ... language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997)); *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113 (2009) ("The goal of statutory interpretation is to effectuate the Legislature's intent. . . . Plain meaning may be ascertained by examining the context and language of the statute as a whole.").

NRS 30.130 is part of the Uniform Declaratory Judgment Act, NRS 30.010 to 30.160. *See* NRS 30.010. The salience of this point is not merely that the "chapter heading" under which NRS 30.130 falls is entitled "Uniform Declaratory Judgment

Act," as the OAG contends. *Cf.* OAG Br., at 12-13. Rather, the Act sets forth a *civil procedure* for establishing "rights, status, and other legal relations" in the absence of a demand for further relief. *See* NRS 30.140 (purpose of NRS 30.010 to 30.160 "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations[.]"). NRS 30.130 must be understood within the Act's broader context and the civil proceeding it establishes.

Under the Act:

> [a]ny person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

NRS 30.040(1).

A "person" under the Act is a private litigant. Person "shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever." NRS 30.020. The term "person" does not include the State. The Act permits such private litigants to bring an action to establish their rights and legal relations under public laws and private contracts, even in the absence of a present violation of the law or breach of the contract. *See, e.g.*, *Cty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 753 (1998) (declaratory judgment action to establish right to statutory damages under NRS 41.031 and NRS 41.035 permissible, even prior to determination of defendant's liability); NRS 30.050 (declaratory judgment action may be brought prior to contract breach).

The proceedings referred to in the Act are *civil proceedings.* For example, the Act has its own provision on the availability of a "jury trial," which makes clear that its provisions do not apply in criminal proceedings: "When a proceeding under NRS 30.010 to 30.160, inclusive, involves a determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." NRS 30.110 (emphasis added). The right to a jury trial in criminal proceedings, of course, is governed by the Sixth Amendment.

NRS 30.130 ("Parties") is another aspect of a "proceeding under NRS 30.010 to 30.160." It provides:

> 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.

NRS 30.130. The "proceeding" referred to in NRS 30.130 is an action for declaratory relief.

Moreover, by its plain terms, this provision applies only to declaratory judgment actions involving the validity of a municipal ordinance or franchise. NRS 30.130 states: "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." The term "also" in the second clause of this sentence necessarily refers back to the first clause of the sentence. "Also" means "in addition to." Given its plain meaning in this sentence, "also" means "in addition to" the municipality whose ordinance or franchise is being challenged as unconstitutional. This sentence states that in a proceeding which involves the validity a municipal ordinance or franchise, the municipality must be served and is entitled to be heard, and if the challenge involves a claim of unconstitutionality, then the Attorney General must also be served in that proceeding. No other reading of the sentence makes sense of the drafters' inclusion of the word "also."

The OAG argues that reading NRS 30.130 according to its plain terms would read the word "statute" out of the second clause of the sentence. OAG Br. at 15. But municipal franchises are often established according to statute, and statutory regulation of municipal franchises was especially common at the time that Nevada adopted the Uniform Declaratory Judgment Act in 1929. *See, e.g.*, NRS 709.050—709.170 (municipal franchise for street railway, 1909); NRS 709.180—709.280 (extension of municipal franchise for electronic heat, light, or power, 1919); *see also* NRS 711.020 *et seq.* (video service franchises).[4]

This was the conclusion of the only court to have addressed the issue. Recently, in *Nationstar Mortgage, LLC v. Falls at Hidden Canyon Homeowners Ass'n*, 15-CV-01287RCJVCF, 2015 WL 7069298, at *4 (D. Nev. Nov. 12, 2015), Judge Jones read NRS 30.130 according to its plain terms and rejected reliance on

[4] The Act has not been amended since the Legislature adopted it in 1929.

the provision to disqualify a constitutional due-process challenge to the state quiet-title statute. The Court noted that NRS 30.130 only applies to challenges to municipal ordinances and franchises:

> [T]he HOA asks the Court to dismiss for Nationstar's failure to notify the Attorney General of its constitutional challenge under NRS 30.130. But that statute applies only to municipal ordinances and franchises. . . . The case the HOA cites in support of its argument involved a Reno city ordinance. *See City of Reno v. Saibini*, 429 P.2d 559, 560 (Nev. 1967). This case involves no municipal ordinance or franchise.

Nationstar Mortgage, 2015 WL 7069298, at *4 (internal citation omitted). Far from "conflict[ing] with the statutory language," Judge Jones's decision in *Nationstar Mortgage* gives full effect to *all* of NRS 30.130's language.

As the OAG does here, the defendant in *Nationstar Mortgage* argued that *dicta* in *City of Reno v. Saibini*, 83 Nev. 315, 321 (1967) meant that notice to the Attorney General was required in *all* constitutional challenges to *state statutes*. *Cf.* OAG Br., at 1. The federal district court rejected this argument, noting that *City of Reno* was a declaratory judgment action involving a constitutional attack on a city ordinance. *Nationstar Mortgage*, 2015 WL 7069298, at *4 ("The case the HOA cites in support of its argument involved a Reno city ordinance. *See City of Reno v. Saibini*, 429 P.2d 559, 560 (Nev. 1967). This case involves no municipal ordinance or franchise."). Specifically, the declaratory judgment plaintiff in *City of Reno* challenged "the validity of Section 4-23 of Reno Ordinance No 1568," arguing that the ordinance was "in direct conflict with NRS 268.510(1) and 286.550(3) and therefore in violation of the Nevada Constitution, Art. 1, s. 8." *City of Reno*, 83 Nev. at 316-18.

City of Reno involved a *declaratory judgment action* challenging the *validity of a municipal ordinance.* One sentence of loose, general *dicta* at the end of that case says nothing about NRS 30.130's application to a constitutional defense to a *state statute* raised in a *criminal proceeding*.

2. This Court has already determined that NRS 30.130 applies only in actions for declaratory relief.

Even if NRS 30.130 could be read to apply to actions challenging the constitutionality of *statutes* that do not relate to the validity of municipal ordinances or franchises, the provision's plain language and placement in the Uniform Declaratory Judgment Act make clear that its notice requirements apply only in actions for declaratory relief. This is the conclusion of this Court and of nearly every other state court in jurisdictions that have adopted the Act.

In *Moldon*, *supra*, the City of Las Vegas Redevelopment Agency deposited $725,000—the value of the plaintiffs' condemned property—with the court. After the plaintiffs and the Redevelopment Agency entered into a settlement agreement, the plaintiffs applied to the district court for the return of the interest accrued on the deposit. The Redevelopment Agency opposed, pointing to the former NRS 355.210, which provided that "[t]he interest earned from any investment of money pursuant to this section shall be deposited to the credit of the general fund of the political subdivision or municipality which supports the court." The plaintiffs argued that "former NRS 355.210 was unconstitutional because it impermissibly allowed local governments to use private monies deposited with the court for public benefit, by retaining the interest earned from the deposits for local government

use." 124 Nev. at 510. This Court agreed that this provision worked a taking, by denying the plaintiffs of interest that was rightfully their property.

The district court had also "den[ied] the Moldons' application for interest earned on the condemnation deposit . . . based in part on the Moldons' failure to serve the Attorney General under NRS 30.130 with notice of their constitutional challenge to NRS 355.210." *Moldon*, 124 Nev. at 516 n.23. But this Court rejected the idea that NRS 30.130 applied to the plaintiffs, because the plaintiffs were not bringing an action for declaratory relief. *Moldon*, 124 Nev. at 516 n.23 ("The Moldons were not seeking declaratory relief with their application; they were merely seeking to recover the interest earned on the condemnation deposit."). The fact that the plaintiffs raised a constitutional challenge to a state statute in the course of seeking restitution of their property did not convert the application into a declaratory judgment action, nor did it create a basis for invoking NRS 30.130.

In short, 30.130 defines the *parties and participants in a declaratory judgment action*, not the parties and participants to any action in which a litigant attacks a statute or ordinance on constitutional grounds. *See Crowley v. Duffrin*, 109 Nev. 597, 602 (1993) ("The parties to a *declaratory relief action* are specified by NRS 30.130[.]") (emphasis added).

Moldon is dispositive here. Like the plaintiffs in that case, Defendants Escalante and Funez have not brought an action for declaratory relief. They are defending themselves against a criminal complaint. In the course of that defense, they have attacked the constitutionality of NRS 207.200(1)(a)'s "vex and annoy"

prong and argued that it is too vague to be constitutionally applied to them. In ruling on Escalante and Funez's motion, the Justice Court held that this prong of NRS 207.200(1)(a) should be "stricken from the Second Amended Criminal Complaint." (Pet. App. 076). Defendants' constitutional defense does not convert a criminal proceeding into a declaratory judgment action.

Nor does the OAG's claim that *Moldon* involved an "as-applied" rather than a "facial" challenge make any sense. *See* OAG Br., at 19-20. As the OAG recognizes, in *Moldon* this Court held that "any statute allowing local governments to keep interest earned on funds deposited with the court is unconstitutional, as applied to condemnation deposits that are ultimately awarded to a private party." 124 Nev. at 509. The Court's ruling, therefore, was not limited to the parties before it or the particular facts of the case. Rather, it recognized that NRS 355.210 was unconstitutional in a large category of cases in which it would otherwise apply: cases involving condemnation deposits with the court.

Moreover, the Declaratory Judgment Act and NRS 30.130 do not distinguish between constitutional challenges that are "as-applied" and those that are "facial." The OAG cites precedent so holding elsewhere in its brief. *Lazo v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 1984-NMSC-111, 102 N.M. 35, 38, 690 P.2d 1029, 1032 (Declaratory Judgment Act "makes no such distinction"); *see* OAG Br., at 14-15. Rather, as this Court recognized in *Moldon*, the distinction that NRS 30.130 makes is between actions for declaratory relief and other types of proceedings (such an

application for return of a condemnation deposit, or—as here—a criminal proceeding).

3. The courts of nearly every other jurisdiction that has adopted the Uniform Declaratory Judgment Act recognize that the Act's requirements do not apply in criminal proceedings.

This Court is not alone in concluding that notice the Attorney General is only required in declaratory judgment actions. The courts in nearly every jurisdiction that has adopted the Uniform Declaratory Judgment Act have concluded that the notice requirement does not apply in criminal proceedings. The one outlier jurisdiction—Kentucky—has a statute that is materially different from NRS 30.130.

The Uniform Declaratory Judgment Act sets forth a *civil proceeding* for establishing rights under public laws. For this reason, its requirement that the Attorney General be notified does not apply in criminal proceedings. This is far and away the majority rule. *Ex parte Williams*, 786 S.W.2d 781, 782 (Tex. App. 1990) is typical in so holding:

> The State next contends the district court was without jurisdiction because appellant was asking the court to declare a statute unconstitutional; however, he did not serve a copy of the application for writ upon the attorney general's office as required by the Declaratory Judgments Act, Tex.Civ.Prac. & Rem.Code Ann. § 37.006(b) (Vernon 1986). The Declaratory Judgments Act is purely a creature of civil law. It has no application in criminal proceedings. Moreover, we are aware of no authority that requires a defendant who is asserting a statute is unconstitutional to serve the Attorney General. The District Attorney is the State's representative in criminal proceedings and can adequately represent the State's interest in a constitutional challenge. This contention is also without merit.

See also Kobos v. State, 822 S.W.2d 779, 779–80 (Tex. App. 1992). Ohio's courts have reached an identical conclusion:

> At the time of the trial court filing, Kinstle did not provide notice to the Ohio Attorney General of his constitutionality challenge. But, no such notice is required in criminal prosecutions. *See Cleveland Bar Ass'n v. Picklo,* 96 Ohio St.3d 195, 2002-Ohio-3995, 772 N.E.2d 1187, ¶ 7 (finding that a party is only required to provide notice of a constitutionality challenge to the Ohio Attorney General where the original action was for declaratory judgment and was brought pursuant to R.C. 2727.12); *State v. Mutter,* 171 Ohio App.3d 563, 2007-Ohio-1052, 871 N.E.2d 1264, ¶ 2 (2d Dist.) (rejecting argument that criminal defendant waives issue of constitutionality of statute if he fails to provide notice of challenge to the Ohio Attorney General).

State v. Kinstle, 2012-Ohio-5952, 985 N.E.2d 184, 191.

The Washington State Supreme Court agrees that the Uniform Declaratory Judgment Act's requirement of notice to the Attorney General applies only in declaratory judgment actions, not in criminal proceedings:

> Insofar as participation of the attorney general is concerned, the city cites RCW 7.24.110. It provides that "[i]n any proceeding which involves the validity of a municipal ordinance ... [that] is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be *entitled* to be heard." RCW 7.24.110 (emphasis added). This statute only applies to proceedings brought under the Uniform Declaratory Judgments Act. *See Standow v. City of Spokane,* 88 Wash.2d 624, 633, 564 P.2d 1145 (1977), *overruled on other grounds by State v. Smith,* 93 Wash.2d 329, 610 P.2d 869 (1980). Walsh is not maintaining a proceeding under the Uniform Declaratory Judgments Act. Rather, he raised his challenge to the constitutionality of the curfew ordinance in an appeal, pursuant to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction, in Pierce County Superior Court. We are simply reviewing the decision of the superior court affirming his convictions in municipal court for violating the ordinance. That being the case, RCW 7.24.110 has no application.

City of Sumner v. Walsh, 148 Wash. 2d 490, 496–97 (2003). So do the Alabama courts:

> The State contends that, pursuant to § 6-6-227, Ala.Code 1975, this appeal should be dismissed because the attorney general was not served with a copy

> of the proceeding or given an opportunity to be heard in the trial court regarding Boyd's challenge to the constitutionality of the CNA. However, this court held in *Townsend v. City of Mobile,* 793 So.2d 828 (Ala.Crim.App.1998), rev'd on other grounds, 793 So.2d 835 (Ala.2000), that § 6-6-227 is a civil provision which is inapplicable in criminal proceedings.

Boyd v. State, 960 So. 2d 717, 719 (Ala. Crim. App. 2006). *See also, e.g., State v. Burton*, No. E201500879CCAR3CD, 2016 WL 3351316, at *3 (Tenn. Crim. App. June 9, 2016) ("This Court has previously explained that Section 29–14–107(b) 'requires notice to the attorney general when the constitutional validity of a general state law is challenged in a declaratory judgment action' and is inapplicable in criminal cases."); *People v. Couillard*, 131 P.3d 1146, 1150 (Colo. App. 2005) (rejecting argument that Uniform Declaratory Judgment Act's notice provision applies in a criminal proceeding); *State v. Holbach*, 2009 ND 37, ¶¶ 19-20, 763 N.W.2d 761, 766 ("The State argues N.D.C.C. § 32–23–11 applies, which is part of the chapter on declaratory judgments and requires the attorney general to be served with a copy of the proceeding if a statute is alleged to be unconstitutional. However, this is not a declaratory judgment proceeding and N.D.C.C. § 32–23–11 does not apply."); *see also Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 506–07 (Mo. 1991) (Declaratory Judgment Act's notice requirement only applies in actions seeking "the *sui generis* declaratory judgment remedy");

These cases reflect the flip-side of the general rule that criminal defendants may not test the constitutionality of the statutes under which they are being prosecuted by bringing a collateral declaratory judgment action. *See, e.g.*, *Kahaikupuna v. State*, 109 Haw. 230, 236 (2005) ("[I]t has also long been

established that declaratory relief is not appropriate for criminal matters 'where a full and adequate remedy is provided by another well-known form of action,' particularly by testing the statute in a criminal proceeding."); *Hall v. State*, 264 Neb. 151, 158, 646 N.W.2d 572, 578 (2002) ("A criminal defendant cannot collaterally attack the constitutionality of statutes relevant to his or her criminal prosecution by declaratory judgment.").

As these courts have recognized, the reason for requiring notice to the Attorney General in a declaratory judgment action is not present in a criminal proceeding. The drafters of the Uniform Declaratory Judgment Act were concerned that the constitutionality of public laws might be adjudicated in declaratory judgment actions by private parties who lacked insufficient interest. *See The Declaratory Judgment in Public Law*, 43 HARV. L. REV. 1290, 1290–91 (1930) ("Among the objections made to testing the validity of statutes before their enforcement is the fact that the argument on the merits may not be thorough, and that a duty is thereby imposed upon courts which does not belong to them historically."). The Act's drafters addressed this potential problem with declaratory judgment actions by ensuring that "all persons shall be made parties who have or claim any interest which would be affected by the declaration" and that municipalities and the Attorney General would be served if a public law were challenged. *See* NRS 30.130; *see also The Declaratory Judgment in Public Law*, 43 HARV. L. REV. at 1291 ("The danger that legislation will be invalidated without

proper consideration of the issues has been prevented by the salutary requirement that the attorney general be made a party.").

By contrast, "[t]he District Attorney is the State's representative in criminal proceedings and can adequately represent the State's interest in a constitutional challenge." *Ex parte Williams*, 786 S.W.2d at 782. In Nevada, the Attorney General exercises supervisory authority over district attorneys. NRS 228.120(2) (Attorney General has authority to "[e]xercise supervisory powers over all district attorneys of the State in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge."). In this case, the Clark County District Attorney vigorously defended NRS 207.200(1)(a)'s constitutionality in response to Defendants' motion to dismiss. At no point did the District Attorney suggest that he was incapable of defending the law he is prosecuting, nor did he request the "personal presence of the Attorney General" pursuant to NRS 228.130.

The OAG claims that "other *states* that have adopted *similar* statutory language require notice to their attorney general in criminal cases[.]" OAG Br., at 13 (emphasis added). But the OAG cites only one jurisdiction that has so held—Kentucky—and the relevant statute in that state is different from NRS 30.130. *See ibid.* (citing *Jacobs v. Commonwealth*, 947 S.W.2d 416, 419 (Ky. App. 1997).

The relevant Kentucky statute provides: "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 . . ."

KRS 418.075(1). Unlike NRS 30.130, KRS 418.075(1) unequivocally requires that the Attorney General be notified "in any proceeding which involves the validity of a statute."

In any case, Kentucky's approach is an outlier; it appears to have been rejected by every other state court to have addressed the scope of its state declaratory judgment statute's notice provision.

II. The Attorney General's policy rationales for rewriting NRS 30.130 are unsound.

The Attorney General makes a series of unfounded policy arguments for disregarding NRS 30.130's language and context and applying it in a criminal proceeding. OAG Br., at 7-9. Of course, it is not the Court's role to make policy determinations. *See People v. Couillard*, 131 P.3d 1146, 1150 (Colo. App. 2005) (rejecting request to require notification of Attorney General in constitutional challenges raised in criminal proceedings: "We conclude that whether public policy mandates creation of such a requirement is an issue better addressed by the General Assembly."); *N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 588 (2013) (noting that it is the Legislature's role to make "policy and value choices by enacting statutory law" and the judiciary's role to determine "that law's construction and application"). But the OAG's hyperbolic arguments about the dangers of following the rule set forth in *Moldon* and adopted by nearly every other jurisdiction applying the Uniform Declaratory Judgment Act are extremely hollow.

A. The Attorney General does not have a general, constitutional duty to defend Nevada's statutes.

First, the OAG suggests that it has a constitutionally mandated role of "protect[ing] the acts of the Legislature and the will of the People." OAG Br., at 8 (citing Nev. Const., Art. 5, §§ 19, 22). But the Nevada Constitution is silent on the Attorney General's duties. "The powers and duties of the attorney general, therefore, are to be found only in legislative enactment. They are not found anywhere in the Constitution of our State." *Ryan v. Eighth Judicial Dist. Court In & For Clark Cty.*, 88 Nev. 638, 642, 503 P.2d 842, 844 (1972); *see* Nev. Const., Art. 5, § 22 (stating that Attorney General shall have such duties as "may be prescribed by law").

NRS 228 does not prescribe for the Attorney General some free-floating "duty to defend Nevada's statutes." The Legislature forth a series of concrete duties for the Attorney General to fulfill, only some of which *may* involve the defense of Nevada's public laws. For example, the Attorney General "shall attend each of the terms of the Supreme Court, and there prosecute or defend, as the case may be, on the part of the State: (a) All causes to which the State may be a party; (b) All causes to which any officer of the State, in his or her official capacity, may be a party; and (c) All causes to which any county may be a party, other than those in which the interest of the county may be adverse to the State, or any officer of the State, acting in his or her official capacity[.]" NRS 228.140(1). The Legislature could have mandated that the Attorney General always represent the State in all lower-court proceedings, but it did not.

The Attorney General has a more general, discretionary duty to "protect the interest of the State": "whenever the Governor directs or when, in the opinion of the Attorney General, to protect and secure the interest of the State it is necessary that a suit be commenced or defended in any federal or state court, the Attorney General shall commence the action or make the defense." NRS 228.170(1). But this is hardly a mandate that the Attorney General participate in every case in which the constitutionality of a statute is raised. The notion that by following the Uniform Declaratory Judgment Act's letter the Court would somehow be interfering with the Attorney General's constitutional or statutory duties is meritless.

B. The Legislature has created sufficient safeguards to protect the Attorney General's interest in criminal cases raising constitutional challenges.

Other Nevada statutes provide sufficient safeguards of the Attorney General's interest in criminal cases raising constitutional challenges to Nevada statutes. The Court does not need to rewrite the Declaratory Judgment Act to do so. The Legislature has given the Attorney General supervisory power over the district attorneys who prosecute Nevada's criminal laws, and allowed the Attorney General to require reports of those district attorneys. NRS 228.120(2) (Attorney General may "[e]xercise supervisory powers over all district attorneys of the State in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge."). Pursuant to this supervisory power, the Attorney General could require that district attorneys under his charge report when criminal defendants have alleged that

Nevada statutes are unconstitutional. The Attorney General could then elect either to take exclusive control over the prosecution of the case pursuant to NRS 228.120(3), or intervene in the case in a more limited fashion to defend the statute's constitutionality.

The Legislature has also specifically required that prevailing parties in justice courts provide notice to the Attorney General of any holding that a Nevada statute is unconstitutional. NRS 4.235 ("If a justice court holds that a provision of the Nevada Constitution or 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."). A similar requirement exists for actions in the district courts. NRS 3.241. This is further demonstration that NRS 30.130 applies only to actions for declaratory relief governed by the Uniform Declaratory Judgment Act. The Legislature would not require prevailing parties in all trial court proceedings to inform the Attorney General that a statute had been declared unconstitutional if the Attorney General had *already* been informed, pursuant to NRS 30.130, that the same statute was under constitutional attack.[5]

[5] The OAG argues that its interpretation of NRS 30.130 as applying to all proceedings—not just actions for declaratory relief—should be "harmonized" with NRS 4.235. OAG Br., at 22 n.10. It claims that in "some rare cases" where (1) there is a "frivolous" constitutional challenge at the trial court level, (2) the Attorney General decides it is not worth his time to become involved, yet (3) the trial court nonetheless strikes down the law as unconstitutional, the Legislature intended to require that "the Attorney General be notified again under NRS 4.235 so that he may now intervene if necessary to defend the statute on appeal." OAG Br., at 22 n.10. But this is engaging in a flight of fancy, not harmonizing statutes. It defies

Instead, the Legislature adopted NRS 30.130 in 1929 to deal with a specific problem inherent in declaratory judgment actions: the possibility of private parties litigating the validity of public laws in advance of those laws' application.

C. The Attorney General's concern that private parties might litigate statutes' constitutionality is irrelevant in this case, and is misplaced generally.

Finally, the OAG worries that upholding the Justice Court's interpretation of NRS 30.130 will mean that private parties might be the only litigants in a case addressing the constitutionality of a statute. OAG Br., at 7. This argument is irrelevant in this case, which involves a criminal proceeding to which the State is a party. But it also misunderstands the role of the courts and private litigants in testing the constitutionality of public laws.

This case involves a criminal proceeding to which the State—represented by the District Attorney—is a party. The State has had every incentive to defend the constitutionality of NRS 207.200(1)(a) in this proceeding, and the District Attorney has done so ably, though so-far unsuccessfully. The OAG's alarmist claims about injury to the separation of powers, legislative votes being "tossed out without due process," and threats to "democratic government" are unfounded and hyperbolic. OAG Br., at 7. Holding that NRS 30.130 does not apply in criminal proceedings will not result in a "massive disruption in the orderly working of the Nevada legal

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belief that the Legislature enacted broad notice provisions governing the justice and district courts simply to address "rare cases" of "frivolous" constitutional challenges that the OAG could not be bothered to track to their conclusion in the trial court.

system," any more than similar holdings have done to the legal systems of Texas, Alabama, Tennessee, Colorado, Washington, or any of the other states that have so ruled.

Moreover, this Court regularly addresses the constitutionality of important Nevada statutes without the aid of the Attorney General, and with the participation only of private litigants. *See, e.g.*, *Galloway v. Truesdell*, 83 Nev. 13, 15, 422 P.2d 237, 239 (1967); *Cramer v. Peavy*, 116 Nev. 575, 581–82, 3 P.3d 665, 670 (2000); *Reinkemeyer v. Safeco Ins. Co. of Am.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001); *Berkson v. LePome*, 126 Nev. 492, 499, 245 P.3d 560, 565 (2010); *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 80, 358 P.3d 234, 236 (2015). There is no indication that democratic government in the State has suffered as a result. That is because it is ultimately the judiciary that is charged with ensuring that Nevada's statutes comport with its Constitution. *See Nevadans for Nevada v. Beers*, 122 Nev. 930, 943 n.20, 142 P.3d 339, 347 (2006) ("A well-established tenet of our legal system is that the judiciary is endowed with the duty of constitutional interpretation.") (citing *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 177–78, 2 L.Ed. 60 (1803)).

CONCLUSION

The Justice Court correctly held that NRS 30.130 did not require Defendants Escalante and Funez to notify the Attorney General of their criminal defense challenging the constitutionality of NRS 207.200(1)(a). The writ petition should be denied.

Dated: September 26, 2016

Respectfully submitted,

McCRACKEN, STEMERMAN & HOLSBERRY

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION with the Clerk of the Court for the Nevada Supreme Court by using the appellate Eflex filing system on September 26, 2016.

Participants in the case who are registered Eflex users will be served by the appellate Eflex system.

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

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Dated: September 26, 2016

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