IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Electronically Filed Feb 11 2019 11:52 a.m. Elizabeth A. Brown Clerk of Supreme Court SUPREME COURT CASE NO: 74604 DISTRICT COURT CASE NO.: A-17-758501-W

RESPONDENT'S SURREPLY

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I. INTRODUCTION

This surreply addresses two new issues raised for the first time in the Coroner's Reply Brief. First, in the brief of Amici Curiae the Reporters Committee for Freedom of the Press and 11 Media Organizations, amici discussed a 2012 investigative reporting series by the Denver Post and television news station KUSA that highlighted how failings in the Colorado child welfare system led directly or indirectly to the deaths of several children. (Brief of Amici Curiae, p. 8.) In its Reply, the Coroner asserts that the Denver Post and KUSA did not have access to autopsy reports regarding these child deaths. (Reply, pp. 37-38.) As set forth below, that factual assertion is demonstrably false, as the media entities did in fact obtain autopsy reports pertaining to several of the child deaths.

Second, the Coroner's Reply Brief[1] addresses the new two-part balancing test announced by this Court in *Clark County School District v. The Las Vegas Review-Journal*, 134 Nev. Adv. Op. 84, 429 P.3d 313 (Oct. 25, 2018) ("*CCSD*"). This test applies only in cases in which courts must determine whether "the nontrivial personal privacy interest of a person named in an investigative report may warrant redaction." *CCSD*, 429 P.3d at 320.

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[1] (See Reply Brief, pp. 28-30.)

In its Reply, the Coroner erroneously asserts that the Court should remand this case to the district court with instructions for the Review-Journal to establish demonstrate "an overriding public interest to overcome the privacy of personal health information." (Reply, p. 30.) In making this argument, however, the Coroner conveniently elides that it has not met its burden under the first prong of the new test outlined in *CCSD*—that there is a nontrivial personal privacy interest at stake.

The Coroner, however, has misapplied the *CCSD* test. Under the new test, a governmental entity must first "establish a 'personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or . . . more than [] de minimis.'" *Id.* (quoting *Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626, 637 (9th Cir. 2017)) (alteration in original). Then, if the governmental entity makes this initial showing, the burden shifts to the requester to demonstrate "'that the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest.'" *Id.*

Because the district court has already found that the Coroner failed to meet its burden of establishing by a preponderance of the evidence that some interest in nondisclosure outweighs the presumption of public access, it has not met its burden under CCSD. (*See* 2JA435-39 (outlining the reasons why the Coroner has not met its burden).) Thus, the Review-Journal is not required to establish that there is a significant public interest that outweighs privacy concerns. Accordingly, because

the Coroner has not—and cannot—meet this burden, remand is not necessary.

II. ARGUMENT

A. The Denver Post and KUSA Obtained Autopsy Reports Related to Child Deaths.

As briefly mentioned by Amici Curiae, in 2012 the Denver Post and television news station KUSA ran an investigative series called "Failed to Death," which reported on the deaths children whose families or caregivers were known to social services before their deaths. (Brief of Amici Curiae, p. 8.)[2] The news outlets focused on 72 cases involving children who were known to Colorado's child welfare system who died as a result of family abuse or neglect.[3]

In its Reply Brief, the Coroner asserts that "juvenile autopsy reports were not produced." (Reply, p. 37.) This is demonstrably false. As part of that investigation, the news outlets obtained records related to those 72 cases from the Colorado Department of Human Services and local governmental entities, all of which are available through the Denver Post's website at http://childfatalities.denverpost.com/. In five of the cases, the Denver Post obtained autopsy reports.[4] Thus, this Court

[2] The Failed to Death investigative series and related articles are available online at https://www.denverpost.com/tag/failed-to-death/ (last accessed December 14, 2018).

[3] *See* https://www.denverpost.com/2012/11/09/letter-from-the-editor-investigation-into-colorados-child-welfare-system/ (letter from the editor introducing the Failed to Death series) (last accessed December 14, 2018).

[4] In total, it appears that the Denver Post published five autopsy reports related

should disregard the Coroner's inaccurate assertion that juvenile autopsy reports were not produced to the Denver news outlets.

B. Remanding This Matter to the District Court is Improper Because the Coroner Has Not Met Its Burden of Demonstrating a Nontrivial Privacy Interest Outweighs the Public's Right of Access.

In *CCSD*, the Review-Journal submitted a records request for, *inter alia*, public records pertaining to an internal investigation conducted by CCSD's Office of Diversity and Affirmative Action into the alleged misconduct of CCSD School Board Trustee Kevin Child. After CCSD refused to produce the records, the Review-Journal petitioned the district court pursuant to Nev. Rev. Stat. § 239.011. 134 Nev. Adv. Op. 84, 429 P.3d 313, 316 (2018). The district court granted the Review-Journal's amended public records petition and ordered CCSD to produce the records with only the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff redacted. *Id.* at 316-17.

On appeal, CCSD argued in part that it should be allowed to redact more information. *Id.* at 317. In its opinion, this Court adopted a two-part balancing test

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to the deaths of children:

> http://childfatalities.denverpost.com/#id=4&name=BridgeoStonie;
> http://childfatalities.denverpost.com/#id=19&name=GonzalesAdam
> http://childfatalities.denverpost.com/#id=28&name=JuarezAnahi
> http://childfatalities.denverpost.com/#id=33&name=LuceroPhabin
> http://childfatalities.denverpost.com/#id=55&name=SaundersJeremiah

(last accessed December 14, 2018).

set forth in *Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626 (9th Cir. 2017) to be applied by courts in cases "in which the nontrivial personal privacy interest of a person named in an investigative report may warrant redaction":

> The *Cameranesi* test is a two-part balancing test. It first requires the government to establish a "personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or ... more than [ ] de minimis." *Cameranesi*, 856 F.3d at 637. "Second, if the agency succeeds in showing that the privacy interest at stake is nontrivial, 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.*

CCSD, 429 P.3d at 320.

In adopting this test, the Court explicitly held that the test cohered with the NPRA and its case law interpreting the provision of the Act. *CCSD*, 429 P.3d at 321. As the Court explained:

> This test coheres with both NRS 239.0113 and [*Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877-78, 266 P.3d 623, 625-26 (2011).]. It is merely a balancing test—in the context of a government investigation—of individual nontrivial privacy rights against the public's right to access public information. *Carlson v. U.S. Postal Serv.*, 2017 WL 3581136, at (N.D. Cal. Aug. 18, 2017). We explained in *Gibbons* that NRS 239.0113 requires that the state bear the burden of proving that records are confidential. *Gibbons*, 127 Nev. at 878, 266 P.3d at 626. The *Cameranesi* test does that, but also gives the district courts a framework to weigh the public's interest in disclosure, by shifting the burden onto the public record petitioner, once the government has met its burden. This ensures that the district courts are adequately weighing the competing interests of privacy and government accountability.

Id. at 321.

A significant rationale cited by the Court in adopting this new balancing test was its recognition that Nevada law and its common law recognize the importance of protecting personal privacy interests. *CCSD*, 429 P.3d at 320 (discussing the common law tort of invasion of privacy for unreasonable intrusion upon the seclusion of another). However, as many courts across the country have recognized, a personal privacy interest is just that—it is ***personal***. Thus, it cannot be asserted by a third party.

As one court has explained, "[t]he right of privacy has always been treated by the courts as a personal right fashioned to protect an individual's solitude. The right is not violated, unless there is some unwarranted disclosure or exploitation of the private affairs or the personality of the ***complaining party himself***." *Young v. That Was The Week That Was*, 312 F. Supp. 1337, 1340 (N.D. Ohio 1969), *aff'd*, 423 F.2d 265 (6th Cir. 1970) (dismissing a class action suit in which the plaintiffs, who all shared a common female ancestor, asserted that a satirical television program invaded the privacy of the plaintiffs by awarding their ancestor the "First Annual Booby Prize in the Birth Control Sweepstakes") (emphasis added); *see also Cordell v. Detective Publications, Inc*., 419 F.2d 989, 990 (6th Cir. 1969) (holding a cause of action for unauthorized public disclosure of private matters "is regarded as purely personal, and only the person about whom facts have unauthorizedly been published may recover"); *Starrels v. CIR*, 304 F.2d 574 (9th Cir. 1962) (right of privacy is

personal and cannot ordinarily be asserted by family members); *Loft v. Fuller*, 408 So. 2d 619, 621 (Fla. Dist. Ct. App. 1981) ("Relatives of a deceased person have no right of action for invasion of privacy of the deceased person regardless of how close such personal relationship was with the deceased."); *Swickard v. Wayne Cty. Med. Exam'r*, 438 Mich. 536, 548, 475 N.W.2d 304, 309 (1991) ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.") (quoting Restatement (Second) of Torts § 652I (1977)). Under this established precedent, the Coroner cannot prove by a preponderance of evidence that any individual privacy right is violated by the disclosure of the requested autopsy reports.

Moreover, the two cases cited by the Coroner in its attempt to meet its heavy burden are inapposite because they addressed the right of families to control deceased children's remains and death images—not autopsy reports. For example, in *March v. Cnty. of San Diego*, 680 F.3d 1148 (9th Cir. 2012) (cited at Reply, p. 29), the plaintiff sued the County of San Diego and a former county prosecutor after the prosecutor released *images* of her child's autopsy to the media. *See id.* at 1152.

Similarly, in *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004), the United States Supreme Court addressed whether the right to "personal privacy" set forth in Exemption 7 to the Freedom of Information Act included the "surviving family members' right to personal privacy with respect to their close

relative's death scene images." *Favish*, 541 U.S. at 170. Unlike *March* and *Favish*, the records at issue in this case are not photographs of deceased juveniles; they are reports created by the Coroner's Office in the course of its official duties. Thus, neither case is of precedential or persuasive value here, and do not aid the Coroner in meeting its heavy burden.

Because the Coroner has never met its initial burden of establishing that the existence of a nontrivial personal privacy interest as required by the first prong of the new *CCSD* test, remanding this matter to the district court to require the Review-Journal to satisfy the second prong of the test would run contrary to this Court's opinion in *CCSD* and all its other NPRA decisions.

Even if this Court were to determine that remand were necessary pursuant to *CCSD*, the Denver Post investigation cited by Amici Curiae and the Coroner demonstrate why the public interest in disclosure of juvenile autopsy records. As noted in the brief of Amici Curiae, the Denver Post's investigation shed light on several issues with Colorado's child welfare system and led to sweeping reforms. (*See* Brief of Amici Curiae, p. 8.) Thus, there is a significant public interest in disclosing these records.

III. CONCLUSION

For these reasons, and for the reasons set forth in the Review-Journal's Answering Brief, this Court must affirm the decision of the district court in its

entirety.

DATED this 24th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S SURREPLY was filed electronically with the Nevada Supreme Court on the 24th day of December, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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