IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Case No.: 74604 Appeal from the Eighth Judicial District Court, the Honorable Jim Crockett Presiding

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In this appeal, the Coroner asks this Court to vacate the District Court's order requiring the Coroner to produce unredacted juvenile autopsy reports since: (1) these reports (except 49 non-CDR cases) are confidential according to NRS 432B.407(6); (2) these reports contain confidential personal health information; (3) these reports cannot be legally disclosed according to the legal underpinnings of AGO 82-12; and (4) AB 57 (2017) amended NRS 259.045 to clarify that autopsy reports are confidential and can only be disclosed to a certain class of individuals. The Coroner also asks this Court to determine that there was no waiver of any portion of the Coroner's legal position to withhold juvenile autopsy reports. Alternatively, if the Court requires the Coroner to produce redacted juvenile autopsy reports, the Coroner asks this Court to determine that the Coroner can charge a reasonable fee to LVRJ for time spent redacting based upon NRS 239.055, aside from a copying cost.

In its answering brief, LVRJ takes extreme positions and argues that (1) this Court should read a waiver remedy into NRS 239.0107; (2) this Court should not follow the plain language of NRS 432B.407(6); (3) confidential personal health information within juvenile autopsy reports somehow becomes available for public perusal upon death; and (4) Attorney General Opinions are not legal authority, such that the legal underpinnings of AGO 82-12 based upon

Nevada law and policy should be ignored. Thus, LVRJ asks this Court to affirm the District Court's order to "produce autopsy reports of autopsies conducted of anyone under the age of 18 conducted from 2012 through April 13, 2017 to the LVRJ in unredacted form." 2 JA 441, ¶ 59. Alternatively, if the Court allows the Coroner to redact confidential information from the juvenile autopsy reports, LVRJ asserts that it has the right to employ the Coroner to search for and redact records without any payment. The amici brief joins with LVRJ's extreme positions and claims that public opinion suggests that this Court should disregard Nevada law and policy to order the disclosure of the requested juvenile autopsy reports in an unredacted form. The Coroner asks this Court to reject the extreme positions take by LVRJ and the amici.

In this reply, the Coroner relies upon the following arguments for its requested relief: (1) LVRJ'S answering brief contains arguments and documents not properly before this Court; (2) The Coroner adequately responded to LVRJ's public records request, and the District Court's conclusions that the Coroner waived its confidentiality arguments are not supported by law; (3) Juvenile autopsy reports are confidential and not subject to disclosure; (4) Alternatively, this Court should remand this case to the District Court with instructions for LVRJ to demonstrate that the public interest sought to be advanced is significant; (5) The Coroner is entitled to charge for extraordinary use of personnel if the Court orders

redaction; and (6) The arguments made in the amici brief are irrelevant and not based on Nevada law and policy.

In summary, the Coroner requests that this Court vacate the District Court's erroneous order requiring that the Coroner produce unredacted juvenile autopsy reports, and instead conclude that the juvenile autopsy reports are confidential. Alternatively, the Coroner asks that this Court determine that the confidential personal health information contained in the autopsy reports be redacted and permit the Coroner to charge for extraordinary use of personnel for the related production consistent with NRS 239.055.

II. LEGAL ARGUMENT

A. LVRJ'S ANSWERING BRIEF CONTAINS ARGUMENTS AND DOCUMENTS NOT PROPERLY BEFORE THIS COURT.

As a general rule, this Court does not address arguments that are made for the first time on appeal and which were not asserted before the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *Dolores v. State, Employment Sec. Division*, 134 Nev. Adv. Op. 34, 416 P.3d 259, 262 (2018) (issues not argued in the lower court are deemed to have been waived and will not be considered on appeal); *Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal.").

First, LVRJ's evidentiary arguments related to Clark County Coroner John Fudenberg's ("Fudenberg") declaration were never raised in the District Court. Yet, LVRJ now contends that Fudenberg's declaration contains hearsay and inadmissible legal conclusions, and as such, should not be considered by this Court. Respondent's Answering Brief ("RAB") 10–12, 23. In the District Court, however, LVRJ made no such arguments. Rather, LVRJ argued that the Coroner did not meet its burden because NRS 432B.407(6) supposedly does not render autopsy reports confidential, and, if autopsy reports are confidential, it is for a temporary period and does not apply once the CDR team is done with its work. 2 JA 238–255. Any objection by LVRJ to Fudenberg's declaration should have been timely raised in the District Court. *See Nevada State Bank v. Snowden*, 85 Nev. 19, 21, 449 P.2d 254, 255 (1969) (failure to object waives challenges to substantive error, and "no issue remains for this court's consideration"). Because LVRJ's evidentiary arguments are being raised for the first time in this appeal, this Court should decline to consider them.

Likewise, LVRJ's arguments regarding the legislative history of the NPRA should not be considered because these arguments were not raised below. This Court previously denied the Coroner's motion to strike Respondent's appendix. *See* Order Granting Motion to File Amicus Brief to Associate Counsel, and Denying Motion to Strike Appendix, filed on October 18, 2018. In support of its

denial, the Court reasoned that the legislative history concerning the NPRA relied upon by LVRJ can be judicially noticed. *Id.* But, the Court did not determine, at that time, whether it would actually consider the new information raised for the first time in this Court. *See Carson Ready Mix*, 97 Nev. at 476, 635 P.2d at 277. LVRJ relies on new references to legislative history in support of its argument that AGO 82-12 is obsolete. RAB 18–20. But, nothing within this legislative history addresses the particulars of AGO 82-12. *Id.* More importantly, this argument was not raised before the District Court and should not be considered by this Court. *Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Indeed, LVRJ's arguments below consisted of: (1) AGO 82-12 is not binding legal authority (1 JA 154–155; 2 JA 248); and (2) AGO 82-12 is not sufficient because it interprets a prior version of the statute. Although LVRJ had the opportunity to raise its "obsolete" argument in the District Court, it failed to do so. LVRJ cannot now assert arguments for the first time on appeal.

Lastly, this Court's prior order did not address LVRJ's reliance on the *Blackjack Bonding v. LVMPD* district court order. Notably, the order relied upon by LVRJ is not the final order in that case. 3 Respondent's Appendix ("RA") 573–576. To be sure, the final amended order was entered on July 1, 2013. 1 Appellant's Reply Appendix ("ARA") 1–4, 80–91. Thus, this Court should disregard LVRJ's arguments that rely on an order that was ultimately amended.

B. THE CORONER ADEQUATELY RESPONDED TO LVRJ'S PUBLIC RECORDS REQUEST, AND THE DISTRICT COURT'S CONCLUSIONS THAT THE CORONER WAIVED ITS CONFIDENTIALITY ARGUMENTS ARE NOT SUPPORTED BY LAW.

In its answering brief, LVRJ contends that NRS 239.0107(d) requires strict compliance. RAB 13–15. But, LVRJ cannot point to any waiver language within this statute. The cases upon which LVRJ relies upon do not discuss waiver of statutory privileges. *Id.* "[I]n determining whether strict or substantial compliance is required, courts examine the statute's provisions, as well as policy and equity considerations." *Leven v. Frey*, 123 Nev. 399, 406–407, 168 P.3d 712, 717 (2007) (citing 3 Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, § 57:19, at 58 (6th ed. 2001)). Generally, statutes creating time or manner restrictions are construed as mandatory. *Id.* On the other hand, statutes are directory (i.e., advisory) if they require performance within a reasonable time or if substantial compliance is sufficient. *See Village League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, 124 Nev. 1079, 1087, 194 P.3d 1254, 1259 (2008). A statute, however, should not be deemed mandatory if it appears to have been prescribed simply as a matter of form. *See Corbett v. Bradley*, 7 Nev. 106, 108 (1871). Furthermore, this Court may construe a statute as directory to avoid "harsh, unfair, or absurd consequences." *Village League*, 124 Nev. at 1088, 194 P.3d at 1260–1261 (2008) (citing *Leven*, 123 Nev. at 407, 168 P.3d at 717).

The District Court's interpretation that the alleged failure to strictly comply with NRS 239.0107(d)(1) results in a waiver of the Coroner's confidentiality arguments is clearly erroneous, as such an interpretation would result in a harsh, unfair, and absurd consequence. 2 JA 436–437, ¶¶ 32–33. In 2007, the Legislature added the five-day response time to the NPRA. *See* Hearing on Senate Bill 123 ("SB 123") Before Senate Committee on Government Affairs, 74th Leg. (Nev. Feb. 26, 2007). The purpose of the five-day rule was to ensure that requesters received some sort of response from the government entity and that the requesters had a deadline. *Id.* In fact, as initially proposed, SB 123 included language that would permit waiver of confidentiality in the event that the government entity failed to timely respond. *Id.* The Legislature, however, had concerns about waiving statutory confidentiality provisions. *Id*. As such, SB 123 was amended to remove the waiver language related to an untimely response from the government. *See* Hearing on SB 123 Before Subcommittee of the Senate Committee on Government Affairs, 74th Leg. (Nev. April 9, 2007).[1] Thus, the legislative history clearly demonstrates that a government entity's failure to respond to a public records request within the five-day period does not waive the confidential status of the records sought.

[1] At the April 9, 2007 hearing, Senator Terry Care, Chair of the Subcommittee specifically stated: "There is no waiver of the confidential status of the document if the government fails a timely response." *Id.*

Nevertheless, should this Court determine that NRS 239.0107 requires strict compliance, the remedy available to address any deficiencies in a response provided pursuant to NRS 239.0107 is judicial relief in accordance with NRS 239.011—not waiver. To be sure, earlier this year this Court rejected a similar waiver argument. *See Katz v. Incline Village Gen. Improv. Dist.*, Dkt. No. 70440, at *8–9 (Feb. 26, 2018) (unpublished). In *Katz*, the plaintiff challenged the district court's conclusion that the defendant did not violate the NPRA. *Id.* The defendant had denied plaintiff's public record requests on the basis that the records requested were not public records. *Id.* The plaintiff contended, without any legal support, that the defendant's failure to articulate the basis for denying the request violated NRS 239.0107 and, thus, waived its confidentiality arguments. *Id*. This Court expressly rejected the plaintiff's waiver argument because it refused to read such a requirement into the NPRA. *Id.*

This holding is further supported by this Court's previous rulings on the NPRA. In *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011), this Court addressed an agency's prelitigation duties under NRS 239.0107(d) after the lower court denied, in part, a petition for writ of mandamus for access to public records. One of the issues before this Court concerned whether an agency was required to submit a log, in the form of a *Vaughn* index,[2] in response to a public

[2] *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

records request prior to the commencement of litigation. *Id.*, 127 Nev. at 884–885, 266 P.3d at 630–631. Consistent with the NPRA, this Court ruled that "[n]o log, in the form of a *Vaughn* index or otherwise, is required under NRS 239.0107(1)(d)." *Id.*, 127 Nev. at 885, 266 P.3d at 631. Instead, if a public records request is denied, the entity "must provide the requesting party with notice and a citation to legal authority that justifies nondisclosure." *Id.*

This Court further clarified that "merely pinning a string of citations" to a blanket denial due to confidentiality does not satisfy an entity's prelitigation obligation under NRS 239.0107(1)(d)(2). *Id.* Because the State made a blanket denial and summarily listed case law, a Nevada Attorney General Opinion, and an internal policy, without any explanation, the Court concluded that the State did not meet its prelitigation duties under NRS 239.0107(1)(d). *Id.* Despite not meeting its prelitigation duties, the Court did not determine that the State waived its confidentiality arguments. *Id.* Rather, *Gibbons* remanded the case to the district court to instruct the State to provide the petitioner with a log and then determine whether the records at issue were subject to disclosure based on the privileges asserted. *Id.*, 127 Nev. at 885–886, 266 P.3d at 631.

There is simply no authority that supports the District Court's ruling on waiver. First, the Coroner met its obligations under the NPRA by providing a proper response pursuant to NRS 239.0107(1)(d), including providing LVRJ with

spreadsheets of data including only public information from the requested autopsy reports. 1 JA 13–143. It was the Coroner's understanding that the spreadsheets satisfied LVRJ's request. 1 JA 228, ¶ 7. Contrary to LVRJ's assertions, the Coroner did not refrain from disclosing juvenile autopsy reports acquired by CDR teams based on the purpose of LVRJ's request. As the D.A.'s Office explained, NRS 432B.407(1) renders all information acquired by CDR teams, including autopsy reports, confidential. 1 JA 45–50. LVRJ was also informed that if the Coroner disclosed such information, it could be subject to a civil penalty. *Id.* The Coroner's denial was based on a statutory confidentiality provision related to the records sought, not LVRJ's purpose.

Second, even if the Coroner did not meet its pre-litigation duties in responding to LVRJ's public records request, which it did, the NPRA does not require the Coroner to automatically turn over otherwise confidential records. *See Katz*, Dkt. No. 70440, at *3. Indeed, the Legislature expressly rejected the notion that a record loses its confidential status merely because the government does not assert a confidential statute within the five-day period. Thus, the District Court erred in determining that the Coroner waived a portion of its legal position to withhold confidential juvenile autopsy reports. This Court should now vacate the District Court's order.

C. JUVENILE AUTOPSY REPORTS ARE CONFIDENTIAL AND NOT SUBJECT TO DISCLOSURE.

The District Court improperly determined that juvenile autopsy reports provided to a CDR team were not deemed confidential pursuant to NRS 432B.407(6). 2 JA 438–439, ¶¶ 37–43. Furthermore, the District Court erred because it ruled that, even if NRS 432B.407 renders autopsy reports confidential, the records are only confidential during a CDR team's review of a child fatality. 2 JA 438–439, ¶¶ 42–43. LVRJ asserts that the District Court's interpretation is proper because "information," as used in this statute, supposedly does not amount to records. RAB 23. But, NRS 239.010 specifically references NRS 432B.407 as an exemption from public records. LVRJ also contends that information provided to CDR teams, such as autopsy reports, cannot be deemed confidential in perpetuity. RAB 28. However, the Coroner has never contended that the juvenile autopsy reports are permanently confidential. *See* NRS 239.0115 (creating a rebuttable presumption for access to records otherwise declared confidential after 30 years). In reaching its erroneous conclusion, the District Court ignored the NPRA's 30-year rule and failed to abide by the plain language of NRS 432B.407, rendering the requested juvenile autopsy reports information confidential.

LVRJ's position and the resulting District Court order cannot be reconciled with the plain language of NRS 432B.407 (6), which renders information provided

to CDR teams confidential. As a matter of law, "Where the language of the statute is plain and unambiguous, such that the legislative intent is clear, a court should not 'add to or alter [the language] to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports.'" *State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1122, 946 P.2d 179, 183 (1997) (citing *Maxwell v. SIIS*, 109 Nev. 327, 330, 849 P.2d 267, 269 (1993)). NRS 432B.407(6) unequivocally provides that all information acquired by a CDR team is confidential. The term "information" is not defined within NRS Chapter 432B. However, this Court has interchangeably used the term "information" and "record" in the context of the NPRA. *See City of Sparks v. Reno Newspapers, Inc.*, 399 P.3d 352, 355 (Nev. 2017) ("Under the Nevada Public Records Act ([NPRA]), all public records generated by government entities are public information. . . ."); *LVMPD v. Blackjack Bonding*, 343 P.3d 608, 612 (Nev. 2015) ("[W]e consider whether the requested information is a public record. . . ."). Pursuant to NRS 432B.407(1)(b), the Coroner provided juvenile autopsy records to the CDR team. Thus, the Coroner's juvenile autopsy reports acquired by the CDR team are confidential.

When interpreting statutes, courts have a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. *See Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712,

714 (2007). Reviewing NRS Chapter 432B as a whole, it is evident that the confidentiality provision in NRS 432B.407(6) applies to the Coroner and its autopsy reports. The Legislature enacted a civil penalty for disclosure of information acquired by a CDR team organized pursuant to NRS 432B.407. *See* NRS 432B.4095(1). Of most importance, "each member" of a CDR team can be penalized for disclosing confidential information. *Id.* It necessarily follows that if the Coroner, as a representative of the CDR team, discloses juvenile autopsy reports, which were acquired by the CDR team, a civil penalty would be assessed for disclosing such confidential information. The penalty statute demonstrates that the Legislature intended to encompass all records acquired by CDR teams, including juvenile autopsy reports provided by the Coroner.

Likewise, nothing within NRS 432B.407 or NRS 432B.4095 limits the confidentiality of the records to the period while the CDR team is conducting its investigation. To the contrary, NRS 432B.407(6) explicitly provides that the records are confidential and must not be disclosed. Furthermore, the NPRA specifically recognizes a limitation to records expressly deemed confidential. *See* NRS 239.010. The NPRA also creates a rebuttable presumption for access to records, notwithstanding any provision of law that has declared a public record confidential, if the record has been in the legal custody and control of the agency for 30 years or until the death of the person to whom the record pertains,

whichever is later. *See* NRS 239.0115(1).[3] In other words, even if a record is deemed confidential pursuant to statute, a person may seek to inspect or copy the record after the government has maintained custody and control over the records for at least 30 years. *Id.* Although the statute creates a presumption, the government agency is still afforded an opportunity to establish that the requested records should remain confidential, even after 30 years. NRS 239.0115(2).

Here, the juvenile autopsy reports acquired by the CDR team are expressly deemed confidential. NRS 432B.4095 reconfirms that all information provided by each member of the CDR team is confidential and not subject to disclosure. Furthermore, the District Court's ruling that NRS 432B.407(6)'s confidentiality provision is only temporary is also flawed because the statute does not make a reference to any time limitation.

[3] "Except as otherwise provided in this subsection and subsection 3, notwithstanding any provision of law that has declared a public book or record, or a part thereof, to be confidential, if a public book or record has been in the legal custody or control of one or more governmental entities for at least 30 years, a person may apply to the district court of the county in which the governmental entity that currently has legal custody or control of the public book or record is located for an order directing that governmental entity to allow the person to inspect or copy the public book or record, or a part thereof. If the public book or record pertains to a natural person, a person may not apply for an order pursuant to this subsection until the public book or record has been in the legal custody or control of one or more governmental entities for at least 30 years or until the death of the person to whom the public book or record pertains, whichever is later."

1. This Court Should Carry Out the Legislative Intent in Interpreting Assembly Bill 57 (2017) and Conclude that Autopsy Reports Are Confidential.

Generally, when examining a statute, this Court ascribes the plain meaning to its words, unless the plain meaning was not clearly intended. *A.J. v. Dist. Ct.*, 394 P.3d 1209, 1213 (Nev. 2017). "The plain meaning rule is not to be used to thwart or distort the intent of the Legislature by excluding from consideration enlightening material from the legislative history." *Id.* (citing 2A Norman J. Singer & Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION, § 48:1, at 555–556 (7th ed. 2014). Relying on the United States Supreme Court, this Court has recognized that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *Id.* (citing *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690 (1974)). Thus, this Court should look to the legislative history of NRS 259.045, specifically AB 57, to conclude that autopsy reports are not to be released to the general public, but limited to those with a familial relationship.

In support of AB 57, Fudenberg testified that the amendment will permit coroners statewide "to release reports to someone who is not necessarily the legal next of kin when the legal next of kin is a suspect in the death." Hearing on AB 57 Before the Assembly Committee on Government Affairs, 79th Leg. (Nev. Mar. 8, 2017). The legislative history further clarifies that a coroner's giving notice of

death and a copy of the autopsy report are limited to parents, guardians, adult children, or custodians of the decedent. *Id.* Had the Legislature intended for such information to be public, there would be no need to identify specific individuals that may receive the autopsy report. However, that is not the language provided in the statute. *See* NRS 259.045. Because the Legislature specifically enumerated a list of individuals to receive an autopsy report, it intended to exclude all others, including the general public, from access to autopsy reports. *See Ramsey v. City of N. Las Vegas*, 392 P.3d 614, 619 (Nev. 2017). Therefore, the Court should declare that the requested juvenile autopsy reports are confidential and cannot be disclosed.

2. Common Law Privacy Interests Protect Confidential Personal Health Information Contained in the Requested Juvenile Autopsy Reports.

Nevada's common law protects personal privacy interests which prohibits the disclosure of the requested juvenile autopsy records. Pursuant to statute, a medical health provider is required to provide the Coroner with access to a decedent's medical records, which are otherwise deemed confidential, so long as the Coroner is performing its statutory duties. *See* NRS 629.061. Upon the examination of the decedent's body, a medical examiner reviews investigative findings, medical records, and health history of the decedent. 1 JA 226, ¶ 2. If an autopsy is performed, the autopsy report will generally include an analysis of the

medical and health status of the decedent, including references to specific medical and health information and personal characteristics about that decedent. 1 JA 226–227, ¶ 3. The sample redacted autopsy reports that the Coroner provided to LVRJ demonstrate that personal health information is present in such reports. 1 JA 116–143. Thus, it necessarily follows that the information that the Coroner obtained pursuant to statute, and included within the autopsy report, must remain confidential. In other words, the information does not lose its confidential nature merely because a healthcare provider, as required by law, provided the Coroner with access to confidential health and medical information. *Cf. Cotter v. Dist. Ct.*, 416 P.3d 228, 232 (Nev. 2018) (allowing attorneys with a common interest to share confidential information without waiving the privilege).

Regardless, it is well established that an individual's privacy is also an important interest that should be considered when requiring disclosure of government records that contain private and personal information. *See Reno Newspapers v. Sheriff*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010). Additionally, courts have recognized that surviving family members retain an interest in the decedent upon passing. *See March v. Cnty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (recognizing a common law right to non-interference with a family's remembrance of a decedent); *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 168 (2004) ("Family members have a personal stake in

honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."). Indeed, this Court recently recognized that "Nevada's common law protects personal privacy interests from unrestrained disclosure under the NPRA." *Clark Cnty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, at *6 (Oct. 25, 2018). To reach this conclusion, the Court relied on the common law tort of invasion of privacy. *Id.* While it is an issue of first impression in Nevada, California has recognized a decedent's family member's right to assert an invasion of privacy claim. *See Catsouras v. Dep't of Cal. Hwy. Patrol*, 181 Cal.App.4th 856, 874, 104 Cal.Rptr.3d 352, 366 (2010); *see also Montesano v. Donrey Media Grp.*, 99 Nev. 644, 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984) (identifying the elements for a tort of invasion of privacy and relying on *Forsher v. Bugliosi*, 26 Cal.3d 792, 163 Cal.Rptr. 628, 608 P.2d 716 (1980)).

This District Court ignored the Coroner's arguments about the privacy interests at stake and improperly ruled that the juvenile autopsy reports must be disclosed in their entirety. Thus, this Court should determine that the common law privilege concerning the privacy interests retained by the decedents' family members substantially outweighs the public's interest in access to the juvenile autopsy reports.

3. The Attorney General Opinion 82-12 Is Relevant, and the Coroner's Reliance on the Opinion Was Appropriate.

The District Court concluded that, because Attorney General Opinions are not binding legal authority, the Coroner improperly relied on the legal analysis contained in AGO 82-12. 2 JA 437. In reaching its erroneous conclusion, the District Court failed to recognize that: (1) the purpose of Attorney General Opinions is to guide public officials; (2) this Court has also relied on legal analyses within Attorney General Opinions when addressing the NPRA; and (3) the legal underpinnings of AGO 82-12 support the Coroner's confidentiality claims.

a. The Purpose of Attorney General Opinions Is to Guide Public Officials.

The Coroner acknowledges that this Court has generally held that Attorney General Opinions are not binding legal precedent. *See Blackjack Bonding v. City of Las Vegas Mun. Ct.*, 116 Nev. 1213, 14 P.3d 1275 (2000). However, one of the very duties the Attorney General is charged with is providing opinions upon any question of law for guidance to public officials. *See* NRS 228.150(1). As such, the Coroner was entitled to rely upon AGO 82-12 because it addresses the very issue presented in this dispute—whether autopsy reports are public records requiring disclosure under the NPRA. *See Cannon v. Taylor*, 88 Nev. 89, 91, 493 P.2d 1313, 1314 (1972) (concluding that public officials from one city were entitled to rely on the state's Attorney General Opinion that was directed to officials in another city

who faced the same problem). The District Court's ruling that a government agency is not permitted to rely on an Attorney General Opinion in response to a public records request eviscerates the entire purpose of NRS 228.150(1). This is especially true in instances, such as this one, where there is no established case law on the legal question at issue. Accordingly, the Coroner's reliance on AGO 82-12, as a public official, was appropriate.

b. This Court has Previously Relied on Attorney General Opinions in NPRA Matters.

The District Court also ignored this Court's previous reliance on Attorney General Opinions in the NPRA context. This Court has had opportunities to denounce a government entity's reliance on Attorney General Opinions, but it has declined to do so. *See Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011). In addressing a government agency's pre-ligitation duty in responding to a public records request, *Gibbons* held that an agency cannot merely provide a list of citations. In *Gibbons*, the State relied on California and Nevada case law, a Nevada Attorney General Opinion, and the State of Nevada Policy on Defining Information Transmitted via E-mail as a Public Record to support its position that the requested records were confidential. 127 Nev. at 885, 266 P.3d at 631. Concluding that the State failed to meet its burden under NRS 239.0107(1)(d), this Court specifically rejected the State's reliance on its own policy, concluding that

the "State's informal employee e-mail policy does not have the force of law." *Id.* Notably, this same rationale was not extended to Attorney General Opinions. *Id.* Although this Court concluded that the State did not meet its pre-litigation obligations in accordance with the NPRA, it based its decision on the fact that the State "provided no explanation whatsoever as to why the cases it cited actually supported its claim of confidentiality or were anything other than superfluous." *Id.*

This Court could have specifically denounced a government agency's reliance on Attorney General Opinions in relation to the NPRA in *Gibbons*, but did not. Contending that AGO 82-12 is not sufficient authority to satisfy the Coroner's obligation under NRS 239.0107(1)(d), LVRJ claims that a specific authority is necessary to prevent a non-attorney from "root[ing] around to figure out what 'AGO 82-12 (6-15-82)' means." RAB 18 n.12. But, such an argument is not relevant here because, in addition to the Coroner's detailed explanation of the application of AGO 82-12, LVRJ was provided an actual copy of the opinion. 1 JA 32–39. Because this Court has indirectly approved of an agency's reliance on Attorney General Opinions in the NPRA context, the Coroner's reliance on AGO 82-12 was proper. Thus, this Court should vacate the District Court's order erroneously concluding that the Coroner did not satisfy its burden under the NPRA because it relied on AGO 82-12. 2 JA 437, ¶¶ 34–36.

c. The Legal Underpinnings of AGO 82-12 Support the Coroner's Confidentiality Claim.

From the outset, the Coroner asserted that AGO 82-12 supported its position that autopsy reports are not subject to public inspection or disclosure. 1 JA 13–27. In relying on AGO 82-12, the Coroner explained that autopsy reports are not open to any member of the public because the reports contain medical information and confidential information about the decedent's body. 1 JA 16.

The Attorney General opined that "public inspection is the rule and secrecy is the exception," but "the right to public inspection of public records is not absolute." AGO 82-12, at *3. The Attorney General further acknowledged that Nevada has a "strong public policy that the secrets of a person's body are a very private and confidential matter upon which any intrusion in the interest of public health or adjudication is narrowly circumscribed." *Id.* This analysis is consistent with this Court's framework in *Gibbons*. *See* 127 Nev. at 880, 266 P.3d at 628 ("[T]he state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access.").

Although AGO 82-12 was issued prior to the NPRA's amendments, including *Donrey* and its progeny, it nonetheless remains applicable. Indeed, the privacy principles discussed in AGO 82-12 were echoed in this Court's recent opinion in *CCSD*, 134 Nev. Adv. Op. 84, at *6 ("Nevada's common law protects personal privacy interests from unrestrained disclosure under the NPRA. . . ."). At

a minimum, AGO 82-12 supports the Coroner's position that the interest in non-disclosure clearly outweighs the public's interest in access. As such, the District Court erred when it ignored the legal underpinnings of AGO 82-12 and required disclosure of the juvenile autopsy reports in an unredacted form.

4. The Coroner Provided LVRJ with Information Pursuant to the *PERS v. Reno Newspapers* Framework.

In support of the District Court's ruling, LVRJ relies on the framework outlined in *PERS v. Reno Newspaper*s, 129 Nev. 833, 313 P.3d 221 (2013), arguing that the scope of confidentiality does not extend to the juvenile autopsy reports since they were acquired by a CDR team. However, the Coroner complied with the *Reno Newspapers* framework by providing LVRJ with a report containing non-confidential information from the juvenile autopsy reports.

In *Reno Newspapers*, the Reno-Gazette Journal ("RGJ") sought various pension files from the Public Employees' Retirement System of Nevada ("PERS") pursuant to the NPRA. *See* 129 Nev. at 835, 313 P.3d at 222. PERS denied the RGJ's public records request, contending that the information sought was maintained in files of individual retired employees, which are confidential pursuant to NRS 286.110(3). *Id.* In support of its position, PERS submitted a declaration "explaining that all information related to the individual files is maintained as confidential but that PERS provides an annual valuation of its system in aggregate

form." 129 Nev. at 835–836, 313 P.3d at 223. The district court ordered PERS to produce a report for RGJ containing the requested information. *Id.* Affirming the district court's order requiring production of the records, this Court concluded:

> Where information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files. Rather, it is the individuals' files themselves that are confidential pursuant to NRS 286.110(3).

129 Nev. at 838, 313 P.3d at 224. This Court further clarified, however, that the "information contained in separate media that is otherwise confidential, privileged, or protected by law" may not be subject to disclosure. *Id.*

The juvenile autopsy reports acquired by the CDR team are unequivocally confidential. *See* NRS 432B.407(6). Likewise, the other 49 non-CDR juvenile autopsy reports contain confidential personal health information. In lieu of providing the autopsy reports, the Coroner provided LVRJ with a spreadsheet, containing information that is otherwise included in autopsy reports, such as the name of decedent, date of death, gender, age, race, location of death, and cause and manner of death. 1 JA 22–27. After meeting with Fudenberg, LVRJ received a second spreadsheet consisting of the same data previously provided, except limited to the cases in which autopsies were conducted. 1 JA 65–88. Importantly, this information coincides with the responsibilities of the medical examiner in performing an autopsy and the findings that the medical examiner documents in an

autopsy report. *See* CCC § 2.12.040, 2.12.060, 2.12.250; 1 JA 226–227. Because the Coroner provided LVRJ with information that is otherwise found in the autopsy reports, but maintained in a separate form, the Coroner met its obligations under the NPRA. As such, the District Court erred by requiring the Coroner to produce juvenile autopsy reports, which are otherwise confidential.

5. Case Law from Other States Determining that Autopsy Reports Are Public Records Can Be Distinguished and Do Not Support Nevada Law and Policy.

LVRJ relies on authority from several other states that purportedly hold that autopsy reports are public records. RAB 40–43. Only one of the cited cases concerns the disclosure of juvenile autopsy reports, and the remaining cases are distinguishable. *Id.* (citing *Charles v. Office of the Armed Forces Med. Exam'r*, 935 F.Supp.2d 86, 99–100 (D.D.C. 2012) (concerning autopsy reports of military soldiers)); *Journal/Sentinel, Inc. v. Aagerup*, 429 N.W.2d 772, 823–824 (Wis. App. 1988) (determining that the interests in non-disclosure outweigh the public's interest in access to an autopsy of an adult who was murdered); *Hearst Television, Inc. v. Norris*, 54 A.3d 23 (Pa. 2013) (concerning disclosure of autopsy report of college student pursuant to Pennsylvania statute that mandates disclosure of autopsy report to the public); *Star Pub. Co. v. Parks*, 875 P.2d 837, 838 (Ariz. App. 1993) (requiring disclosure of autopsy reports related to three adults because the government failed to assert a privacy interest); *Swickard v. Wayne Cnty. Med.*

Exam'r, 475 N.W.2d 304 (Mich. 1991) (requiring disclosure of autopsy report of government official); *Schoenewis v. Hamner*, 221 P.3d 48, 54 (Ariz. App. 2009) (remanding to conduct a balancing test of the interests involved); *Freedom Newspapers, Inc. v. Bowerman*, 739 P.3d 881, 883 (Colo. App. 1987) (recognizing that a balancing test is necessary to determine whether an autopsy report must be disclosed).

Likewise, LVRJ's case concerning juveniles can also be distinguished from the instant matter. In *Bozeman v. Mack*, the court determined that the juvenile decedent was not subject to the statutory exemption under the child death review act. *See Bozeman v. Mack*, 744 So.2d 34, 38 (La. App. 1998). Consistent with Nevada law, had the autopsy report been reviewed pursuant to the child death review act, it would have been exempt from disclosure. *Id.*; NRS 432B.607(6). Furthermore, the autopsy report was only released to the juvenile decedent's grandmother. *Id.* Such a disclosure comports with AB 57 and the amendments made to NRS 259.045. Additionally, Nevada has also expressly recognized a strong public policy interest concerning the confidential nature of juvenile information. *See generally* Juvenile Justice Act, NRS Chapters 62–63.

LVRJ's other authorities support the Coroner's position that, if disclosure is required, this Court must also order redaction of all personal information, including confidential personal health information. *See Charles*, 935 F.Supp.2d at 99–100.

In *Charles*, the court determined that the privacy interests raised by the decedent's family were non-existent because the records provided would have all personal information redacted. *Id.* The *Charles* court further explained that because personal information was redacted, there was no evidence to demonstrate that the family members would be able to identify the decedent. *Id.* Here, the information requested implicates the decedents' family members' privacy interests because the Coroner has already provided LVRJ with the names and dates of birth of the decedents. 1 JA 17–18, 228.

Thus, at a minimum, the remaining personal health information must be redacted. Moreover, determining whether autopsy reports should be disclosed to the public "requires a case-by-case evaluation. Some autopsy reports, presumably would not be of a kind that would shock the sensibilities of surviving kin. Others clearly would." *Badhwar v. U.S. Dep't. of Air Force*, 829 F.2d 182, 185–186 (D.D.C. 1987).

The remaining cases addressed by LVRJ are either irrelevant or contrary to Nevada law. *See Everett v. Southern Transplant Serv., Inc.*, 709 So.2d 764 (La. 1998) (vacating judgment against the coroner concerning the use of autopsy records in a civil litigation, not holding that autopsy reports are public records); *People v. Leach*, 980 N.E.2d 570, 582 (Ill. 2013) (addressing whether an autopsy report is privileged in a lawsuit pursuant to the doctor-patient privilege); *Sandles v.*

State, 875 S.W.2d 932, 936 (Tex. App. 1993) (addressing the admissibility of autopsy records in a lawsuit); *Home News Pub. Co. v. State, Dep't. of Health*, 570 A.2d 1267, 1271 (N.J. App. 1990) (holding that death certificates are a public record). *Cf.* NAC 440.021 (limiting inspection of a death certificate).

In reaching its decision that the juvenile autopsy reports are exempt from the NPRA, this Court must look to Nevada law and the strong public policy established concerning juvenile information and personal privacy interests. As a result, this Court should reverse the District Court's order requiring disclosure of confidential information.

D. ALTERNATIVELY, THIS COURT SHOULD REMAND THIS CASE TO THE DISTRICT COURT WITH INSTRUCTIONS FOR LVRJ TO DEMONSTRATE THAT THE PUBLIC INTEREST SOUGHT TO BE ADVANCED IS SIGNIFICANT.

If the Court determines that the privacy interests do not render the requested juvenile autopsy reports confidential, the Court should determine that the Coroner has established that the disclosure of the juvenile autopsy reports implicates nontrivial privacy interests. The Court should then remand this case to the District Court, with instructions for LVRJ to demonstrate that the significant public interest is being sought, and that disclosure of the decedents' confidential health and medical information will advance that interest.

Recently, this Court adopted a two-part balancing test, also known as the *Cameranesi* test,[4] to determine whether a government entity may redact information subject to a public records request. *See CCSD*, 134 Nev. Adv. Op. 84, at *5–7. Under this balancing test, the government must first demonstrate that "disclosure implicate[s] a personal privacy interest that is nontrivial or more than de minimus." *Id.* at *6. If the government meets its burden, the requester must show that the public interest sought to be advanced is a significant one and that the information sought is likely to advance that interest. *Id.*[5]

As outlined, the disclosure of health and medical information concerning a decedent implicates a substantial privacy interest. *See* NRS 621.061; *March v. Cnty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (recognizing a common law right to non-interference with a family's remembrance of a decedent); *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 168 (2004) ("Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was

[4] *See Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626 (9th Cir. 2017).

[5] This balancing test is applicable to the instant case because the requested juvenile autopsy records relate to a government investigation. The Coroner's Office is charged with investigating deaths within Clark County that are violent, suspicious, unexpected, or not natural for the purpose of identifying and reporting on the cause and manner of death. 1 JA 226, ¶ 2.

once their own."); *Catsouras v. Dep't of Cal. Hwy. Patrol*, 181 Cal.App.4th 856, 874, 104 Cal.Rptr.3d 352, 366 (2010) (recognizing a decedent's family member's right to assert an invasion of privacy claim).

According to the *CCSD* framework, the burden shifts to LVRJ to demonstrate that the public interest sought to be advanced is significant and that disclosure of the information sought will likely advance that interest. While LVRJ asserts that there is a "great public interest in shining a light on the deaths of vulnerable children," LVRJ must show how disclosing the juveniles' medical and health information will advance that interest. RAB 20. Indeed, LVRJ already has the spreadsheets from the Coroner disclosing the public information within the juvenile autopsy reports. 1 JA 22–27, 65–88. Therefore, this Court should vacate the District Court's order requiring production of the juvenile autopsy records without redaction and direct the District Court to balance the interests as established by *CCSD* to determine whether LVRJ can meet its burden to demonstrate an overriding public interest to overcome the privacy of personal health information.

E. THE CORONER IS ENTITLED TO CHARGE FOR EXTRAORDINARY USE OF PERSONNEL IF THE COURT ORDERS REDACTION.

1. The Coroner May Charge a Fee for the Extraordinary Use of Its Personnel.

"[A]mbiguity is not always a prerequisite to extrinsic aids." *A.J.*, 394 P.3d at 1213 (citing 2A Norman J. Singer & Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION, § 48:1, at 554 (7th ed. 2014)). In instances where the plain meaning rule would thwart or distort the intent of the Legislature, this Court may evaluate the Legislature's intent by examining enlightening material from the legislative history. *Id.* The legislative history of NRS 239.052 and NRS 239.055 sheds light on the Legislature's intent of the fee a government agency may impose on a requester for copies of public records.

In 1997, the NPRA underwent its first major overhaul. Assembly Bill 214 ("AB 214") was specifically crafted to address the fee provisions, which are now codified at NRS 239.052 and NRS 239.055. AB 214 was first introduced to the Assembly Committee on Government Affairs by Chief Deputy, Secretary of State, Dale Erquiga. *See* Hearing on AB 214 Before Assembly Committee on Government Affairs, 69th Leg. (Nev. Mar. 20, 1997). Addressing the definition of actual costs, Erquiga explained that it meant if an employer had a lease and a maintenance agreement on a copier, the employee who ran the copier could not charge those costs through on the record, as the employer would always pay the

lease and maintenance agreement to make his own operating copies. *Id.* Thus, it was always intended that "actual costs," as defined in NRS 239.005, meant paper, toner, discs, and so forth. *Id.*

Erquiga further clarified the extraordinary personnel exception within AB 214. Erquiga gave the following example at the hearing:

> [I]f a person came into the Secretary of State's office and wanted a list of all corporations which had filed pursuant to Nevada Revised Statutes (NRS), Chapter 82, a program would have to be written to pull the information out of the database—which was extraordinary use of that office's technology.

Id. On May 28, 1997, Erquiga reiterated to the Senate Committee on Government Affairs that the language "actual cost" in NRS 239.052(1) does not include costs an entity already incurs such as personnel or a lease on the machine. *See* Hearing on AB 214 Before Senate Committee on Government Affairs, 69th Leg. (May 28, 1997). On the other hand, AB 214, section 3 (codified at NRS 239.055), established an exception when extraordinary use of personnel was required. *Id.* The purpose behind this section was to recover government costs. At the same hearing, Alan Glover, Clerk/Recorder for Carson City, expressed concern about a high demand for public records, especially in relation to groups harassing staff in the recorder's offices by asking for exorbitant amounts of records, thereby tying up the government. *Id.* In response, Kent Lauer, Lobbyist for Nevada Press

Association, assured the Committee that the extraordinary use of personnel section would address Glover's concern of low fees in his scenario. *Id.*

Due to the discrepancy of copy costs across government agencies, Senator Tick Segerblom proposed Senate Bill 74 ("SB 74") to limit an agency's copy cost to 50 cents, but permit an additional fee when extraordinary use of personnel or technological resources occurred. During an Assembly Committee hearing, Senator Segerblom and his intern, Taylor McCadney, were asked several questions regarding whether additional charges, such as postage and staff time, were prohibited as a result of the 50-cent per page limitation. *See* Hearing on SB 74 Before Assembly Committee on Government Affairs, 77th Leg. (Nev. May 3, 2013). Throughout the hearing, both Senator Segerblom and McCadney clarified that the 50-cent fee limitation strictly applied to copying charges, and the purpose of NRS 239.055 was to allow leeway if additional cost was incurred as a result of the extraordinary use of personnel. *Id.* In particular, McCadney gave the following testimony:

> Taylor McCadney: Assemblyman Daly, the section that you are talking about is section 4, subsection 1, where it states, "Except as otherwise provided in this subsection, a governmental entity may charge a fee for providing a copy of a public record. Such a fee must not exceed the actual cost to the governmental entity to provide the copy of the public record unless a specific statute or regulation sets a fee. . . ." In section 4.5, it also goes into detail about how they can charge extra for extraordinary use of technology or manpower. That is where the leeway comes from for them to charge more than the actual cost of a copy.

> Assemblyman Daly: We knew it was a lot of paper and they charged us a fair price based on their costs. They did include staff time and various things. . . .

Id. The legislative history evidences the Legislature's intent to distinguish between the 50-cent copy limitation and fees for extraordinary use of personnel and technological resources. The NPRA explicitly permits an agency to charge for costs it actually incurs in producing public records, including redacting confidential information if redactions would require an agency to expend extraordinary use of its personnel. *See* NRS 239.055(1). Part of the government's responsibility in producing records is to redact confidential information not subject to disclosure. *See* NRS 239.010(3). It necessarily follows that a government entity redacting confidential information from records and providing the requester with portions of the record that are not otherwise confidential comports with the NPRA and does not promote secrecy.

This Court has indicated previously that the cost to a government agency, including staff time, may be recovered pursuant to NRS 239.052 and NRS 239.055. *See LVMPD v. Blackjack Bonding*, 343 P.3d 608, 614 (Nev. 2015) (determining that the district court mitigated any burden associated with the request by requiring Blackjack to pay the costs associated with the production of

the requested documents);[6] *Public Employee's Retirement System of Nevada v. Nevada Policy Research Institute, Inc*, 134 Nev. Adv. Op. No. 81, at *16 (Oct. 18, 2018) ("PERS cannot evade disclosure on the basis that satisfying NPRI's public record request would require additional staff time and cost because PERS could charge NPRI for such an incurred fee.").

In instances where producing records will require the extraordinary use of personnel to comply with disclosure and the NPRA, a government agency is permitted to charge the requester a reasonable fee for the staff time that the agency actually incurs in responding to a request, including redaction of confidential information from public records.

2. Redacting the Instant Records Requires the Extraordinary Use of Personnel.

The NPRA fails to define what constitutes an "extraordinary use." In reviewing the legislative history of NRS 239.055, the Attorney General has interpreted "extraordinary use" to mean any response that takes staff over 30 minutes to retrieve and produce the request. *See* AGO 2002-32. In reaching its conclusion, the Attorney General noted that the "vast majority of public records requests are surely handled in under 30 minutes and requests of over 30 minutes are more likely to be of a nuisance type or to hinder governmental operations." *Id.*,

[6] In its answering brief, LVRJ relied on a superseded order that this Court should refuse to consider. 3 RA 573–576.

at *7. It is clear that the law requiring disclosure of public records "was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Judicial Watch, Inc. v. Dep't of State*, 177 F.Supp.3d 450, 457 (D. D.C. 2016), *aff'd sub nom. Judicial Watch, Inc. v. United States Dep't of State*, 681 F. App'x 2 (D.C. Cir. 2017) (citing *Assassination Archives & Research Ctr., Inc. v. C.I.A.*, 720 F.Supp. 217, 219 (D. D.C. 1989), *aff'd in pertinent part*, No. 89-5414, 1990 WL 123924 (D.C. Cir. Aug. 13, 1990)).

Whether applying the 30-minute rule announced by the Nevada Attorney General, or reviewing the facts on a case-by-case basis, redaction of the autopsy reports requires extraordinary use of personnel. The nature of the confidential information to be redacted from the juvenile autopsy reports requires employees with experience, knowledge of the subject matter, and capable of paying attention to detail. 1 JA 230, ¶ 12. If the Court requires disclosure, the Coroner seeks $45 an hour for redacting the 49 autopsy reports that were not reviewed by the CDR team. 1 JA 230, ¶ 14. The $45 per hour fee is commensurable pay to the rate of a mid-level employee of the Coroner. *See* AGO 2002-32 (the calculation of costs of the extraordinary use of personnel based on the actual hourly wage of the lowest compensated individual reasonably available and qualified to respond to the public records request). Aside from this fee for redacting, this Court should also allow the Coroner to recover 50 cents per page for copies.

F. THE ARGUMENTS MADE IN THE AMICI BRIEF ARE IRRELEVANT AND NOT BASED ON NEVADA LAW AND POLICY.

The amici brief relies on irrelevant news articles that can be distinguished from the instant case, which concerns juvenile autopsy reports. Furthermore, other than the legal standard for an NPRA matter, the amici brief is not supported by any authority discussing public policy reasons for urging disclosure of autopsy reports. Instead, the amici brief solely relies on its own news articles. Moreover, as discussed in detail below, some of the cited articles address and rely on portions of autopsy reports, including the cause of death, which has already been provided to LVRJ. Other articles relied upon by amici concern the disclosure of autopsy photographs, which is irrelevant to the juvenile autopsy reports at issue in this case. Finally, the amici brief fails to articulate how a decedent's personal health information is beneficial to and necessary for the public. Therefore, the Court should disregard the amici brief in resolving the issues in this appeal.

1. Colorado Law Permits Disclosure of Child Fatality Prevention Review Team Reports, Absent Confidential Information.

The closest example amici provided in relation to the instant case concerns news articles from Colorado. Amici Br. 8. The articles from Colorado discuss the number of deaths of juveniles in relation to the child welfare system. Contrary to amici's assertions, juvenile autopsy reports were not produced. *Id.* The article

relies on a child fatality report, which is permitted to be disclosed in Colorado, unlike Nevada. 1 ARA 5–33. The report is not an autopsy report created by the coroner and does not contain personal health information for purposes of an autopsy report. 1 ARA 20–27. Indeed, the focus of the report is on the state's child welfare system and interaction with the child. *Id.*

The disclosure of the Child Fatality Prevention Team Report, absent confidential information, is permitted by law in Colorado. *See* C.R.S. 26-1-139(4)(i)(III). Similar to Nevada, Colorado employs a Child Fatality Review Team to review each incident of egregious abuse or neglect, near fatality, or fatality of a child due to abuse or neglect. *See* C.R.S. 26-1-139(5)(c). Each team is required to draft a confidential case-specific review report and submit it to the relevant Department of Public Health and Environment. *See* C.R.S. 26-1-139(4)(i)(II). A case-specific executive summary, absent confidential information, is posted on the state department's website. *See* C.R.S. 26-1-139(4)(i)(III).

In contrast, Nevada law expressly and unequivocally provides that information acquired by and records created by a CDR team are confidential. *See* NRS 432B.607. Thus, amici's out-of-state arguments are not persuasive, as Nevada maintains a statute that directly addresses the records at issue.

2. Unlike Nevada, Texas Legal Authority Has Expressly Deemed Autopsy Reports Public.

The Texas article cited by amici can also be distinguished. 1 ARA 34–58. The article discusses the death of two children who died after being in the care of the same individual. *Id*. The article also provides that forensic pathologists reviewed the children's autopsy reports. *Id*. There is no indication of whether the autopsy reports were made available to the public or limited to the pathologists. *Id*. Nevertheless, the information relayed in the article pertains to the coroner's findings (i.e., cause and manner of death), which have already been disclosed to LVRJ. Furthermore, unlike Nevada, Texas explicitly recognizes that autopsy reports are subject to public dissemination. *See* Tex. Atty. Gen. Op. 2001-2357. There is simply no Nevada authority or public policy that supports the notion that a decedent's personal health information is subject to public disclosure.

3. Amici's Reliance on Articles Addressing the Disclosure of Autopsy Photographs Is Misplaced.

The amici brief relies on various articles discussing the disclosure of autopsy photographs. Amici Br. 9–10. While amici claim that the articles pertain to autopsy reports, the article specifically addresses how autopsy photographs—not reports—are often used to refute official conclusions. 1 ARA 59–60. Amici also direct this Court to an article involving the death of Dale Earnhardt, a famous racecar driver. Amici Br. 10. The article referenced by amici discusses expert

review of various documents related to Earnhardt's autopsy. 1 ARA 59–60. A lawsuit was initiated by the media for access to Earnhardt's autopsy photographs. After a three-day evidentiary hearing of experts reviewing the photographs, not involving the public, the court determined that the release of the photographs would constitute a serious invasion of privacy. *See Campus Commc'ns, Inc. v. Earnhardt*, 821 So.2d 388 (Fla. App. 2002); 1 ARA 70–73. It appears from the lawsuit that the coroner had voluntarily released the autopsy report and related documents to the public. *Id.* at 391. An agency's conscious decision to publish an autopsy report, or related documents, about a famous racecar driver cannot be imputed to all other agencies, especially with respect to juvenile autopsy reports in this case.

4. Illinois Has Determined that Juvenile Autopsy Reports Are Confidential.

In further support of their extreme position to release unredacted autopsy reports to the public, amici refer to a Chicago news article discussing the death of a 17-year old by a police officer. Amici Br. 9; 1 ARA 61–66. The author of the article claims that he obtained a copy of the finalized autopsy report pursuant to a Freedom of Information Act request. 1 ARA 62. The article, however, does not indicate whether the information provided included confidential personal health information. 1 ARA 61–66.

Notably, Illinois prohibits the disclosure of juvenile autopsy reports. *See Trent v. Office of Coroner of Peoria Cnty.*, 812 N.E.2d 21 (Ill. App. 2004). *Trent* based its conclusion, in part, on the notion that the autopsy report contained confidential medical information, holding that "a[]n individual's medical records fall squarely within this exemption for documents, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* at 24. As such, Illinois law follows Nevada public policy and supports the Coroner's position that juvenile autopsy reports are not subject to disclosure because they contain confidential health and medical information.

5. The LA Times Article Makes No Reference to the Disclosure of Autopsy Reports.

The last article cited in the amici brief is irrelevant because it does not discuss autopsy reports. Amici Br. 11. The Los Angeles Times article pertains to a local coroner's officer removing the corneas of deceased individuals after performing an autopsy in accordance with California law. 1 ARA 74–79. The article lacks any reference to the review and disclosure of autopsy reports to the public. *Id*. Instead, the article indicates that "[c]ornea removals are disclosed on public autopsy forms." 1 ARA 76. Thus, this article is not relevant to the disclosure of complete, unredacted juvenile autopsy reports.

It is evident that amici simply cherry-picked its own articles discussing autopsy reports in an attempt to demonstrate that "public interest is served" by the

disclosure of the instant juvenile autopsy reports. Amici Br. 12. Yet, the amici brief is not supported by any law or policy established within Nevada and should be disregarded by this Court in resolving the confidentiality of the requested juvenile autopsy reports.

III. CONCLUSION

In summary, the Coroner requests that this Court vacate the District Court's erroneous order requiring that the Coroner produce unredacted juvenile autopsy reports, and instead conclude that the juvenile autopsy reports are confidential. Alternatively, the Coroner asks that this Court determine that the confidential personal health information contained in the autopsy reports be redacted and permit the Coroner to charge for extraordinary use of personnel for the related production consistent with NRS 239.055.

Dated this 3rd day of December, 2018.

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CERTIFICATE OF COMPLIANCE

1. 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 Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 9,939 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby 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 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 that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF** and **APPELLANT'S REPLY APPENDIX** were filed electronically with the Nevada Supreme Court on the 3rd day of December, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.

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