Case No. 76485

In the Supreme Court of Nevada

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, PH.D., M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark; and the HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondents,

and

ALVOGEN, INC.; and HIKMA PHARMACEUTICALS USA INC.,

Real Parties in Interest,

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District Court
No. A-18-777312-B

HIKMA'S ANSWER TO WRIT PETITION

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NRAP 26.1 DISCLOSURE

Hikma Pharmaceuticals USA Inc., formerly known as West-Ward Pharmaceuticals Corp., is a Delaware corporation with its principal place of business located at 246 Industrial Way West, Eatontown, New Jersey. Hikma is a subsidiary of Hikma Pharmaceuticals PLC, a publicly traded company on the London Stock Exchange. Hikma has been represented in this litigation by E. Leif Reid, Daniel F. Polsenberg, Josh M. Reid, and Kristen L. Martini of Lewis Roca Rothgerber Christie LLP.

DATED this 16th day of August, 2018.

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ROUTING STATEMENT

The Nevada Supreme Court should retain the Petition to Dissolve Stay of Execution Under NRS 176.492 and Petition for Writ of Mandamus or Prohibition because it involves issues relating to the death penalty. *See* NRAP 17(a)(1).

Even though this Court should retain this Petition, it should not hear it because the record is not fully developed. Any petition raising these issues should await further proceedings in the district court.

STATEMENT OF THE ISSUES

1. Whether the State's request for extraordinary writ relief is ripe for review given that the district court has taken no action with respect to Hikma's claims and the absence of a developed record in the underlying proceedings.

2. Whether Hikma is able to seek injunctive relief in the underlying district court action.

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ANSWER TO WRIT PETITION

I. INTRODUCTION

This Court has long held that there is a property right to carry on a lawful business without obstruction, and that businesses may seek equitable relief in Nevada courts in order to prevent or restrain actions that may destroy a business's rights, reputation, credit, or profits. Hikma Pharmaceuticals USA Inc. ("Hikma") has filed a complaint in the underlying district court action seeking equitable relief to prevent damage to its reputation, business and investor relationships, and other irreparable harm to be proven at trial in the underlying action. The State[1] is now asking this Court to allow it to circumvent Nevada's well-established legal process and make a finding that Hikma has no rights, and no ability to seek the equitable relief allowed for under Nevada law, without a hearing or the ability to develop a record in the district court. An order granting the State's Petition to Dissolve Stay of Execution Under NRS 176.492 and Petition for Writ of Mandamus or Prohibition ("Petition") would, in effect, immediately shut the courtroom door for Hikma, and contravene the many prior opinions of this Court that allow

[1] Hikma refers to Petitioners collectively as the "State" for ease of reference.

businesses, like Hikma, to obtain equitable relief to protect their rights and business interests.

Hikma has been clear in its pleading and papers filed in the district court that it has not come before it to litigate the merits of capital punishment, the death sentence imposed upon Scott Raymond Dozier ("Dozier"), or any other condemned prisoner, or the rights of any other party. In continuance of its pattern of avoiding transparency and accountability, and in order to shield its potentially illegal and tortious conduct, the State claims in its Petition that this case is not about a business protecting its interests under Nevada law. Rather, the State makes unsubstantiated claims that this case is about death penalty advocacy and creating turmoil within the criminal justice system. Hikma respectfully requests that this Court reject these spurious claims, deny the Petition, and allow Hikma to seek the same equitable relief in the district court that this Court has allowed countless other individuals and businesses to seek in order to protect its rights and interests.

II. FACTUAL AND PROCEDURAL BACKGROUND

Hikma makes medicine. That medicine is designed and intended to relieve pain, and to promote health and well-being. Hikma is a leading provider of quality generic medicines in the United States. 3 Real Parties in Interest Joint App'x ("RA") 427.

Hikma aims to improve lives by providing patients access to high-quality, affordable medicines. *Id.* Hikma's medicines are used thousands of times a day around the world to treat illnesses, save lives, and improve the quality of patients' lives. *Id.* Hikma has built a global reputation for helping patients. 2 RA 213.

In that pursuit, Hikma manufactures fentanyl, a medicine in the narcotic (opiate) analgesics class of medications ("Hikma's Fentanyl"). *Id.* Fentanyl has been approved by the FDA since 1972 (and in combination since 1968) for use in as an analgesic (pain reliever) and anesthetic. *See id.*; 3 RA 434. Fentanyl is a Schedule II controlled substance. NAC 453.520(3).

To maintain its reputation for safe and high-quality products, Hikma has always been committed to going beyond mere compliance with the law, and it strives to uphold the highest ethical standards in

everything it does. 2 RA 214. In line with its efforts to ensure that its medicines are used responsibly, Hikma has placed controls on the purchase and use of its products. *See* 3 RA 434. These controls include internal policies and procedures with its customers to restrict the supply of Hikma products for the distribution and use in lethal injection protocols. *See id.* Hikma refuses the direct sale of its products to departments of corrections in the United States for use in capital punishment, and Hikma works directly with its distribution partners to add restrictions for unintended use to its distribution contracts. *See id.*

Hikma is not the only pharmaceutical company that takes affirmative action not to sell their products for use in lethal injection. 3 RA 475. More than 20 American and European pharmaceutical companies have taken similar action. *See id.*; *see also* 1 Pet'rs' App'x ("PA") 69-153. Like those other pharmaceutical companies, Hikma has an important interest in protecting its business reputation and in meeting its fiduciary duties to its investors. *See* 3 RA 477. Experts have opined that a pharmaceutical company's involvement with lethal injection may open the company to risk and liability of various types, including the loss of confidence from consumers, resistance from

prescribing doctors (who are bound by the Hippocratic oath), the loss of support from institutional investors and possible litigation from their shareholders. *See id.* Accordingly, Hikma has taken actions to protect its property rights in those products, including Hikma's Fentanyl, and its reputation. 2 RA 212.

A. The State Requests Bids for Execution Drugs Without Receiving a Single Response

The State, like other death-penalty states, was well aware of drug manufacturers' restrictions on the use of their drugs in executions. Based upon drug manufacturers' restrictions, according to the Las Vegas Review-Journal, as reported on October 7, 2016, NDOC sent out 247 requests for proposals to manufacturers for the purchase of the drugs that the State intended to use in lethal injections after the stockpile of at least one of the drugs in its possession expired. 3 RA 481.

Not one response was received. *Id.*

No vendor responded because not one of the manufacturers would allow their drugs to be used in executions. Because no pharmaceutical companies would bid to supply their drugs for lethal injections, Nevada

prison officials were on the record as stating that "the state will have to explore its options to carry out executions." *Id.*

B. Hikma Exercises Its Rights Regarding the Sale and Use of Its Products

Upon learning that some states, including Nevada, were considering new compounds for use in lethal injection protocols, Hikma took preemptive steps to prevent its products from being used for such purposes. *See* 3 RA 433, 484, 485, 486. Using Hikma's products in lethal injection is inconsistent with the FDA's indication, and contradictory to Hikma's intention in manufacturing its medicines, its values as an health care organization, the interests of its customers, and the financial interests of Hikma and its shareholders. *See id.*

In 2016, Hikma exercised its right not to sell its products to the State for use in lethal injection, notifying the public and the State of its rights. In October 2016, Hikma published on its website its policy on states' use of its products in capital punishment regimes, declaring its strong objection to the acquisition and use by any department of corrections of its products for such a purpose. *See* 2 RA 214-15.

On December 20, 2016, Hikma went further to specifically notify the State that Hikma objected, in the strongest possible terms, to the

use of any of its products for lethal injection. *See* 3 RA 484-86. Hikma sent letters ("2016 Letters") to Nevada's Attorney General Adam Laxalt, Governor Brian Sandoval, and Defendant Dzurenda. *Id.* In its 2016 Letters, Hikma "object[ed] in the strongest possible terms to the use of any of our products for lethal injection" and again made clear that its objection applied to all of its products, which include Hikma's Fentanyl. *Id.*

Hikma notified these state constitutional officers that such use of its products was

> inconsistent with the FDA indication and contrary to [Hikma's] intention of manufacturing the product for health and well-being of patients in need, but also it is completely counter to [Hikma's] values as an organization.

Id. Hikma stated that it was not aware of the State having possession of any of its products at that time, but restated its objection because it had become aware that some states were considering new compounds to use in their lethal injection protocol. *Id.* At that time, the State did not have possession of any Hikma product.

Hikma further explained,

> In the event that we were forced to implement additional controls to prevent these uses, it may

> have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine need. This outcome would not be beneficial for anyone, particularly the people of Nevada. We believe that Nevadans deserve high quality, generic medicines and we are very pleased to continue to play a role in manufacturing much needed products to improve health. As such, we hope that you will give serious consideration to the positions that we have set forth in this letter and be our partner in furthering our values and policy.

Id.

By the end of September 2017, Hikma continued to publish on its website its policy against states' uses of its products in capital punishment regimes. Hikma said:

> We object in the strongest possible terms to the use of any of our products for the purpose of capital punishment. Not only is it contrary to the intended label use(s) for the products, but it is also inconsistent with our values and mission of improving lives by providing quality, affordable healthcare to patients.

See id. at 432-33.

Hikma's website publishes the controls it has "to prevent these products from being used for the purpose of capital punishment," including that Hikma "will not accept orders for these products directly

from any Departments of Correction or correctional facilities in the United States, unless accompanied by an original, raised seal copy of an affidavit signed by the state attorney general (or governor), certifying under penalty of perjury that the product(s) will not be used for capital punishment," and that Hikma "will only sell these same drugs to pre-selected commercial customers who agree that they will not then sell them to Departments of Corrections/correctional facilities, or to secondary distributors or retail pharmacies." *Id.* at 433. Hikma also restricted particular drugs that have a heightened potential of misuse for lethal injection protocols and published them on Hikma's restricted list. *See id.*

C. The State Modifies its Execution Protocol to Include Fentanyl in 2017

In November 2017, in Dozier's habeas corpus case, *Dozier v. State*, Case No. 05C21503, the State filed a redacted version of NDOC's Notice of Redacted Version of the State of Nevada's Execution Protocol, dated November 7, 2017. That manual confirmed that fentanyl was one of the three drugs in Nevada's new lethal injection cocktail. This was the first time any state in the country included fentanyl as part of its lethal injection protocol. *See* 3 RA 488. Pfizer, a manufacturer of fentanyl,

objected to NDOC's use of its products for lethal injections, and it demanded return of their products. *See id.* NDOC spokeswoman Brooke Keast rejected any assertion that the State was obligated to return any of Pfizer's products. *See id.*

D. In 2017, Hikma Reminds the State that It Cannot Use Hikma's Products in Executions

In December 2017, as yet another reminder to the State, Hikma sent letters to Nevada's Attorney General Adam Laxalt, Governor Brian Sandoval, and Defendant Dzurenda ("2017 Letters"). *See* 3 RA 492-97. In its 2017 Letters, Hikma again steadfastly objected to any of its products being used for lethal injection. Hikma made clear its position that such use of any Hikma products is contrary to the FDA indication, in addition to being contradictory to the intended use of the products and contrary to Hikma's values. *Id.* at 492, 494, 496.

Despite Hikma's demands not to have its products used in conjunction with lethal injection, the State unlawfully acquired Hikma's products for use in its lethal injection protocol.

E. The First Judicial District Court Compels the State to Disclose Previously-Withheld Documents

On June 15, 2018, the American Civil Liberties Union of Nevada ("ACLU") submitted a public records request to NDOC requesting

documents pertaining to the State's lethal injection drugs and procedures. 1 PA 15. The Public Information Officer then told the Associated Press that the State's lethal injection protocol was "evolving." *Id.* at 16. The ACLU followed up with its public records request on June 22. *Id.* NDOC claimed to the ACLU that the records were not readily available and that it anticipated responding within 60 days—well after Dozier's scheduled execution. *Id.*

On June 25, the ACLU explained why NDOC's proposed response time was untimely. *Id.* at 17-18. NDOC did not respond. *Id.* at 18.

The ACLU followed up with its request on June 28, to which NDOC again responded that it anticipated being able to respond within 60 days. *Id.*

On July 3, 2018, the ACLU filed an emergency petition for writ of mandamus in the First Judicial District Court ("ACLU action"). *See id.* at 6-60. The ACLU requested an order directing NDOC to disclose, pursuant to the Nevada Public Records Act, time-sensitive records about the State's lethal injection drugs and procedures, including those pertaining to the execution of Dozier. *Id.* at 9-24.

Three days later, on July 6, the district court in the ACLU action compelled NDOC to disclose the specific lethal injection procedures that the State planned to implement in Dozier's execution, including the names and quantities of the drugs to be used, the amount of those drugs in NDOC's custody or control, the date of purchase or acquisition of those drugs and their expiration date, and the records from the Drug Enforcement Agency demonstrating authority to handle controlled substances at the Ely State Prison. *See id.* at 66-67. In its order, the court noted that the State has taken efforts to maintain the secrecy of and to conceal its acquisition and possession of these drugs to use in its lethal injection procedures because of a concern that information as to "where a state obtains execution drugs" may be used "to persuade the manufacturer and others to cease selling that drug for execution purposes." *See id.* at 64.

On July 6, the State produced the documents ordered for production. *See generally* 3 RA 499, 501.

F. The State's Disclosure Reveals that It Unlawfully Obtained Manufacturers' Products for Use in Dozier's Execution

The documents disclosed by the State in the ACLU action included a list of the drugs to be included in the State's newest lethal injection cocktail, along with the invoices related to NDOC's purchase of those specific drugs. *See* 2 PA 252-53; 3 RA 499, 501. These invoices identified NDOC's purchase and receipt of Hikma's Fentanyl, identified as NDC/UPC 0061-6027-25. *See* 3 RA 499. The invoices further showed that NDOC placed multiple small orders of the drugs over a number of months, with some orders following the last by only one day. 2 RA 218, 252-53, 3 RA 499.

The invoice for Hikma's Fentanyl was from one of Hikma's wholesale distributors, Cardinal Health, placed on September 28, 2017, for shipment the next day. *See* 3 RA 499. The invoice was addressed to be billed and shipped to NDOC's Pharmacy, located at the NDOC's administrative building in Las Vegas—not to the Ely State Prison, the execution site located over 200 miles away from its Las Vegas building. *Id.* Under the product description, the distributor referenced message

121: "This product is required by the FDA to be dispensed with a medication guide." *Id.*

To purchase Hikma's Fentanyl, NDOC was required to provide the distributor with proof of a medical license issued to NDOC's medical director. NDOC's purchase order to the distributor for Hikma's Fentanyl used the Nevada Chief Medical Officer's license to unlawfully obtain Hikma's Fentanyl. *See id.* at 501.

G. Alvogen Initiates the Underlying Action

On July 10, 2018, Alvogen filed its Complaint for Emergency Injunctive Relief and Return of Illegally-Obtained Property, and an *ex parte* application for a temporary restraining order and preliminary injunction. 1 PA 69-250-2 PA 251-341. Through these filings, Alvogen confirmed that the State intended to use Alvogen's midazolam product not Hikma's midazolam, in the execution. *See generally id.* & 2 PA 252-53.

The district court heard argument on Alvogen's *ex parte* application in the underlying action at 9 a.m. on July 11, 2018. *See id.* at 431. The district court issued the Temporary Restraining Order ("TRO" or "Alvogen's TRO") the same day, prohibiting and enjoining the

State from using Alvogen's midazolam product in capital punishment until further order of the district court. *Id.* at 429-31.

In issuing the TRO, the district court found that Alvogen and the issues raised did not request or present a "stay of execution." *Id.* at 414. The only issue was Alvogen's right not to do business with someone, including the government, especially if there is a fear of misuse of its product. *Id.* The district court further found as a fact that Alvogen had a reasonable probability of success of establishing that the State knew that its intended use of Alvogen's midazolam product was not one approved by the FDA. *Id.*

Given Alvogen's letters to the State before its purchase of Alvogen's midazolam product, the district court found that Alvogen had a probability of success in establishing that the State was not a bona fide purchaser of the product. *Id.* at 415. Finally, the district court concluded that NRS 41.700 does not preclude an action for damages by Alvogen, that Alvogen established a reasonable probability that it would suffer damages to its business reputation, which would impact investor and customer relations, and that Alvogen had a reasonable probability of establishing claims under replevin and NRS 41.700. *Id.*

H. Hikma Confirms that the State is Both in Possession of Hikma's Fentanyl and Intends to Use it in the State's Lethal Injection Protocol

On July 11, Hikma confirmed that the State was in possession of and intended to use the unlawfully-obtained Hikma's Fentanyl in the scheduled execution. *See* 2 RA 218. Hikma hand delivered its third notices to Attorney General Laxalt, Governor Sandoval, and Defendant Dzurenda ("2018 Letters") the same day. *See* 3 RA 503-11. Hikma reminded these recipients, including NDOC—once again—of Hikma's position on the misuse of its medicines in executions. *See id.*

Hikma stated its belief that the State is in possession of Hikma's Fentanyl, and that it may be used in a pending execution, additionally stating the following:

> Despite our best efforts to ensure our medicines are used only for their intended medicinal purposes—including a requirement that these products are only supplied to pre-authorized customers who agree in writing not to sell them to Departments of Corrections or other entities that intend to use them for lethal injection—some states continue to attempt to procure our products from distributors and other intermediaries for use in lethal injection. Not only is this inconsistent with the FDA indication and contrary to our intention of manufacturing the product for the health and well-being of

> patients in need, but it is also completely counter to our company values.

Id. at 504, 507, 510.

Hikma demanded that NDOC immediately return all of Hikma's Fentanyl, and other Hikma products, that the State intended for use in executions because this use would represent a serious misuse of these medicines. *Id.* at 504. Hikma specifically requested that Director Dzurenda and other NDOC officials not circumvent Hikma's carefully-prepared controls or potentially undermine the specifically-drafted legal provisions in its agreements. *Id.* at 505, 508, 511.

The State did not respond to Hikma's letter. *See* 2 RA 221.

I. The State Seeks a Stay of Execution

After the district court issued the TRO in the underlying action, the State requested that Judge Togliatti, who had issued Dozier's death warrant, "lift and vacate the order of execution requiring the execution to proceed this week," and stipulated to a stay of the execution. 2 PA 435, 438. Despite its request, the State later voiced concern that it didn't "want to seem as though that NDOC is requesting a quote[un]quote stay of execution. . . . [Its] request is to vacate and lift

the order" since a stay under the statute had consequences. *Id*. at 440. Judge Togliatti then issued the Stay of Execution. *Id.* at 444-46.

J. Hikma Intervenes in the Underlying Action, and the State Pushes for a Decision from this Court Absent a Record Below

On July 24, Hikma submitted to the district court its Motion to Intervene on Order Shortening Time. *See* 1 RA 31.

The next day, the State filed its Petition before this Court. On July 27, the State requested that this Court resolve this writ proceeding on an expedited basis. *See* Mot. to Expedite Decision by October 19, 2018 (Jul 27, 2018). This Court granted the State's motion to expedite proceedings and directed Alvogen to file an Answer by August 16, 2018. *See* Order Granting Mot. to Expedite & Directing Answer (July 27, 2018).

On July 30, in the underlying action, the district court heard argument on and granted Hikma's motion to intervene pursuant to NRCP 24(b). *See* Hikma's Emergency Mot. Under NRAP 27(e) to Amend the Caption & Appear as Real Party in Interest, at 3, Ex. 1 (Aug. 8, 2018) ("Hikma Emerg. Mot."). Hikma filed its Complaint in Intervention in the underlying action on July 30, 2018. *See* 2 RA 209.

On August 2, the State moved the district court to stay the underlying action pending resolution of this writ proceeding. *See* Hikma Emerg. Mot. 3-4, Ex. 3. The district court heard argument and denied the State's stay request on August 6. *See id.* at 4. On August 7, the State moved this Court on an emergency basis to stay the district court proceedings. *See* Emergency Mot. Under NRAP 27(e) to Stay Dist. Court Proceedings Pending this Court's Decision on the Pet. (Aug. 7, 2018).

On August 8, Hikma filed its Joinder in and Supplement to Alvogen's Motion for Preliminary Injunction. *See* 3 RA 398.

That same day, Hikma sought leave from this Court to amend the caption and appear as a real party in interest in this writ proceeding. *See* Hikma Emerg. Mot. This Court granted Hikma's request to appear, and imposed a temporary stay of the underlying action pending oppositions to the State's stay request from Alvogen and Hikma. *See* Order Granting Mot. to Appear, Den. Mot. to Strike & Imposing a Temporary Stay (Aug. 8, 2018). Hikma and Alvogen filed their oppositions to the State's request for a stay on August 13, 2018. The

State filed a reply to Alvogen's opposition to the State's request for a stay countermotion to dismiss the Petition on August 13, 2018.

This Answer now follows.

III. ARGUMENT

The State has not met its burden of demonstrating that extraordinary writ relief is warranted. This Court lacks original jurisdiction to issue a writ under NRS 176.492 because the TRO issued in the underlying action is not, and the preliminary injunction requested would not be, a "stay of execution." Under no circumstance can the injunctive relief sought in the underlying action be reasonably construed as a stay of execution. To the contrary, the requested relief is specifically allowed under NRS 33.010.

Extraordinary writ relief is also not appropriate in this case where the record in the underlying proceedings is not sufficiently developed to permit a determination by this Court on the sufficiency of the claims alleged in the underlying action, particularly Hikma's claims. Based on the harms at issue to be suffered by Hikma, as alleged in the underlying action, the law recognizes the availability of the injunctive relief that Hikma seeks in the proceedings before the district court.

For these reasons, as discussed more fully below, issuance of the State's request for extraordinary writ relief is not warranted.

A. <u>This Court is Without Original Jurisdiction Under NRS 176.492 because the District Court did Not Stay the Execution</u>

Hikma has filed three papers in the underlying action: a Motion to Intervene on an Order Shortening Time, a Complaint in Intervention, and a Joinder in and Supplement to Alvogen's Motion for Preliminary Injunction. *See* 1 RA 31; 2 RA 209; 3 RA 398. In these filings, Hikma expressly states that it takes no position relating to the death sentence imposed upon Dozier and that it is not seeking a stay of execution for Dozier. *See* 3 RA 398; 1 RA 31.

Rather, Hikma seeks to protect its rights through "a preliminary and permanent injunction precluding the use of any Hikma drug, including Hikma's Fentanyl and midazolam, in carrying out **<u>any</u>** capital punishment and further ordering NDOC to return immediately all of Hikma's Fentanyl to Hikma" to protect itself from "reputational injury" and "the corresponding damage to business and investor and prospective investor relationships." 2 RA 224-33 (emphasis added); *accord* 1 RA 37; 3 RA 404-05. In addition, Hikma's request for relief is

limited to "declaratory relief as requested herein," and "an award of attorneys' fees and costs of suit as allowed by law." *See* 2 RA 232-33; 3 RA 420.

Hikma's Joinder in and Supplement to Alvogen's Motion for Preliminary Injunction is expressly made pursuant to NRS 33.010 and NRCP 65. *See generally* 3 RA 398. Nowhere does Hikma mention of a stay of execution or a request such relief under NRS 176.492.[2] *See id.*

1. NRS 176.492 does Not Prohibit Injunctive Relief Sought Under NRS 33.010

The keystone for the State's Petition is the faulty premise that a court may not grant injunctive relief if such relief would in any way affect a planned execution performed by the State. *See* Pet. 18-25. In support of its argument advancing this premise, the State emphasizes the circumstances delineated in NRS 176.492 that authorize a stay of execution, and from there asserts that any court order granting injunctive relief affecting an execution should be treated as an

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[2] Hikma only intervened in the underlying district court action after finding that the State was in possession of Hikma's Fentanyl and planned to use Hikma's Fentanyl as part of its execution protocol in the execution of Dozier. 1 RA 43.

unauthorized stay of execution.[3,4] *Id.* Thus, as maintained by the State, because a pharmaceutical manufacturer seeking to enforce its business and property interests through injunctive relief is not one of the permitted circumstances identified in NRS 176.492, and the State was without other midazolam to use in the execution, the district court did not have the authority to issue the TRO.[5] *Id.* This assertion is wholly unfounded.

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[3] On its face, this legal theory presented by the State could lead to absurd and unconscionable outcomes. For example, under the State's theory, the State could walk into a privately owned hospital and confiscate the drugs necessary for Dozier's execution, and then take the drugs to a nearby Catholic church that the State has occupied over protest to conduct the execution. Under the State's legal theory, neither the privately owned hospital nor the Catholic church could obtain injunctive relief under NRS 33.010 if it adversely affected the State's planned execution.

[4] The State argues in its Petition that the Alvogen TRO issued by the district court was effectively a stay of execution because: (1) the TRO prevented the State from using Alvogen's midazolam product is the planned execution of Dozier; (2) the State had only purchased Alvogen's midazolam for the planned execution of Dozier; and (3) without midazolam, the Alvogen TRO "deprived the State of its only method to carry out the sentence," so the State could not perform the planned execution of Dozier. Pet. 18-25.

[5] The State does not explain in its Petition why it only purchased one brand of midazolam for the execution of Dozier. *See generally* Pet. Had it purchased more than one brand of midazolam, the Alvogen TRO would not have prohibited the State from performing the execution of Dozier on July 11th. The State purposely tried to hide the manufacturers of the drugs they planned to use for the execution of Dozier from disclosure because the State knew that a drug

As an initial matter, the State fails to provide any pointed legal authority to support its argument that a party may not seek injunctive relief that in any way affects an execution being performed by the State outside of what is provided for in NRS 176.492. *See general id.* The State instead cites to cases from outside of this jurisdiction in which condemned prisoners on death row sought temporary restraining orders that would effectively stay their pending executions. *See* Pet. 25 (citing *Workman v. Bresden,* 486 F.3d 896 (6th Cir. 2007) & *Boltz v. Jones*, 182 F. App'x 824 (10th Cir. 2006)). These cases deal with the appellate process in which condemned prisoners challenged their death sentences and have no bearing on a business seeking injunctive relief to protect its business and property interests. *See id.*

The State's attempt to persuade this Court with the Arkansas Supreme Court's decisions in *McKesson Medical-Surgical, Inc. v. State* by arguing that no other pharmaceutical manufacturer has ever been successful in obtaining a TRO to stay an execution is misdirected. *See*

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manufacturer might challenge the use of its product in the execution. *See* 1 PA 64. After admitting that a challenge from a drug manufacturer was reasonably foreseeable, the State should be required to explain why it did not secure the necessary execution drugs from various manufacturers through the development of a record in the district court.

Pet. 23. Despite the State's assertion that the Arkansas Supreme Court "sided with the State" and granted the State's immediate stay of the lower court's injunction, *see id.*, as succinctly articulated by Alvogen in its Answering Brief, in which Hikma joins, the Arkansas Supreme Court did not address the merits of the issues raised before by the TRO. *See* Alvogen's Answer to Pet. ("Alvogen Answer") 17-18. The Arkansas Supreme Court did not provide a reasoned decision; instead, it merely granted the stay of the injunction pending further briefing. *See, e.g.*, 2 PA 490-91. The Arkansas Supreme Court never reached a decision on the merits because the parties voluntarily dismissed the proceedings. *See* 1 RA 27. The State cannot, therefore, adopt the arguments made by the State of Arkansas' as conclusive of the high court's ruling.[6] *See* Pet. 2-24.

The State makes no mention of NRS 33.010, *i.e.*, the very statute authorizing the injunctive relief sought by Hikma in the underlying

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[6] Further, the basis for the State of Arkansas' request for a stay of the injunction was sovereign immunity. *See* 2 PA 462-64. In the instant writ proceeding, the State admitted that it does not make such an argument before this Court. Pet. 40 n.24.

action, in its NRS 176.492 analysis.[7] *See generally* Pet. The State's omission is intentional. There is no authority to suggest that a party's ability to seek injunctive relief to enforce its business and property interests are limited if the relief in any way affects a state-sponsored execution. The State's failure to discuss or offer relevant Nevada authority to support its contention, particularly where it ignores the governing statute under which the relief was sought, is a basis to deny review of the Petition. *See, e.g.*, *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this Court need not consider claims unsupported by relevant authority).[8]

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[7] In its Notice of Supplemental Authorities filed on August 10, 2018, the State provided this Court with a decision by the United States District Court for the District of Nebraska denying a temporary restraining order and preliminary injunction in a lawsuit filed by the drug manufacturer, Fresenius Kabi USA, LLC. While the State refers to the Nebraska case as a "copy-cat" lawsuit to the underlying district court action, clearly it is not. In addition to the Nebraska case being filed in federal court, and viewed under a different legal standard, the manufacturer involved did not know if its drugs were even being used in the pending execution because the State of Nebraska had not disclosed the makers of the drugs to be used.

[8] *See also State, Dep't of Motor Vehicles & Public Safety v. Rowland*, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (stating that unsupported arguments are summarily rejected on appeal); *Randall v. Salvation Army*, 100 Nev. 466, 470-71, 686 P.2d 241, 243-44 (1984) (providing that this Court may decline consideration of issues lacking citation to

Not only is the State's argument unsupported, but it contradicts the position previously argued by the State and the Clark County District Attorney's Office, an amicus in this writ proceeding. In *Coleman v. State*, 130 Nev., Adv. Op. 22, 321 P.3d 863, 867 (2014), the State and the Clark County District Attorney's Office argued before this Court that injunctive relief under NRS 33.010 provides a post-conviction remedy for a convicted sex offender when traditional post-conviction habeas relief is unavailable. *See id.*; 1 RA 12 ("It is important to note that affirmance of the district court will not leave Appellant without a remedy. While traditional post-conviction relief is not available, Appellant could still pursue injunctive relief pursuant to NRS 33.010."). The State now contradicts itself by having argued that (1) under NRS 33.010, an injunction is available for a convicted sex offender when post-conviction relief is unavailable under NRS Chapter 176; but now (2) NRS 176.492 bars a court from granting injunctive

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relevant legal authority); *Smith v. Timm*, 96 Nev. 197, 201, 606 P.2d 530, 532 (1980) (stating that the mere citation to legal encyclopedia does not fulfill the obligation to cite to relevant legal precedent); *Holland Livestock v. B & C Enters.*, 92 Nev. 473, 474, 533 P.2d 950, 950 (1976) (reiterating that the failure to offer citation to relevant legal precedent justifies affirmation of the judgment below).

relief under NRS 33.010 to a law-abiding business owner seeking to protect its business or property interests.

As discussed further below, NRS 33.010, and governing caselaw make clear that the district court is authorized to grant injunctive relief to enforce and protect a party's business and property interests, without any such limitation argued by the State.

i. *NRS 33.010 Authorizes a District Court to Grant Injunctive Relief*

It is well-established that district courts may exercise their discretion and issue injunctive relief. NRS 33.010 expressly authorizes the grant of an injunction in the following cases:

> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
>
> 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
>
> 3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiffs rights

> respecting the subject of the action, and tending to render the judgment ineffectual.

Nevada caselaw interpreting NRS 33.010 establishes that the district court's issuance of preliminary injunctive relief is appropriate when an applicant shows a likelihood of success on the merits and a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damages is an inadequate remedy. *See, e.g.*, *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters.*, 125 Nev. 397, 400, 215 P.3d 27, 29 (2009); *Dangberg Holdings Nev., LLC v. Douglas Cnty.*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999).

The decision whether to grant a preliminary injunction is within the sound discretion of the district court, which decision will not be disturbed on appeal absent an abuse of discretion. *Dangberg*, 115 Nev. at 142-143, 978 P.2d at 319 (citing *Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779, 781, 587 P.2d 1329, 1330 (1978)); *Attorney Gen. v. NOS Commc'ns*, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004) (stating that the district court's decision "will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact"). There can be no

dispute that the law affords the district court broad authority to issue preliminary injunctive relief under NRS 33.010.

ii. *Injunctive Relief May be Granted to Preserve a Business or Property Interest*

The district court's authority to grant injunctive relief includes exercising its discretion to protect interference with a business or property right. This Court has recognized a property right "to carry on a lawful business without obstruction," and that actions that interfere with the business "or destroy its custom, its credit or its profits, do an irreparable injury and thus authorize the issuance of an injunction." *See Guion v. Terra Mktg. of Nev., Inc.,* 90 Nev. 237, 240, 523 P.2d 847, 848 (1974); *accord Sobol v. Capital Mgmt. Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986). This Court has held on multiple occasions that equity will "restrain tortious acts where it is essential to preserve a business or property interest." *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) (citing *Guion, supra*); *Chateau Vegas Wine, Inc. v. S. Wine & Spirits of Am., Inc.*, 127 Nev. 818, 829, 265 P.3d 680, 687 (2011).

iii. Public Officers and Government Agencies May be Enjoined from Acts that are Unlawful or in Excess of their Authority

The district court's authority and broad discretion to issue an injunction also extend to enjoining public officers from acts that are unlawful or in excess of the officer's authority. *See City Council v. Reno Newspapers, Inc.,* 105 Nev. 886, 890, 784 P.2d 974, 977 (1989); *State ex rel. Berger v. Myers,* 108 Ariz. 248, 250, 495 P.2d 844, 846 (1972). Further, a public agency may be enjoined from acting in excess of its authority or jurisdiction. *Id.*; *see also Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't,* 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 357, 302 P.3d 1118, 1124-25 (2013). In these instances, this Court has held that injunctions sought against public officers and government agencies must comply with the same standards as injunctive relief generally. *See, e.g.*, *City of Sparks*, 129 Nev. at 357, 302 P.3d at 1124 ("A preliminary injunction is available when it appears from the complaint that the moving party has a reasonable likelihood of success on the merits and the nonmoving party's conduct, if allowed to continue, will cause the moving party irreparable harm for which compensatory relief

is inadequate."). The fact that the party to be enjoined as a public officer or agency does not limit or otherwise impede the district court's jurisdiction to grant injunctive relief under NRS 33.010.

2. The TRO Entered in the Underlying Action is Not a Stay of Execution, and This Court Should Decline to Exercise its Original Jurisdiction under NRS Chapter 176

This Court's exercise of jurisdiction to hear the Petition under NRS Chapter 176 is not proper. The TRO issued by the district court is not a "stay of execution," *see* Pet. 6, and cannot be treated as such. The TRO prohibits the State from using a specific brand of medicine, Alvogen's midazolam, to execute Dozier. 2 PA 430. Under the TRO, the State can acquire any other brand of the midazolam (or even choose an entirely different combination of drugs for its protocol) and proceed with the execution at any time. Justice Hardesty appropriately noted that

> neither the State nor Dozier has sought this court's review of their stipulation to vacate the warrant of execution in the district court. Nothing in this case prevents the State from seeking a warrant for Dozier's execution through other means, and thus far, the State has failed to demonstrate that it cannot conduct its responsibilities to carry out Dozier's execution through other medication.

Order Granting Mot. to Appear, Den. Mot. to Strike, & Imposing a Temporary Stay (Aug. 8, 2018) (Hardesty, J., concurring in part and dissenting in part). Lest the State forget, it was the State's stipulation to stay the execution that caused Judge Togliatti to issue the stay, not the district court's TRO. *See* 2 PA 432-46.

For this reason, and the reason set forth above, State cannot be heard to argue that the TRO stayed the execution. An exercise of this Court's original jurisdiction under NRS Chapter 176 is not proper here.

B. Extraordinary Writ Relief is Not Appropriate in this Case

This Court may issue extraordinary mandamus relief "to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion." NRS 34.160; *Las Vegas Sands v. Eighth Judicial Dist. Court*, 130 Nev., Adv. Op. 61, 331 P.3d 876, 878 (2014). A writ of prohibition may be issued to "arrest[ ] the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." NRS 34.320; *Las Vegas Sands*, 331 P.3d at 878. "Petitioners carry the

burden of demonstrating that extraordinary relief is warranted." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Because the district court has discretion in determining whether to grant preliminary injunctive relief, this Court will only reverse the district court's decision when "the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact."[9] *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev., Adv. Op. 38, 351 P.3d 720, 722 (2015) (internal quotations omitted). This Court reviews questions of law in this context de novo. *Id.*

However, where the district court's order at issue is the grant or denial of an application for a temporary restraining order, this Court has refused to issue writ relief because "the record below [i]s not sufficiently developed" in such proceedings. *See, e.g.*, *Does 1-24 v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, No. 64890,

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[9] *See also Landrigan v. Brewer*, 625 F.3d 1132, 1133 (9th Cir. 2010) ("We review the district court's grant of a preliminary injunction for abuse of discretion" and "apply the same abuse-of-discretion standard to temporary restraining orders.") (citing *Woratzeck v. Arizona Bd. of Exec. Clemency*, 117 F.3d 400, 402 (9th Cir. 1997)).

2016 WL 374956, at *1 (Nev. Jan. 22, 2016) (citing *Pan*, 120 Nev. at 229, 88 P.3d at 844) (unpublished disposition).

The absence of a developed record in the underlying action demonstrates that review of the TRO by this Court is premature at this time. The State has failed to meet its burden to establish that extraordinary writ relief is warranted, as further set forth below.

1. The State's Misuse of Hikma's Fentanyl Would Harm Hikma, and the Record is Not Developed Enough to Assume there is No Basis for Injunctive Relief

The State's utilization of Hikma's Fentanly as an intentional instrument of death would not only be a misuse of the product, it would alter and tarnish the reputation of Hikma. Hikma would be harmed from such misuse by the State.

Hikma makes medicine to treat illnesses, save lives, and improve the quality of life for patients. 3 RA 427. The State's proposed use of Hikma's Fentanyl is wholly contrary to that purpose. *E.g.*, 3 RA 433, 484-86. As the Hippocratic Oath directs, "Above all, do no harm." *See The Oath of Hippocrates* (as quoted in *Council on Ethical and Judicial Affairs Report on Physician Participation in Capital Punishment*, 270 JAMA 365 (1993)).

Hikma's effectiveness, perception, and reputation in the healthcare field would be undermined by the State's use of its medicine to render death in State-sponsored executions. The public would perceive Hikma's Fentanyl as something that is purposefully lethal, not as an efficacious medical treatment. This misuse would disparage Hikma, a situation compounded by the State's slanderous remarks about opioids in this litigation. 1 RA 113-14, 197.

The social, legal, and economic consequences to Hikma resulting from the Sate's misuse of Hikma's products are apparent. Hikma is entitled to be free from the inference that these harms would result in, at least until its claims are heard by the district court in the preliminary injunction hearing.

i. *Review of a Writ is Not Proper in the Absence of a Fully Developed Record*

The development of the underlying record in this case is necessary to facilitate this Court's review of the Petition, thus rendering the State's Petition premature. This Court's review would be best assisted through formal discovery and a hearing on the merits on Hikma's claims.

It is well established that this Court, as an appellate court, is "'a court of review, not of first view.'" *City of N. Las Vegas v. Eighth Judicial Dist. Court*, 401 P.3d 211 (Nev. 2017) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)) (unpublished disposition, Gibbons J., dissenting). As such, this Court is not properly suited to—and will not—resolve disputed questions of fact. *E.g.*, *Round Hill Gen. Improv. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

In the context of writ proceedings, this Court has explained, "When disputed factual issues are critical in demonstrating the propriety of a writ of mandamus, the writ should be sought in the district court, with appeal from an adverse judgment to this court." *Id.* This is true even when the writ petition raises issues of important public interest: this Court will not exercise its discretion "unless legal, rather than factual, issues are presented." *Id.* Simply stated, where the record below "[i]s not sufficiently developed," denial of the writ petition is appropriate. *Does 1-24*, No. 64890, 2016 WL 374956, at *1 (citing *Pan*, 120 Nev. at 229, 88 P.3d at 844) (unpublished disposition) ("Further, we note that because the district court order at issue is the

denial of an application for a temporary restraining order, the record below is not sufficiently developed for judicial review.").

This rule is well reasoned. "To efficiently and thoughtfully resolve such an important issue of law demands a well-developed district court record, including legal positions fully argued by the parties and a merits-based decision by the district court judge." *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 101, 407 P.3d 702, 708 (2017) (noting that appellate consideration of arguments not presented to the district court makes the district court "merely a dress rehearsal," "erodes the finality of [district] court holdings," denies the district court the opportunity to avoid or correct its own error, and "encourages unnecessary appeals").

The State raises disputed issues of fact in its Petition, which have yet to be considered, let alone resolved, in the underlying action.[10]

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[10] These factual disputes include, *inter alia*: (1) whether the manufacturers implemented controls to protect their right to "exercise [their] own independent discretion as to parties with whom [they] will deal," *contra* Pet. 3 (internal quotations omitted); (2) whether the State obtained the drugs in violation of those controls, *contra id. at* 9-10, 16; (3) whether the State ordered the medicines after the distributor had contracted with the manufacturers not to sell to the State, and whether the State was aware of those agreements, *contra id.* at 11 & n.8, 12, 13, 16; (4) whether the manufacturers will suffer irreparable harm from the State's use of their products in the execution, *contra id.* at 17; (5)

These disputed factual issues are critical in demonstrating the prematurity of the State's Petition, where the record below "[i]s not sufficiently developed." *See Round Hill Gen. Improv. Dist.*, 97 Nev. at 604, 637 P.2d at 536.

ii. Hikma Should be Allowed to Pursue Injunctive Relief, where the State has Not Challenged the Complaint Under Rule 12(b)(5) or Developed a Record

Where there is potential harm, a party should be able to take equitable action to prevent that harm in the first instance. The State would not otherwise be permitted to circumvent the underlying proceedings to obtain a final determination on harm, especially where it has not even made an NRCP 12(b)(5) motion to challenge the sufficiency of the complaint. The State cannot cut off Hikma's rights to pursue injunctive relief in this manner, challenging only the TRO issued on behalf of Alvogen without having challenged the underlying complaint

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whether the State possesses any other drugs it could use, *contra id.* at 18; (6) the expiration date of the drugs that the State currently possesses, *contra id.* at 27-28; (7) the identity of the person(s) supervising and administering the drugs, *contra id.* at 31; (8) how the State obtained the drugs, *contra id.* at 31-36 & n. 22; (9) whether the State obtained the drugs such that they have no lawful title to them, *contra id.* at 46 n.28; and (10) whether the State obtained the drugs in a manner that violates NRS 453. *See contra id.* at 36-40.

or developed the record in the district court. Hikma is entitled to the legitimate inferences, from its complaint, that irreparable harm could result from the State's actions.

However, in challenging the Alvogen TRO, the State does not focus on the resulting harms. *See generally* Pet. The State focuses on the particular claims for relief alleged in the underlying action to assert that those claims are not applicable in these circumstances. This argument is not ripe. The parties have not had an adequate opportunity to develop the claims, themselves, in the district court, either in the preliminary injunction context or through an NRCP 12(b)(5) motion.

iii. Hikma is Still Entitled to Modify Its Claims in the Underlying Action

As further evidence that the Petition is premature, granting it would effectively destroy Hikma's right to amend the complaint. Had the State filed a Rule 12(b)(5) motion and challenged the particular claims for relief alleged, the district court could have allowed Hikma to amend its pleading, to the extent necessary, to clarify the existing

claims or add new ones.[11] And because the State has not served its responsive pleading in the underlying action, Hikma is still entitled to amend its original pleading as a matter of right. *See* NRCP 15(a).

However, the State attempts to destroy Hikma's right to amend by seeking adjudication of Hikma's claims in this forum. Were this Court to dissolve the TRO, the State could execute Dozier before it files any responsive pleading or Rule 12(b)(5) motion and before Hikma has any opportunity to amend. This Court should decline the State's request to terminate this case so prematurely and with such an empty record. Preservation of the status quo and allowing Hikma's causes of action to be tested and, if necessary, amended in the district court, is proper under these circumstances.

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[11] For example, assuming Hikma is permitted to proceed below, it intends to amend its complaint to add a claim for tortious inducement of breach of contract. *See, e.g.*, *Span-Deck, Inc. v. Fab-Con, Inc.*, 677 F.2d 1237, 1245 (8th Cir. 1982) (proving that claim for tortious inducement requires a plaintiff to allege "(1) the contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) without justification; and (5) damages resulting therefrom"). To support this claim, Hikma will allege the following: Hikma's repeated notices and other documents became part of its agreement with Cardinal Health; the State knew that Cardinal Health agreed that it would not sell Hikma's medicine for use in executions; and despite such knowledge, the State caused Cardinal Health to breach that agreement by employing a purchasing scheme designed to avoid Cardinal Health's detection. Hikma intends to add these allegations to its existing allegations.

iv. *Denial of the State's Request for an Advisory Mandamus is Appropriate*

The district court's hearing on the pending motion for preliminary injunction is set to be scheduled for September 2018. The only papers of substance on file with the district court relating to Hikma are the complaint and motion for preliminary injunction. The State has not moved to dismiss any of Alvogen's or Hikma's claims for failure to state a claim upon which relief may be granted. The State has yet to oppose Alvogen's or Hikma's motions for preliminary injunction. This Court's review of the issues raised in the Petition would be benefited by a complete, post-hearing record of the preliminary injunction proceedings. *See Archon*, 407 P.3d at 709-10 (emphasizing the judicial economy and efficiency interests served by allowing review only upon a complete record).

In short, the State's blatant attempt to cut off the claim for injunctive relief before it can be developed should be rejected. The State's current request for an advisory mandamus on a legal issues mixed with disputed questions of fact not properly resolved before the district court does not promote sound judicial economy or administration: the issues are before this Court "with neither a

complete record nor full development of the sup-posed novel and important legal issue to be resolved." *See id.*, 407 P.3d at 706-07. Under these circumstances, this type of "interference from the appellate court during the course of preliminary and trial proceedings" should be avoided.[12] *See Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5, 106 P.3d 134, 136-37 (2005).

2. Hikma Properly Seeks an Injunction Under NRS Chapter 453

The State contends that injunctive relief is unavailable under NRS Chapter 453 because only the State has a right of action to enforce the statute. *See* Pet. 38. According to the State, it cannot be compelled to comply with NRS Chapter 453. *See id.* Accepting the State's argument would mean that the State is free to violate the entire chapter, even intentionally, unless State officials choose to enforce it. *Id.* Compliance, according to the State, is optional. *See id.* Thus, in effect, the State asks this Court to conclude that the State is not subject

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[12] And, to the extent that the district court's preliminary injunction hearing were to result in a preliminary injunction, the State has an adequate legal remedy available in the form of an appeal from the interlocutory order, with a developed record (which also precludes writ relief). *See* NRS 34.170; NRS 34.330; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). .

to NRS Chapter 453's criminal prohibitions. These statutes, however, provide for the exact opposite. Moreover, Hikma has a right to seek an injunction requiring State officers to comply with the statute.

i. *NRS Chapter 453's Mandates Expressly Apply to the State*

By its plain language, NRS Chapter 453 applies to *all* "persons," expressly defining "person" to include the State and State agencies. NRS 453.113 ("'Person' includes a government or a governmental subdivision or agency.").[13] As a purely textual matter, the State is subject to NRS Chapter 453's prohibitions. As one example, under NRS 453.331(1)(d), it is unlawful for the State to knowingly acquire a controlled substance by deception, subterfuge, or misrepresentation:

> 1. It is unlawful for a person [including the State] knowingly or intentionally to:
> . . . .
> (d) Acquire or obtain or attempt to acquire or obtain possession of a controlled substance or a prescription for a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge or alteration.

[13] While the State relies on the general definition for "person" from NRS 0.039, Pet. 31, that definition does not apply to NRS Chapter 453, which includes its own, state-inclusive, controlling definition. *See* NRS 0.039 (applying that definition "[e]xcept as otherwise expressly provided in a particular statute."); NRS 453.113.

Through its Petition, however, the State seeks an end-around, arguing that nobody except the State can enforce this prohibition against the State. *See* Pet. 38. In effect, the State argues that even if it is a "person" and even if its plan violates, and will continue to violate, NRS Chapter 453, Nevada's courts lack authority to compel the State's compliance unless the State itself consents.

The Legislature most certainly could not have intended such an illusory enforcement mechanism when it crafted a statute-specific definition of "person" that expressly subjects the State to NRS Chapter 453's prohibitions. *See* NRS 453.113. Indeed, the *only* function of the definition in NRS 453.113 is to apply NRS Chapter 453 to the State. Nevertheless, the State seems to suggest that when the Legislature drafted NRS 453.113, it deliberately failed to provide a mechanism by which to compel the State's compliance. This, to borrow the State's term, is "illogical." *See* Pet. 4. The plain language of the provisions included in NRS Chapter 453 unambiguously require the State's compliance. Consequently, the State's argument, which treats compliance as merely optional, is simply untenable. Neither the State

nor its officers are above the law. *See* NRS 453.113; *State v. Dickerson*, 33 Nev. 540, 113 P. 105, 111 (1910).[14]

ii. NRS Chapter 453 does Not Prohibit an Aggrieved Party from Seeking an Injunction Against the State

The State's argument would compel this Court to debate who has standing to seek an injunction requiring compliance with NRS Chapter 453, where, as here, the State chooses not to enforce those provisions. But the answer is straightforward: any party who alleges facts showing that it will suffer "great or irreparable" injury as a result of the planned noncompliance can seek an injunction. NRS 33.010; *see also Reno Newspapers,* 105 Nev. at 890, 784 P.2d at 977 (stating that Nevada courts can enjoin public officers "from acts that are unlawful or in excess of the officer's authority").

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[14] As this Court taught in *Dickerson*, "there is nothing under our system of government which places [the Governor or other State officers] upon a pedestal above the laws enacted in accordance with the provisions of the Constitution by the people's representatives in the Legislature. *Id.* Rather, because executive officers are under an oath to "see that the laws are faithfully executed," it is "even more incumbent upon [them] than upon ordinary citizens to yield obedience to the statute." *Id.* "The fact that with the best of motives, and on the highest of moral grounds, [state officers] may disagree with the will of the Legislature as expressed in the statute cannot justify [their] failure or refusal to perform an act clearly required by its terms." *Id.*

The State declines to address this issue. Instead, it cites NRS 453.276 and NRS 453.553 for the proposition that only the State can seek to enjoin NRS Chapter 453 violations and that all civil actions "must be brought in the name of the State of Nevada." Pet. 38. The State misunderstands those statutes.

NRS 453.276 does not direct that only the Board of Pharmacy or the Attorney General may seek an injunction under NRS Chapter 453. Rather, it says that these two entities are authorized to seek such an injunction without complying with certain Rule 65 requirements, but only where they bring the action in the name of the State:

> **NRS 453.276 Injunctions.** The Board or the Attorney General may bring an action to enjoin any act which would be in violation of the provisions of this chapter. Such an action must be commenced in the district court for the county in which the act is to occur and must be in conformity with Rule 65 of the Nevada Rules of Civil Procedure, except that the Board or the Attorney General is not required to allege facts necessary to show or tending to show lack of adequate remedy at law or irreparable damage or loss. The action must be brought in the name of the State of Nevada.

(Emphasis added.) This, of course, does not mean that private parties, like Hikma, cannot seek injunctive relief under NRS Chapter 453.

Similarly, NRS 453.553 in no way directs that only the Attorney General or district attorneys are allowed to bring a civil action. Instead, it expresses that only the Attorney General or a district attorney may recover a civil penalty under NRS Chapter 453 and that all such recovery actions must be brought in the name of the State:

> 1. In addition to any criminal penalty imposed for a violation of the provisions of NRS 453.011 to 453.552, inclusive, any person who violates NRS 453.324, 453.354, 453.355 or 453.357, unlawfully sells, manufactures, delivers or brings into this State, possesses for sale or participates in any way in a sale of a controlled substance listed in schedule I, II or III or who engages in any act or transaction in violation of the provisions of NRS 453.3611 to 453.3648, inclusive, is subject to a civil penalty for each violation. This penalty must be recovered in a civil action, brought in the name of the State of Nevada by the Attorney General or by any district attorney in a court of competent jurisdiction.

(Emphasis added.) NRS 453.553 does not preclude a private party from seeking an injunction against the State. Indeed, it speaks only to the recovery of civil penalties, not the injunctive relief that Hikma seeks here. The State's argument that the "Legislature restricted the ability to obtain an injunction to the Board and the Attorney General in the

name of the State" is wholly without textual support and lacks any merit as a result.

iii. This Court's Rules for Statutory Construction Preclude the State's Interpretation of NRS Chapter 453

This Court's rules for statutory construction confirm that an aggrieved private party can seek to enjoin the State from violating NRS Chapter 453. Any other reading of the statutory scheme would render NRS 453.113's personhood definition meaningless, as it would allow the State to violate NRS Chapter 453's prohibitions at will, without being treated as a "person" for enforcement purposes. To be sure, if an aggrieved private party could not enjoin the State's compliance with NRS Chapter 453, then the State would never be forced to comply with statute, and NRS 453.113 would lack any force or application. This reading of the statute would violate the well-settled rule against reducing statutes to mere surplusage, which requires Nevada courts to "construe statutes to give meaning to all of their parts and language, and . . . read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

The State's proposed reading would further reduce the statute to an absurdity, an impermissible result. *See id.* (stating that a statute's "language should not be read to produce absurd or unreasonable results") (internal quotations omitted). Such a reading of the statute would require the State to bring a suit against the State, in the name of the State, to enjoin the State's compliance with a statute specifically crafted to regulate State conduct. *See* NRS 453.113. This Court should not construe the statute to require such an absurd result. *See Harris Assocs.*, 119 Nev. at 642, 81 P.3d at 534.

The statutes must be read as a whole. Doing so commands the conclusion that where the State intends to violate (or continue violating) NRS Chapter 453, an aggrieved private party has standing to seek prospective relief. *See id.* Any other result would allow the State to flout NRS Chapter 453.

iv. *NRS Chapter 453's Statutory Scheme Implies a Right to Private Injunctive Relief*

The Court's standard for finding implied rights of action further supports Hikma's reading of NRS Chapter 453. In finding such implied rights, the Court is guided by "the entire statutory scheme, reason, and public policy." *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958,

194 P.3d 96, 101 (2008). "[T]he determinative factor is always whether the Legislature intended to create a private judicial remedy." Each consideration indicates an implied right to seek prospective relief against the State in this case.

First, as demonstrated above, when the statutory scheme of NRS Chapter 453 is read in the entirety, it necessarily implies a private right of action to compel the State's compliance, for without such actions NRS 453.113 would be meaningless and illusory. *See supra.* Second, the rule of reason demands such an implied right. Any other reading would lead to absurd enforcement requirements and give the State the option to comply with a statute that, on its face, expressly requires State compliance. *See id.* Third, sensible public policy demands that where, as here, the Legislature has expressly mandated the State's compliance, a meaningful enforcement mechanism is implied.

These considerations confirm that the text of NRS Chapter 453 implies a right to restrain the State violations.[15] By expressly

[15] While the State repeatedly suggests that the Court should began its inquiry with legislative history or intent, such an inquiry is neither

prohibiting the State from engaging in specific conduct, NRS Chapter 453 provides a right to be free from such state conduct. Such a right, however, cannot exist without a corresponding remedy. *See, e.g.*, *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382 (5th Cir. 2014) ("[W]e regularly rely on the presumption that there should be no right without a remedy."); *accord Von Hoffman v. City of Quincy*, 71 U.S. 535, 554 (1866) ("A right without a remedy is as if it were not."); *State of Rhode Island v. Com. of Massachusetts*, 37 U.S. 657 (1838) ("[I]t is monstrous to talk of existing rights, without correspondent remedies."); *Barrett v. Holmes*, 102 U.S. 651 (1880) ("A right without a remedy is unknown to the law.").

A remedy in the form of injunctive relief is necessarily implied in NRS Chapter 453.

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necessary nor appropriate here, as NRS Chapter 453 unambiguously applies against the State. *See* NRS 453.113. And if there is any lingering questions about legislative intent, they are resolved by the Legislature's inclusion of a unique "person" definition that by its plain language exists for the express and sole purpose for requiring the State's compliance. *See id.*

v. *Dissolving the TRO will Allow the State to Continue Violating NRS Chapter 453 and Preclude Hikma's Remedy*

In the underlying action, Hikma has alleged ongoing NRS Chapter 453 violations, and it seeks only prospective injunctive relief, not civil penalties or other money damages. *See generally* 2 RA 209. As mentioned before, the State has not challenged any of Hikma's NRS Chapter 453 claims or allegations in a motion to dismiss. Rather, the State sought to challenge the sufficiency of these claims in this forum, arguing that discovery should be precluded in the underlying action and the TRO should be dissolved for lacking a right to relief. *See, e.g.*, Pet. 30, 36. But, again, the State's argument fails.

Compliance with NRS Chapter 453 is not optional, and Hikma should have the opportunity to conduct discovery and prove that injunctive relief is warranted. Dissolving Alvogen's TRO, however, would prevent injunctive enforcement, because it would allow the State to complete its planned NRS Chapter 453 violations, misuse Hikma's Fentanyl in violation of Hikma's rights, and terminate this case prior to the entry of a preliminary injunction. The State's continued violations of NRS Chapter 453 should not be sanctioned.

3. Hikma Properly Seeks an Injunction Under NRS 41.700

NRS 41.700 further allows for a cause of action for any misuse of a controlled substance that causes harm. Even where a statute speaks of damages, remedies are deemed cumulative unless the Legislature expressly excludes them. Nothing in NRS 41.700 forbids injunctive relief where monetary damages are inadequate.

For the reasons stated in Alvogen's Answering Brief, joined in by Hikma, a private right of action exists under NRS 41.700, s*ee* Alvogen Answer 34-38, Hikma is within the zone of interests protected under NRS 41.700, *id.* at 37-41, and these Petitioners include natural persons under NRS 41.700. *Id.* at 41-45.

Although, the State suggests that its attending physician can lawfully use Hikma's Fentanyl to execute Dozier under NRS 453.377(6), Pet. 36 n.2, that exception does not apply here. NRS 453.377(6) does not allow the State's attending physician or Chief Medical Officer to use or furnish any controlled substance in an execution. Rather, NRS 453.377(6) authorizes a prison pharmacist to dispense controlled substances for use in a lethal injection. NRS 453.377(6). Hikma does not challenge the pharmacist's authority to dispense controlled

substances for lethal injections. Instead, Hikma contends that (1) under NRS 453.381, an attending physician can administer a controlled substance "only for a legitimate medical purpose and in the usual course of his or her practice"; and (2) causing death by State-sponsored executions is not one of fentanyl's "legitimate medical purpose[s]." 2 RA 224-26.

Tellingly, the State does not attempt to counter these arguments. *See generally* Pet. Nor can it. There is no "legitimate medical purpose" at issue here, and there is neither allegation nor argument that the attending physician uses fentanyl to cause death "in the usual course of his or her practice."

Instead of addressing these defects, the State relies on NRS 454.213(1)(k). Pet. 36 n.2. That statute is inapplicable for at least two reasons. First, it only states that a "person designated by the head of a correctional institution" may administer drugs. It does not state, as the State suggests, that such persons may administer any drug for any purpose. Indeed, the State neither contradicts nor even implicates NRS 453.381(1)'s "legitimate purpose" or "usual course" requirements. Second, NRS 454.213(1)(k) applies only to the administration of

"dangerous drugs," which, by definition, excludes controlled substances, such as fentanyl. NRS 454.201 ("'Dangerous drug' means any drug, other than a controlled substance, unsafe for self-medication or unsupervised use."). The State's attempt to defend its use of fentanyl as a "lawful use" of a controlled substance falls flat as a result.

In summary, nothing precludes a Nevada court from enjoining the State from using an ill-gotten controlled substance to violate the law. A claim for injunctive relief exists, and dissolution of the Alvogen's TRO by this Court, without allowing Hikma to seek a motion for preliminary injunction, is not warranted.

4. Hikma Can Control Distribution to Prevent Harmful Use of Its Products; Its Replevin Claim Should Proceed

Hikma's property right to its fentanyl product and its rights to deal is based upon the long-standing doctrine that the United States Supreme Court recognized as the "right of [a] trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal, [a]nd, of course, [to] announce in advance the circumstances under which he refuse to sell." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919);

accord Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984). The issue of whether a manufacturer exercised its rights with whom to deal and announce in advance the circumstances under which it refuses to sell is an issue of fact not properly before or resolved by this Court. *See Round Hill Gen. Imp. Dist.*, 97 Nev. at 604, 637 P.2d at 536 (providing that, this Court is not the proper forum to resolve disputed questions of fact, and, in the context of writ proceedings, "[w]hen disputed factual issues are critical in demonstrating the propriety of a writ of mandamus, the writ should be sought in the district court, with appeal from an adverse judgment to this court").

Moreover, the State's arguments that are predicated on cases preceding the Uniform Commercial Code to argue that the law does not "permit servitudes or covenants on chattel, personal property, or goods that are enforceable against downstream purchasers," are misplaced. *See* Pet. 41-41. As articulated by Alvogen in its Answering Brief, and joined in by Hikma, the replevin claims alleged in the underlying action are governed by the Uniform Commercial Code,[16] which allows a holder

[16] The Nevada Legislature adopted Article 2 of the Uniform Commercial Code in 1965. *See* NRS tit. 8, Ch. 104, art. 2, Refs & Annos (West).

of voidable title to pass "good title" so long as to a "good faith purchaser for value." *See* Alvogen Answer 25-30.[17] Manufacturers such as Hikma have a cognizable claim for replevin under these circumstances.

IV. CONCLUSION

For the foregoing reasons, Hikma respectfully requests that the Petition be denied, and Hikma be permitted to continue to seek equitable relief and pursue its claims in the district court pursuant to Nevada law.

Article 2 applies to all transactions in goods, unless context otherwise requires. NRS 104.2102

[17] To the extent this Court is inclined to entertain the State's reframing of the issue and application of common law, the caselaw is not as one-sided as the State seeks to lead this Court to believe. Courts have recognized the right of a seller of personal property to control its downstream use. *See, e.g.*, *Tri-Cont'l Fin. Corp. v. Tropical Marine Enters., Inc.*, 265 F.2d 619, 626 (5th Cir. 1959) (rejecting "the dry as dust and technical common law distinction between chattels and realty" and enforcing on a subsequent purchaser of a ship a covenant not to operate it in certain ports); *Nadell & Co. v. Grasso*, 346 P.2d 505, 510 (Cal. Ct. App. 1959) (enforcing, on the third purchaser downstream, a requirement that the Kraft brand lids be replaced prior to sale to a retailer and recognizing that the restrictions were "a proprietary interest in the articles for the benefit of [Kraft's] business as a dominant tenement"); *id.* (enforcing an equitable servitude on Clariol hair care products aimed at controlling distribution channels).

DATED this 16th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 12,164 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 16th day of August, 2018.

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