IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.: 76485

District Court No.: A-18-77312-B

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,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

and

ALVOGEN, INC. and HIKMA PHARMACEUTICALS USA, INC.

Real Parties in Interest.

ALVOGEN, INC.'S ANSWER TO PETITION TO DISSOLVE STAY OF EXECUTION UNDER NRS 176.492 AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Real Party in Interest Alvogen, Inc. is a Delaware corporation with its principal place of business in Pine Brook, New Jersey.

DATED this 16th day of August, 2018.

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By: _____

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I. STATEMENT OF THE ISSUES

1. Whether this Court should preemptively intervene to review a temporary restraining order ("TRO") before a preliminary injunction hearing occurs, particularly where the State[1] procured the hearing's postponement in favor of discovery?

2. Whether the district court abused its discretion in granting Alvogen, Inc. ("Alvogen") a TRO to prohibit the irreparable harm from the unlawful use of Alvogen's wrongfully-obtained product, particularly where the State admitted knowledge of Alvogen's refusal to sell that product to the State for such a use?

II. INTRODUCTION

In its petition for extraordinary relief, the State and its agents endeavor to obscure the nature of this case. Contrary to the State's high rhetoric, this case is not about the death penalty's merits (on which Alvogen takes no position) or the people of Nevada's undeniable right to choose methods of criminal punishment. Rather, this case is, at bottom, a commercial dispute concerning a business' undeniable right to control the distribution of its products in order to prevent their misuse.

Alvogen seeks to prevent the State from using its product in a way that the product is not intended to be used, and which not only violates Alvogen's distribution

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[1] For ease of reference, Alvogen will refer collectively to petitioners the State of Nevada, the Nevada Department of Corrections, James Dzurenda, Ihsan Azzam, and John Doe as "the State" or "the State and its agents."

policies – policies the State admits it knew before purchasing – but is also likely to irreparably impair Alvogen's reputation and business relationships. The District Court, recognizing that Alvogen raised legitimate claims and was at risk of irreparable harm, properly granted a TRO to maintain the status quo. The State erroneously attempts to circumvent orderly legal process by claiming that the District Court's order is an improper "stay" of execution, and that "urgency" necessitates extraordinary mandamus relief. (Pet. at 18-29.) Neither is true.

The TRO cannot be recast as a "stay of execution" of Scott Raymond Dozier as the order does not prevent the State from carrying out his – or any other – capital sentence. It simply prevents the State from using *Alvogen's product*, one improperly acquired, for an unapproved and unauthorized use. (App. Vol. II, 455.)

Moreover, the State's sudden desire for a speedy resolution on a less-than-complete record flies in the face of its own demand for "substantial" discovery, which prompted the District Court to delay its preliminary injunction hearing in the first place. The State seeks to rationalize its new need for speed by asserting that one batch of Cisatracurium – an entirely different drug than the one that is the subject of the TRO here – will supposedly expire on November 30, 2018, and may be unavailable for use in executions. But the State has admitted that it has other batches of that very same drug that would permit it to carry out Dozier's execution well into 2019. In any event, the District Court has agreed to shorten

discovery deadlines and conduct the preliminary injunction hearing before the State's claimed November deadline. The State's claim of an emergency is simply manufactured.

There is no reason or need for this Court to disrupt the orderly course of proceedings below and grant extraordinary relief now – and every reason to allow this legally and factually complex matter to proceed in the District Court so that the record may continue to develop. The State's petition should be denied.

III. STATEMENT OF THE CASE

A. Alvogen Provides Notice Of Approved Usage For Its Product.

Alvogen is a leading pharmaceutical company that develops, manufactures, and sells life-saving and life-enhancing products. (App. Vol. I, 185:13-14.) Committed to patients' safety, Alvogen endorses the use of its products for indications approved by the U.S. Food and Drug Administration ("FDA"). (*Id.* at 185:15-17.) One of the products Alvogen distributes is an injectable solution of Midazolam Hydrochloride ("Midazolam") approved by the FDA for use in preoperative sedation and in inducing general anesthesia before administration of other anesthetic agents, among other uses. (*Id.* at 185:18-26.) It is also a Schedule IV controlled substance. NAC 453.540(3).

Midazolam is not approved by the FDA for use in executions. (App. Vol. I, 185:15-28, 189-227.) Nevertheless, it has been used by some state

correctional facilities as a component in capital punishment regimens. Past attempts by other states to use the medicine in lethal injections have been extremely controversial, and have led to widespread concern that prisoners have suffered cruel and unusual treatment. (*Id.* at 76:11-17, 187:17-26, 235, 238.) Indeed, earlier this month, Justice Sotomayor characterized a lethal injection cocktail containing Midazolam as "quite possibly torturous," and the media has characterized several attempted executions using Midazolam as "botched" executions. *Irick v. Tennessee*, No. 18A142, 2018 WL 3767151, at *3 (U.S. Aug. 9, 2018) (Sotomayor, J., dissenting); (App. Vol. I, 76:11-26 (noting media coverage of the use of midazolam in the botched executions of Clayton Lockett, Joseph R. Wood III, and Ronald Bert Smith); App. Vol. II, 349:4-6.)

Against that backdrop, Alvogen publicly announced that it does not authorize the use of Midazolam produced for and distributed by Alvogen ("Alvogen Midazolam") in executions and implemented controls to prevent its diversion for this use. (App. Vol. I, 186:1-10, 229.) On April 20, 2018, Alvogen sent letters to the governors, attorneys general, and department of corrections directors in every state that has a death penalty, including Nevada. (*Id.* at 240:12-21, 242-248.) In that letter, Alvogen stated "in the clearest possible terms that Alvogen strongly objects to the use of its products in capital punishment." (*See, e.g.*, *id.* at 243.) Alvogen specifically identified Alvogen Midazolam as a product that

should not be used in executions, and noted that use of Alvogen Midazolam in executions "clearly runs counter to the FDA-approved indication for these products." (*Id.*) The letter went on to explain:

> To ensure our products are not purchased for use in lethal injection executions, Alvogen does not accept orders from any state departments of corrections. Further, Alvogen has controls in place and directs its customers not to sell its medicines to correctional facilities or otherwise for use in connection with lethal injection executions. These controls reflect our company's policy of ensuring the appropriate use of our medicines.

(*Id.*) In addition, Alvogen specifically demanded that any state that obtained products for execution return them immediately for a full refund. (*Id.*) Alvogen further warned against attempts to obtain Alvogen Midalozam surreptitiously for executions. (*Id.*)

Alvogen sent this letter directly to the Nevada Department of Corrections' facility at Ely State Prison, where Nevada's newly-constructed death penalty chamber is located. (*Id.*) Alvogen sent additional letters to Defendant Dzurenda, the Governor of Nevada, and Nevada's Attorney General. (*Id.* at 240:12-21, 242-248.) Alvogen has reinforced its policy prohibiting such use by posting on its website the distribution controls that ensure that Alvogen Midazolam is not used in lethal injections. (*Id.* at 186:3-10, 229.)

When Alvogen Midazolam was first distributed in the United States, Alvogen had conversations with its distributor Cardinal Health ("Cardinal") regarding

Alvogen's position that its products not be sold to corrections facilities for use in lethal injection protocols. From those conversations, Alvogen understood that Cardinal would not distribute Alvogen Midazolam to corrections facilities for use in executions. (*Id.* at 186:11-16.) Alvogen confirmed that understanding when it conducted a quarterly review of sales data for the first quarter of 2018 and found that no Cardinal sales to correctional departments had occurred. (*Id.*) Alvogen and Cardinal also entered into a written amendment to their Generic Wholesale Service Agreement effective May 28, 2018 memorializing the agreement to prohibit sales to correctional facilities. (*Id.* at 186:17-26.)

B. Alvogen Learns Of The State's Prohibited Use.

Despite Alvogen's warnings, on July 7, 2018, the media alerted Alvogen to the fact that Nevada had just disclosed its intent to use Alvogen Midazolam as part of a three-drug cocktail in the Dozier execution on Wednesday, July 11, 2018. (App. Vol. I, 186:27-187:2, 240:22-241:3.) Alvogen subsequently learned from disclosures made in response to a suit brought by the Nevada branch of the American Civil Liberties Union ("ACLU") that Petitioners acquired Alvogen Midazolam for use in the Dozier execution from Cardinal after they had received Alvogen's letters advising them that Alvogen prohibited the product's purchase for lethal injection protocols. (*Id.* at 187:5-9; App. Vol. II, 252-53, 259, 351:23-352:1, 375:7-8.)

The State has since acknowledged this fact. (App. Vol. II, 351:20-352:3; *see also id.* at 252-53, 259.) Based on the State's actions, Alvogen contends that the State acquired Alvogen's product from a third-party intermediary through subterfuge, both by concealing the April 20, 2018 letter and implicitly representing that it intended to use the product for therapeutic purposes. (App. Vol. I, 80:1-21.) Alvogen has already received negative press coverage in association with the State's planned use of its product in the Dozier execution, and stands to suffer further reputational and business harm if the State is permitted to proceed with such prohibited uses. (*Id.* at 187:17-23, 234-38.)

Thus, on the morning of July 10, 2018, Alvogen filed its Complaint in the District Court, raising common-law claims for replevin, conversion, and false pretenses, as well as statutory claims under NRS 41.700 and NRS 453.331, 453.381 and accompanying regulations. (*See id.* at 82-97.) Later that day, Alvogen filed its *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction, and *Ex Parte* Motion for Order Shortening Time. (*Id.* at 154-341.) Alvogen sought the return of its illegally obtained property and preliminary injunctive relief. (*Id.* at 75:4-10, 97:12-16.)

C. The TRO Precludes Use Of Alvogen's Product, Not The Execution.

That same afternoon, the District Court held a telephonic hearing with parties for Alvogen and the State, during which it scheduled a hearing by agreement of the parties for 9:00 a.m. on July 11, 2018, on Alvogen's TRO motion.

At the July 11 hearing, the District Court made clear that it was not hearing or deciding issues related to a stay of Dozier's execution. (App. Vol. II, 414:17-19.) Rather, it emphasized that "the issue presented . . . is [Alvogen's] right to decide not to do business with someone, including the government." (App. Vol. II, 414:19-21.) Alvogen reiterated that it did not seek an order preventing the State from carrying out the Dozier execution by means other than use of Alvogen Midazolam. (App. Vol. II, 349:14-21.) Nonetheless, because the State obtained Alvogen Midazolam with full knowledge that Alvogen prohibited its purchase for such use, and because of the harm Alvogen was likely to suffer if such use was permitted by the State, Alvogen argued that it was entitled to a TRO. (App. Vol. II, 415:1-20; *see also id.* Vol. I, 242-246.)

After two hours of argument from both sides, the District Court issued the TRO. (App. Vol. II, 415:1-20, 429-431.) The District Court ruled that Alvogen demonstrated a reasonable likelihood of success on the merits of its claims that the State had illegally obtained Alvogen Midazolam through subterfuge, and that the State's wrongful conduct gave the State at best voidable title. (*Id.* at 414:23-415:3.)

Alvogen therefore had demonstrated its right to the return of its product under the doctrine of replevin, and had a cause of action under NRS 41.700 based on the State's violations of Alvogen's property rights and NRS Chapter 453. (*Id.* at 415:4-10.)

The District Court further ruled that Alvogen showed a reasonable probability it would suffer irreparable injury. (*Id.* at 415:11-17.) Because the potential harm to Alvogen outweighed any potential harm to the State, the District Court entered a TRO simply preventing the State from using Alvogen Midazolam in lethal injections, pending further proceedings. (*Id.* at 429-431.)

D. The State Demands Discovery Before Any Preliminary Injunction Hearing.

The parties agreed that discovery should precede any preliminary injunction hearing. Alvogen requested discovery regarding the State's acquisition of Alvogen Midazolam, and the State claimed that it needed "substantial" discovery on Alvogen's reputation. (App. Vol. II, 418:15-16.) In light of the State's request for broad discovery, the District Court agreed to permit 120 days of discovery. (*Id.* at 419:4-6.) Later that day, having decided not to proceed with Dozier's execution, (*id.* at 435:9-13), the State sought and obtained a stay of Dozier's execution from Judge Togliatti, the presiding judge in Dozier's criminal case. (*Id.* at 444-446).

On July 25, 2018, the State filed its present Petition to Dissolve Stay of Execution and Petition for Writ of Mandamus, along with what it terms a "protective" appeal. (Pet. at 28 n.13.) With this Petition, the State now reverses course, claiming that no discovery should be allowed and no injunctive hearing ever held. Respectfully, the State's efforts to evade further inquiry into how it improperly acquired Alvogen's Midazolam Product defies the law, logic, and the need for transparency on a matter of public concern.

IV. ARGUMENT

A. This Court Should Reject the State's Attempt to Circumvent the Limits on Appellate Review.

This Court "has jurisdiction to entertain an appeal only insofar as the appeal is authorized by statute or court rule." *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994). So herein lies the problem for the State: there is no statute or rule authorizing appeals of TROs. Knowing that, the State urges this Court to transform the District Court's garden-variety TRO issued in a business dispute, first into an appealable interlocutory order, and second, into a pseudo "stay" of execution reviewable under NRS 176.492. Yet, neither of the State's positions has merit.

1. The TRO is not an appealable interlocutory order.

It is well-settled that an interim order that does not fully resolve an issue and contemplates further action is not appealable. *See, e.g., In re Temp. Custody of Five*

Minor Children, 105 Nev. 441, 443, 777 P.2d 901, 902 (1989). Therefore, the TRO is not an appealable interlocutory order. *See* NRAP 3A (listing appealable orders and judgments); *Sicor, Inc. v. Sacks*, 127 Nev. 896, 900, 266 P.3d 618, 620 (2011) (citing *Sugarman Iron & Metal Co. v. Morse Bros. Mach. & Supply Co.*, 50 Nev. 191, 255 P. 1010 (1927)). This is so because a TRO is temporary in nature, does not finally resolve any issue, and contemplates further proceedings before a complete resolution of the issues. *See* NRAP 3A(b)(3); *see also Sicor, Inc.*, 127 Nev. at 900, 266 P.3d at 620. Where, as here, "no statutory authority to appeal is granted, no right to appeal exists." *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990).

There is no question that Alvogen requested "a TRO that preserves the status quo . . . until the Court [could] hold a preliminary injunction hearing" (App. Vol. II, 349:22-350:3), and that is all the District Court granted. The State knows this. In response to the State's request to convert the TRO into a preliminary injunction so that it could take an emergency appeal to this Court, the District Court explicitly stated it was "*not* going to treat [the TRO] as a preliminary injunction." (*Id.* at 417:9-12 (emphasis added) ("There are different burdens on a TRO and a preliminary injunction, and typically on a preliminary injunction I hear actual testimony and evidence.").) That should be the end of the matter. The State cannot enlarge, or recast, the limited relief granted by the District Court.

The State will have an opportunity to appeal should a preliminary injunction be entered against it, once the factual record has been further developed and the parties' more fulsome arguments heard in a preliminary injunction hearing. *See, e.g.*, NRAP 3A(b)(3); *Hosp. Int'l Grp. v. Gratitude Grp., LLC*, 387 P.3d 208, 2016 WL 7105065, at *1 (Nev. 2016) (finding that temporary restraining orders cannot "sustain interlocutory appellate review") (unpublished disposition) (citation omitted); *see also Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5-6, 106 P.3d 134, 136-37 (2005) (noting the value of a fully developed district court record for appellate review).

Nothing in *Hospitality International Group v. Gratitude Group, LLC* states the contrary, as suggested by Petitioners. 387 P.3d 208, 2016 WL 7105065, at *1 (Nev. 2016) (unpublished disposition). There, the court issued a TRO on December 18, 2015, and then issued another order labeled as a TRO on January 5, 2016. *Id.* Given that the district court had already issued a TRO, however, this Court determined that the January 5, 2016 order was in fact a preliminary injunction, and thus reviewable. *Id.* at *2. This case is completely different. Here, the District Court issued a single TRO, denied the State's request to convert it into a preliminary injunction, and then granted the State's request for substantial discovery in anticipation of scheduling the preliminary injunction

hearing. [2] (App. Vol. II, 419:6-10.) There is no basis to suggest that the District Court's TRO here amounts to a preliminary injunction.

2. Nor is the TRO an appealable stay of execution.

The State's corollary assertion (Pet. at 20) that the District Court's TRO – which simply preserves the status quo in a business dispute regarding the State's unlawful acquisition and proposed use of Alvogen's product – should be treated as a "stay of execution" is just another attempted end-run around the limits on premature appellate review.

To begin with, the State's argument contravenes the express terms of NRS 176.492 and NRS 176.415. NRS 176.415 lists the circumstances in which the "execution of a judgment of death" may be stayed. NRS 176.492 then provides that "[t]he respondent may file a petition with the appellate court of competent jurisdiction . . . within 10 days after the entry of a *stay of execution* by a district court to dissolve a stay which was improperly entered" (emphasis added). But Alvogen never requested any stay of the "execution of a judgment of death;" it sought to protect its legitimate business interests by preventing the State from using one of its products in a manner it proscribed. (App. Vol. I, 97:12-16.) Indeed, the nature of

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[2] In *Hospitality*, this Court took into account the fact that the second TRO exceeded the 15 days a TRO can last when determining that the TRO was in fact a preliminary injunction. 2016 WL 7105065, at *1. These facts are distinguishable because, here, the District Court postponed the preliminary injunction hearing to accommodate the State's request for additional time to conduct discovery.

the ultimate relief Alvogen seeks belies the State's claim. Thus, with regard to its replevin claim, Alvogen requests "return [of] all of the Midazolam Product to Alvogen" (*id.*), a relief which in no way, shape, or form can fairly be characterized as a "stay of execution."

The District Court's TRO also does not stay any execution. The TRO was not entered in Dozier's criminal case; it issued in an entirely different case by a different judge in Business Court. And the TRO in no way purports to suspend or overturn the death warrant and order of execution entered in Dozier's criminal case. (*See id.* at 1-5.) The TRO provides only that the State is "prohibited and enjoined from using *Alvogen's product* midazolam in capital punishment until further order of this Court." (App. Vol. II, 430:22-23 (emphasis added).) Under the terms of the TRO, the State is free to pursue Dozier's execution – or any other execution – through means that do not involve Alvogen's product.[3] In sum, the only way the TRO could be construed as a stay of execution is if the State would be in contempt of the order were it to carry out Dozier's execution by alternative means. It clearly would not,

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[3] The fact that the State may pursue the execution by such other means (such that the TRO is not a stay of execution) has been publicly noted. *See Laxalt wastes court's time, taxpayer money on political grandstanding*, LAS VEGAS SUN, August 9, 2018, https://lasvegassun.com/news/2018/jul/30/laxalt-wastes-courts-time-taxpayer-money-on-politi/ ("But instead of all the litigation, why not instead work to find the right method of execution for the right reasons?").

which wholly undermines the State's mischaracterization of the TRO as a stay of execution.[4]

The State's own actions and words emphasize its understanding of the true nature of these proceedings – *i.e.*, that they involve a business dispute, not a criminal appeal or post-conviction litigation. In its petition, the State acknowledges that Alvogen "moved the District Court to stop NDOC's *use* of Midazolam." (Pet. at 21 (emphasis in brief) (citing App. Vol. I, 180-181).) The State further acknowledges that the order enjoined them "from *using* Alvogen's product midazolam in capital punishment." (Pet. at 21 (emphasis in brief) (citing App. Vol. II, 430); *see also* Pet. at 18, 22, 24.)

In fact, it is the State who requested a stay of Dozier's execution. After the District Court issued a TRO against the use of Alvogen's product, the State sought from Judge Togliatti an order halting Dozier's execution. (*Compare* App. Vol. II, 426-31, *with id.* at 444-46.) As a result, Judge Togliatti entered a stay of execution under NRS 176.486, NRS 176.487, and NRS 176.488 until the parties – Dozier and the State – could agree on language for the order to vacate the execution order. (*See id.* at 438:11-15.) The State's actions reflect its understanding of what is actually a "stay of execution."

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[4] By way of contrast, the State would be in contempt of an actual stay of execution in such circumstances.

Cases involving post-conviction petitions brought by death row inmates, including Dozier, who challenged earlier lethal injection protocols, are inapposite. (*See* Pet. at 20, 25 (citing *Nev. Dep't of Corrections v. Eighth Judicial Dist. Ct.*, 417 P.3d 1117, 2018 WL 2272873, at *3 (Nev. May 10, 2018) (unpublished disposition) (citations omitted) (*an inmate* may not litigate a challenge to a lethal injection protocol in a *post-conviction petition* because it falls outside the relatively narrow statutory framework of NRS Chapter 34); *Workman v. Bredesen*, 486 F.3d 896, 904 (6th Cir. 2007) (rejecting § 1983 action brought by an inmate against Governor of Tennessee challenging constitutionality of Tennessee's lethal injection protocol and seeking temporary restraining order suspending his execution); *Boltz v. Jones*, 182 F. App'x 824, 825 (10th Cir. 2006) (rejecting stay of prisoner's execution and his § 1983 action challenging lethal injection in light of unlikelihood of success on merits of underlying action both as to use of § 1983 to raise constitutional challenge to lethal injection procedure and as to constitutional challenge itself).) Those cases simply do not apply to this business dispute.

Ultimately, the State resorts to arguing about the "real-world consequence[s]" of the situation created by *its* conduct so as to characterize what is plainly a TRO into a reviewable stay of execution. (Pet. at 21.) But the "real world consequence" of the District Court's TRO is that it simply preserves the status quo regarding Alvogen's products while Alvogen's claims can be fully considered. The State

remains free to execute Dozier – and anyone else – using another manufacturer's drugs, or another protocol. As Justice Hardesty recently observed, "the State has failed to demonstrate that it cannot conduct its responsibilities to carry out Dozier's execution through other medications." (Order Granting Temp. Stay at 4-5, Aug. 8, 2018, on file (Hardesty, J., dissenting).) The State's own lack of preparation cannot be used as a basis to transform a garden-variety TRO into a stay of execution.

Lastly, the State's distraction with the *McKesson* case – a case that did not resolve any of the issues presented here – misses the mark completely. First, the State claims that the Arkansas Supreme Court immediately vacated the lower court's first TRO (Pet. at 23), and "subsequently" determined that the lower court judge was biased (*id.* at 23 n.12). To the contrary, that court vacated the TRO *because* it found the lower court judge was biased, and did *not* pass on the merits. *See* (Order No. 17-155, *In Re Pulaski Cty. Cir. Ct.*, (Ark. Apr. 17, 2017) (per curiam), RP App. Vol. I, 22-26); *see also In re Kemp*, 894 F.3d 900, 904-05 (8th Cir. 2018) (explaining proceedings).[5] Second, the second lower court only "initially denied the TRO" (Pet. at 23), "insofar as Plaintiff [McKesson] requested ex parte relief" because the court found that a hearing was warranted (App. Vol. II, 452). It did not deny the TRO on the merits – indeed, it granted the injunction. (*Id.* at 455.) Third,

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[5] The State did not include this April 17, 2017 per curiam order explaining the court's decision in its appendix.

the Arkansas Supreme Court only issued a stay of the circuit court's injunction pending further briefing – it did not reverse the injunction, and its summary order did not address the merits. (*Id.* at 490.)

Still further, the Arkansas Supreme Court never reached the merits of that injunction because the case was voluntarily dismissed as moot as the drugs had expired. (*See* RP App. Vol I, 27-30.) Yet, the State claims that the court "sided with" the State of Arkansas and gave Arkansas the go-ahead to use the drugs at issue in executions. (*See* Pet. at 24.) To the contrary, during the Arkansas Supreme Court's interim stay of the circuit court's injunction, and while briefing was pending, the State of Arkansas executed inmates.[6] If *McKesson* truly supported the State, there would be no need for such overreaching.

The record below is straightforward and clear: The District Court's TRO is not a "stay" of Dozier's execution, and it cannot be recast as one so as to accomplish the State's new attempt to avoid discovery and an evidentiary hearing as to its conduct.

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[6] *See* Ed Pilkington & Jacob Rosenberg, *Fourth & Final Arkansas Inmate Kenneth Williams Executed*, THE GUARDIAN, Apr. 28, 2017, https://www.theguardian.com/us-news/2017/apr/27/arkansas-executions-kenneth-williams-fourth-final (noting that Arkansas carried out four executions within the week).

B. The State has Failed to Demonstrate that Extraordinary Relief is Warranted.

The same must be true for the State's attempts to accomplish the same ends through writ relief. A writ of mandamus is an extraordinary remedy, and the State bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Mandamus "is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Aspen Fin. Servs., v. Eighth Judicial Dist. Ct.*, 128 Nev. 635, 639, 289 P.3d 201, 204 (2012) (quoting *Int'l Game Tech. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)); *see also* NRS 34.160. However, mandamus relief is not available when the petitioner has a plain, speedy, and adequate remedy at law. *See* NRS 34.170; NRS 34.330; *Aspen Fin. Servs.*, 128 Nev. at 639, 289 P.3d at 204.[7]

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[7] The State suggests in passing that the Court could issue a writ of prohibition. (Pet. at 29 n.15.) A writ of prohibition is appropriate only to stop a district court from acting outside its jurisdiction and, like a writ of mandamus, is an extraordinary remedy that is only available where the petitioner has no adequate alternative legal remedy. NRS 34.320; *Aspen Fin. Servs.*, 124 Nev. at 639, 289 P.3d at 204. To that end, the State argues that the District Court lacked jurisdiction to enter a "stay" of Dozier's execution. (Pet. at 29 n.15.) But as explained above, (*supra* 13-18), the District Court did not enter a "stay" of Dozier's execution. Moreover, the same factors that militate against issuing a writ of mandamus, discussed *infra*, likewise militate against a writ of prohibition.

1. The District Court did not abuse its discretion in granting the TRO.

Although the State attempts to present several discrete legal questions for this Court's review, ultimately the only question raised by this case at this time is whether the trial court abused its discretion in granting a TRO based on the record before it. There is no basis for this Court to find any such abuse of discretion.

The decision to grant injunctive relief lies within the district court's sound discretion. *Boulder Oaks Cmty. Ass'n v. B&J Andrews Enters., LLC,* 125 Nev. 397, 403, 215 P.3d 27, 31 (2009); *Labor Comm'r of Nev. v. Littlefield*, 123 Nev. 35, 38-39, 153 P.3d 26, 28 (2007). The purpose of injunctive relief is to preserve the status quo, or to "preserve a business or property interest." *Guion v. Terra Mktg. of Nev., Inc.*, 90 Nev. 237, 240, 523 P.2d 847, 848 (1974) ("The right to carry on a lawful business without obstruction is a property right, and acts committed without just cause or excuse which interfere with the carrying of on plaintiff's business or destory [sic] its custom, its credit or its profits, do an irreparable injury and thus authorize the issuance of an injunction."). "In exercising its discretion, the district court must determine whether the moving party has shown a likelihood of success on the merits and that the nonmoving party's conduct, should it continue, would cause irreparable harm, for which there is no adequate legal remedy." *Labor Comm'r of Nev.*, 123 Nev. at 38-39, 153 P.3d at 28 (citing *State, Dep't of Conservation v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005)); NRS 33.010.

While the elements required to issue a TRO are the same as a preliminary injunction, a TRO is intended to be a short-term measure until the court is able to issue a more lasting remedy, such as a preliminary injunction. For preliminary injunctions, which are generally intended to preserve the status quo pending a final decision, judges typically hear evidence and witnesses. *See Hosp. Int'l Grp.*, 2016 WL 7105065, at *2 ("The moving party bears the burden of providing testimony, exhibits, or documentary evidence to support its request for an injunction.") (citing *Coronet Homes, Inc. v. Mylan*, 84 Nev. 435, 437, 442 P.2d 901, 902 (1968)); (*see also* App. Vol. II, 419:21-24 (District Court explaining that it typically hears evidence and witnesses at a preliminary injunction hearing).) Here, after finding that Alvogen has shown a reasonable likelihood of success on the merits, that Alvogen would suffer irreparable harm without the TRO, and considering the relative interests of the parties, the District Court granted the TRO until a preliminary injunction hearing could take place. (App. Vol. II, 419:6-10.) This decision was "within the district court's sound discretion." *Labor Comm'r of Nev.*, 123 Nev. at 38, 153 P.3d at 28.

a. The District Court properly found that Alvogen will suffer irreparable harm absent injunctive relief.

The District Court plainly did not abuse its discretion in finding that Alvogen established a reasonable probability that it will suffer irreparable harm absent a TRO. Specifically, Alvogen – "a pharmaceutical company whose entire mission and

business purpose is to create and market and sell products that are designed to enhance and prolong peoples' lives" (App. Vol. II, 363:3-12) – is likely to suffer reputational and goodwill harm if its product is used in an execution. (*Id.* at 415:5-17; *see also* App. Vol. I, 185:13-26, 187:24-28.) These severe business harms would result in loss of customers and investors, as well as end-user goodwill built up over the years. (App. Vol. I, 187:24-188:4.) Such a misuse of Alvogen Midazolam risks creating the erroneous misperception in the minds of the public, customers, employees, and prospective investors that Alvogen is acting hypocritically in light of its public stance that its therapeutic products are designed to enhance human health – particularly in light of the fact that Midazolam, which has been linked to botched executions, is not FDA-approved for use in executions. (*Id.* at 185:15-26, 187:16-28.)

In contrast to Alvogen's threat of irreparable harm, which the State does not dispute, the risk of harm to the State is slight. While the U.S. Supreme Court has noted that "[t]he state[] [has a] legitimate interest in carrying out a sentence of death in a timely manner," *Baze v. Rees*, 553 U.S. 35, 61, 128 S.Ct. 1520, 1537 (2008), nothing in the TRO prevents the State from carrying out its statutory duty. First, the State is not prevented from pursuing alternative drug protocols to carry out executions. (Order Granting Temp. Stay at 4-5, Aug. 8, 2018, on file (Hardesty, J., dissenting) ("the State has failed to demonstrate that it cannot conduct its

responsibilities to carry out Dozier's execution through other medications")]; (*see supra* 16-17.) Second, while the State vaguely refers to the possibility that its drugs will expire at some point, it did not assert *which* of the drugs will expire, and *when*. (Pet. at 27.) Subsequently, in its Emergency Motion to Stay District Court Proceedings, the State represented that a batch of Cisatracurium – an entirely different drug than the one at issue here – is ostensibly set to expire on November 30, 2018, and may not be available for use in the Dozier execution. But the State has admitted that it has other batches of that very same drug that would permit it to carry out Dozier's execution well into 2019. (RP App. Vol. III, 375-78; Pet'r Reply in Support of Em. Mot. under NRAP 27(e) to Stay, at 1, Aug. 13, 2018, on file.) Thus, there is ample time to hold a preliminary injunction hearing along with an orderly appeal well before that time, which obviates the State's claimed prejudice.

Nor do the interests of Dozier's victims or the fact that the State has expended resources in this litigation tip the balance of hardship in the State's favor. The State created those purported hardships by shrouding its execution protocol in secrecy. The State admitted that it received Alvogen's April 20, 2018 notice, and that it flatly refused to disclose the execution protocol until ordered to do so by Judge Wilson on July 6, 2018, just days before the Dozier execution. (App. Vol. II, 351:20-352:1.) The State cannot deny that it concealed this information in order to prevent drug manufacturers, like Alvogen, from exercising their rights. (*See id.* at 350:15-352:1.)

Any urgency of this business dispute is therefore purely of the State's own making. Fundamentally, the District Court's TRO allows the State to comply with Nevada law as well as Alvogen's express policies and controlled distribution agreements, which the State has no right to breach.[8]

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[8] *Fresenius Kabi USA v. Nebraska*, which the State cites in its supplements and in its reply in support of the motion to stay the district court proceedings (*See* Pet'rs' Notice of Suppl. Auths., Aug. 13, 2018, on file; Pet'rs' Reply in Support of Emergency Mot. under NRAP 27(e) to Stay at 1 n.1, Aug. 13, 2018, on file; Pet'rs' Second Notice of Suppl. Auths., Aug. 15, 2018, on file), presents materially different circumstances. There, the district court denied a temporary restraining order where the plaintiff failed to show that its drug was going to be used by the State of Nebraska in an execution. *Fresenius Kabi USA, LLC v. Nebraska*, No. 4:18-cv-3109, 2018 WL 3826681, at *3, 6 (D. Neb. Aug. 10, 2018), *aff'd* –F. App'x–, 2018 WL 3831007, at *2 (8th Cir. Aug. 13, 2018). Furthermore, Nebraska's lethal injection protocol was known for nearly a year prior to the execution, but the drug company did not seek information about the identity of the source of the drugs until two weeks before the scheduled execution. *Id.* at *1-2. The court therefore found that the public interest outweighed the speculative risk of harm to the drug company. *Id.* at *3-5; *see also* 2018 WL 3831007, at *2 (noting that "the district court reasonably concluded that . . . the injury [ ] alleged was too speculative to support a preliminary injunction"). In contrast, here it is undisputed that Alvogen is the source of the midazolam the State intends to use, and the risk of harm Alvogen faces is therefore concrete. (App. Vol. I, 186:27-188:4.) The State has not challenged Alvogen's showing of harm here – and it should not be permitted to do so underhandedly outside its opening brief. It is also undisputed here that the State purchased the drugs with the express knowledge of Alvogen's prohibition on such use. And Nevada, unlike Nebraska, concealed its execution protocol until just days before Dozier's scheduled execution, and Alvogen took immediate action upon learning that its drugs were to be used for this improper purpose.

b. The District Court properly found that Alvogen demonstrated a reasonable likelihood of success on the merits.

The District Court also properly exercised its discretion in finding that Alvogen has a reasonable likelihood of success on the merits of its claims. *Boulder Oaks*, 125 Nev. at 403, 215 P.3d at 31. Any factual findings underlying the District Court's determination are entitled to deference on review. *Id.* Moreover, because discovery is not yet complete and the record is still being developed, the factual disputes at the heart of Alvogen's claims are more appropriately resolved at the trial court level.

1. The State's use of the drug would violate Alvogen's property rights because they are not bona fide purchasers.

Alvogen demonstrated a reasonable likelihood of establishing that the State violated Alvogen's property rights when it unlawfully obtained Alvogen's product through subterfuge. Alvogen has property interests in its product and, like any business, has discretion to choose "with whom [it] will deal; and, of course, [to] announce the circumstances under which [it] will refuse to sell." *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468 (1919). Alvogen exercised that right by refusing to sell directly to state corrections facilities and by imposing restrictions on the product's use in lethal injections. (App. Vol. I, 147, 186-87, 243-46.)

Moreover, Alvogen specifically and unequivocally informed the State of these restrictions in an April 20, 2018 letter that the State acknowledges receiving almost a month ***before*** its acquisition of the Alvogen product. (*Id.* at 243-46; App. Vol. II, 351:20-352:3.) The State violated Alvogen's rights when it obtained Alvogen's product from an unsuspecting intermediary and in violation of Alvogen's policies, and thus, as the District Court found, was not a bona fide purchaser of Alvogen's products. (App. Vol. II, 252-53, 415:1-3.) As a result, Alvogen has property claims on the Alvogen Midazolam at issue.

i. Alvogen has a cause of action for replevin.

The District Court found that Alvogen has a reasonable likelihood of establishing a claim for replevin, which allows for Alvogen's recovery of its property. (App. Vol. II, 415:9-10.) A claim for replevin has four elements: (1) ownership of the property at issue; (2) a right to immediate possession; (3) defendant's wrongful taking of the property; and (4) a demand for its return. *Johnson v. Johnson*, 55 Nev. 109, 112, 27 P.2d 532, 533 (1933).

At the outset, while the State suggests that its writ challenges "the existence . . . of Alvogen's asserted private causes of action" (Pet. at 6), it raises no such challenge with regard to replevin. (*See id.* at 40-49.) That is for good reason – courts have long recognized the existence of such common law claims against the State. *See Andolino v. State*, 97 Nev. 53, 55, 624 P.2d 7, 9 (1981) (recognizing a claim for

negligence against the state and its political subdivision); *Clark Cty. v. Powers*, 96 Nev. 497, 501, 611 P.2d 1072, 1074 (1980) (recognizing claims for common law torts of nuisance and trespass against a political subdivision of the state).

Instead, the State's arguments center on outdated case law from the early 1900's concerning "covenants" and "mere chattel." (*See* Pet. at 41 (citing *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907)).) But those cases predate the Uniform Commercial Code (UCC), which abrogated such common law rules for purposes relevant here. Alvogen's replevin claim involves a purported sale of goods (here, Alvogen Midazolam). That transaction is governed by the UCC, not ancient common law precepts involving "alienation," as the State erroneously suggests. (*See id.*)

Alvogen's reasonable claim of title to Alvogen Midazolam is clear under the UCC, which recognizes the concept of voidable title, which is title that exists in the "middle of the spectrum that runs from best faith buyer at one end to robber at the other." *Deerfield Mfg., Inc. v. JEM Inv. Props.*, No. 04-cv-73934, 2005 WL 2562956 at *7 (E.D. Mich. Oct. 11, 2005) (quoting 1 James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 3-12 (4th ed. 1995)); *see also* NRS 104.2403(1) (codifying the good faith purchaser rule). A transferee can have voidable title in a variety of ways, but generally it occurs through behavior that is neither fair dealing nor outright theft. For instance, the violation of a contract

restricting an item's resale can render title voidable, such that the original owner can reclaim it. *Tempur-Pedic Int'l v. Waste To Charity, Inc.*, 483 F. Supp. 2d 766, 774-75 (W.D. Ark. 2007) (citing 1 James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 3-12 (4th ed. 1995)); *see also Tempur-Pedic Int'l, Inc. v. Waste To Charity, Inc.*, No. 07-2015, 2008 WL 343417, at *1, 3-4 (W.D. Ark. Feb. 6, 2008).[9] However, to prevent limitations on the free flow of goods, the UCC allows a holder of voidable title to pass "good title" so long as to a "good faith purchaser for value." NRS 104.2403(1).

Here, the District Court recognized that the State does not qualify as a good faith purchaser for value. (App. Vol. II, 415:1-3 ("Given the April letter, Plaintiff has a reasonable probability of success in establishing the State was not a BFP.").) That conclusion has ample support in the record. Again, Alvogen sent the State a letter almost a month before the purchases, alerting it that Alvogen would not sell its products to the State for use in executions and that Alvogen's distributors were not authorized to sell its products to the State for said purpose. (App. Vol. I, 240:12-21.) That notice alone amply supports the District Court's

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[9] Petitioners' attempts to distinguish *Tempur-Pedic* as involving a thief taking void title are inapposite. Alvogen's brief in the underlying litigation mistakenly included the citation to an earlier decision in the same litigation. As these later decisions show, the transferee in *Tempur-Pedic* took voidable title as the result of violating resale restrictions in a contract.

finding that the State was not a good faith purchaser.[10] *Cooper v. Pacific Auto. Ins. Co.*, 95 Nev. 798, 801-02, 603 P.2d 281, 283 (1979) (because of the unusual circumstances of a sale, "appellant should have been on notice of an outstanding claim and was thus not buying in good faith"); *Tempur-Pedic Int'l*, 483 F. Supp. 2d at 775 (a company that purchased products from an intermediary under circumstances suggesting that the intermediary lacked authority to sell them was not a "good faith purchaser" capable of receiving good title).

Here, the State was even more clearly on notice of the restrictions than the buyers in *Cooper* and *Tempur-Pedic*. Whereas the buyers in *Cooper* and *Tempur-Pedic* were on mere ***inquiry*** notice of the voidable title based on the sale's circumstances, Alvogen directly informed the State by letter that it was not authorized to acquire Alvogen Midazolam, whether directly or indirectly. (App Vol. I, 240:12-21.) Thus, the State took only voidable title to Alvogen Midazolam, and Alvogen established a reasonable probability that it is entitled to

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[10] The State briefly disputes whether it qualifies as a good faith purchaser and whether Alvogen had controls in place with its distributor. However, the District Court's factual finding is entitled to deference on review, and the State's passing mention that they dispute that finding is insufficient to vacate the TRO and precisely why discovery should proceed. *See Boulder Oaks*, 125 Nev. at 403, 215 P.3d at 31.

recover the product by way of replevin. *See Cooper*, 95 Nev. at 801-02, 603 P.2d at 283; *Tempur-Pedic*, 2008 WL 343417 at *1, 3-4.

Tellingly, the State cannot muster a UCC case to support its argument, instead reaching back to pre-UCC case law from 1901 and commentators from the 1600's to raise baseless concerns about these restrictions inhibiting "Trade and Traffique," that is, the free flow of goods. (Pet. at 42 (quoting 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628)). But it is well-established that where the common law and the UCC conflict, the UCC abrogates common law doctrines. *See, e.g.*, *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. Adv. Op. 78, 335 P.3d 190, 194 (2014) (noting that Article 8 of the UCC, as adopted in Nevada, partially abrogates the common law as to transfer agents); *Jonibach Mgmt. Tr. v. Wartburg Enters., Inc.*, 136 F. Supp. 3d 792, 809 n.17 (S.D. Tex. 2015) ("The UCC supersedes the common law."). And, in any event, the UCC ensures the free flow of goods by way of the good faith purchaser rule. *See West v. Roberts*, 143 P.3d 1037, 1046 (Colo. 2006). Purchasers who act in good faith are protected, even when they purchase from a thief. Only bad actors, like the State, have to worry about the rightful owner reclaiming its property – as Alvogen is entitled to do.

Accordingly, the District Court did not abuse its discretion in finding that Alvogen was reasonably likely to succeed on its claim for replevin. That finding, coupled with the finding of irreparable harm, amply supports the TRO.

2. Alvogen has stated a claim under NRS 41.700.

Under Nevada law, a person who "[k]nowingly and unlawfully services, sells, or otherwise furnishes a controlled substance to another person" is "liable in a civil action for any damages caused as a result of the person using the controlled substance." NRS 41.700(1)(a). In addition, a person who "[k]nowingly allows another person to use a controlled substance in an unlawful manner on premises or in a conveyance belonging to the person allowing the use or over which the person has control" is "liable in a civil action for any damages caused as a result of the person using the controlled substance." NRS 41.700(1)(b).

As the District Court found, Alvogen has shown a reasonable likelihood of establishing a claim under subsections (a) and (b) of NRS 41.700. (App. Vol. II, 415:9-10.) The State's conduct violates NRS 41.700(a) because the State has already announced its decision to furnish Alvogen Midazolam, a controlled substance, to John Doe and/or non-physician administrators for purposes carrying out the execution. (*Id.* at 259, 282.) The State's conduct also violates NRS 41.700(b) because Defendants intend to allow another person—John Doe and/or non-physician administrators—to use a controlled substance (Alvogen Midazolam) on their premises. (*Id.* at 259, 281-289.)

The State's unlawful predicate acts for purposes of establishing a NRS 41.700 claim include the State's violation of Alvogen's property rights, including Alvogen's

right to control to whom it sells its products, addressed above. That conduct alone establishes that the Petitioners' conduct is "unlawful" under the ambit of NRS 41.700. Additional predicate acts are discussed below.

i. The State intends to use Alvogen's product unlawfully by violating Alvogen's property rights as well as NRS Chapter 453.

In addition to violating Alvogen's property rights, discussed *supra*, the State's acquisition and intended misuse of Alvogen Midazolam violates multiple provisions of NRS Chapter 453 and accompanying regulations. First, various provisions prohibit persons, NRS 453.331(d), NRS 453.391(1), or physicians specifically, NRS 630.230(d), from unlawfully obtaining a controlled substance by misrepresentation or subterfuge.[11] Individual Petitioners Dzurenda, Director of the Nevada Department of Corrections and Azzam, a licensed physician, who acquired and/or directed the acquisition of Alvogen Midazolam (App. Vol. I, 85-86), each qualify as a "person" for purposes of the foregoing. NRS 0.039. Furthermore,

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[11] *See* NRS 453.331(1)(d) (making it unlawful for "a person to knowingly and intentionally . . . [a]cquire or obtain or attempt to acquire or obtain possession of a controlled substance . . . by misrepresentation, fraud, forgery, deception, subterfuge or alteration"); NAC 630.230(d) (prohibiting a physician from "[a]cquir[ing] any controlled substances from any pharmacy or other source by misrepresentation, fraud, deception or subterfuge"); NRS 453.391(1) ("[A] person shall not . . . [u]nlawfully take, obtain or attempt to take or obtain a controlled substance or a prescription for a controlled substance from a manufacture, wholesaler, pharmacist, physician, . . . or any other person authorized to administer, dispense or possess controlled substances.").

Midazolam is a Schedule IV controlled substance. NAC 453.540(3). These individuals – agents of the State – had actual and/or constructive notice by way of the April 20, 2018 letters that Alvogen prohibited the use of its product in executions and refused to supply its product for that purpose. (App. Vol. I, 243-246; *see also id.* at 229.)

Yet the State wrongfully acquired Alvogen Midazolam just weeks after receiving those letters. Based on Alvogen's reasonable belief, the State did so by: (1) identifying the shipment location as the Central Pharmacy for the NDOC in Las Vegas, rather than the site of the proposed execution, to create the impression that the order was placed at the request of or for the benefit of the physician and would be used for a legitimate medical purpose, (*see* App. Vol. II, 252-253); and (2) without disclosing to the unsuspecting distributor the contents of the letters and/or the fact that they sought to obtain Alvogen Midazolam for non-therapeutic purposes (*i.e.*, an execution), (App. Vol. I, 83-85). These efforts qualify as subterfuge, in violation of Nevada law. *See* NRS 453.331(1)(d); NRS 453.391(1); NAC 630.230(d).

Second, under Nevada law, "a physician . . . may prescribe or administer controlled substances only for a legitimate medical purpose and in the usual course of his or her professional practice." NRS 453.381(1). Under the NDOC's Execution Manual, "an attending physician or other properly trained and qualified medical

professional" will be present at the execution. (App. Vol. I, 173, App. Vol. II, 310.) And the Manual, as well as other legal and ethical duties, charge the attending physician with various and ultimate responsibilities for the inmate's care. (App. Vol. I, 173, App. Vol. II, 261-239.) Execution by lethal injection is not a "legitimate medical purpose" given the uses for which Midazolam is FDA-approved. (App. Vol. I, 173.) Accordingly, in implementing the State's proposed execution protocol, Petitioner John Doe, the Attending Physician for the planned Dozier execution, would violate Nevada law by directing the administration of Alvogen Midazolam, a controlled substance, for a purpose that is outside of the therapeutic purposes set forth in the Alvogen labeling and for a use (ending a life) that does not qualify as a legitimate medical purpose.

ii. The State's arguments as to why Alvogen may not invoke NRS 41.700 are invalid.

The District Court properly found that Alvogen has a reasonable likelihood of establishing an NRS 41.700 claim in light of the State's violations of Alvogen's property rights as well as NRS 453. (*See* App. Vol. II, 415:9-10.) The State raises three reasons why it can evade Alvogen's rights under NRS 41.700, all of which fail.

(a) No private cause of action is needed under the predicate statutes.

Because NRS 41.700 refers to, but does not define, the "unlawful" use of a controlled substance, reference must be made to common law and other statutes to

determine what constitutes an unlawful use. One statute that proscribes the State's unlawful conduct is NRS Chapter 453. Yet the State claims that "[s]ince NRS Chapter 453 provisions contain no private cause of action, they cannot serve as the predicate offense for a violation of NRS 41.700." (Pet. at 39.) That is wrong, and this Court has already rejected such reasoning in a similar context.

In *Neville v. Eighth Judicial District Court*, an employee sued his employer alleging violations of various provisions in NRS Chapter 608, "Compensation, Wages and Hours." 133 Nev. Adv. Op. 95, 406 P.3d 499, 501 (2017). Those provisions prescribe duties of employers with regard to wages, but each is "silent as to whether a private right of action exists to enforce their terms." *Id.* at 502. The district court dismissed the plaintiff's claims, finding no private right of action exists for each of those provisions. *Id.* Nonetheless, this Court held that because each of the plaintiff's Chapter 608 claims "referred to NRS 608.140," which provides "a private cause of action for unpaid wages" because it authorized an award for costs and fees, the plaintiff could accordingly bring his Chapter 608 claims under NRS 608.140. *See id.* at 503-04 ("Neville's NRS Chapter 608 claims involve allegations that wages were unpaid . . . Neville tied his NRS Chapter 608 claims with

NRS 608.140. Thus, we conclude that Neville has and properly stated a private cause of action for unpaid wages.").[12]

Because Nevada law is irreconcilable with the State's position, the State resorts to inapposite cases elsewhere. (Pet. at 39-40.) Two of the cases address 42 U.S.C. § 1983. *Almond Hill Sch. v. U.S. Dep't of Agric.*, 768 F.2d 1030 (9th Cir. 1985); *Dugar v. Coughlin*, 613 F. Supp. 849, 852 (S.D.N.Y. 1985). Whether a Section 1983 suit is available to seek relief for a violation of a federal law does not turn on whether that federal law itself provides a private right of action – the inquiry is far more nuanced. *See, e.g., Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 977-83 (9th Cir. 2010) (explaining and applying the Supreme Court's more recent law regarding the inquiry into whether a statute creates a right enforceable

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[12] An analogue in federal law is the federal civil RICO statute, which creates a private cause of action based on various predicate acts of "racketeering," defined to include a variety of criminal law violations. *See* 18 U.S.C. §§ 1961(1), 1962, 1964. Civil RICO plaintiffs are not required to have private causes of action under the predicate criminal statutes in order to bring a claim based on violations of those statutes. *See e.g., Flynn v. Nat'l Asset Mgmt. Agency*, 42 F. Supp. 3d 527, 536 n.43 (S.D.N.Y. 2014) (noting that there is no private right of action for violation of the mail and wire fraud statutes, "except to the extent that RICO . . . makes mail and wire fraud predicate acts and thus may afford a remedy in some instances"); *Galaxy Distrib. of W. Va., Inc. v. Standard Distrib., Inc.*, No. 15-cv-4273, 2015 WL 4366158 at *3 (S.D. W. Va. Jul. 16, 2015) ("Although §§ 1028(a)(7) and 1343 do not provide private rights of action on their own, violation of these statutes can serve as predicate acts for a claim under RICO § 1964(c), which provides a civil cause of action for victims of criminal racketeering activity.").

under section 1983). The State also cites to *Smith v. Oppenheimer Funds Distributors, Inc.*, 824 F. Supp. 2d 511 (S.D.N.Y. 1985), which turns on the complexities of the Investment Company Act, as well as "further principles limiting implied private rights of action in federal securities laws." The case is so statute- and context-specific, that it has no relevance here. *Id.* at 518 (declining to permit one subsection to serve as a private right of action to enforce other subsections due to the "careful allocation of remedies" as "various provisions of the statute accord highly disparate remedies and causes of action"). Finally, the State cites to *Gassman v. Clerk of the Circuit Court of Cook County*, 71 N.E.3d 783, 790 (Ill. App. 2017). While the State plucks a line using the term "predicate," that case, and the case upon which it relies for the line quoted by the State, stand for the unremarkable proposition that a person may have an action sounding in tort for a violation of a statute if the court can imply one under various factors. *See Noyola v. Bd. of Ed. of Chicago*, 688 N.E.2d 81, 86 (Ill. 1997). It is simply another way of stating the implied private right of action doctrine.

And what the State's position lacks in law, it equally lacks in logic. Requiring a private right of action under the predicate statutes would render NRS 41.700 superfluous. If a private right existed for each violation of Nevada's controlled substances statutes under the terms of those statutes themselves, then there would be no need for NRS 41.700 – its provisions would be wholly redundant. *See*

G.C. Wallace, Inc. v. Eighth Judicial Dist. Ct., 127 Nev. 701, 710, 262 P.3d 1135, 1141 (2011) (It is a "well-established canon of statutory construction" that statutory provisions should not be construed so that they are superfluous.).

The alternative would be a statute that accomplishes nothing: If other provisions of the code do not establish what activities qualify as "unlawful" for purposes of NRS 41.700, then the statute's silence as to what conduct is "unlawful" would mean that the statute, which on its face imposes "liab[ility] in a civil action," does no such thing. This Court should not construe the statute to have such an absurd result. *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 452 n.21, 25 P.3d 175, 180 n.21 (2001) ("Statutory interpretation should avoid absurd or unreasonable results.").

(b) Alvogen falls within the zone of interests protected under NRS 41.700.

Likewise, the State's argument that Alvogen does not fall within NRS 41.700's zone of interest lacks merit.

To determine whether a plaintiff is within the "zone of interest," and thus within the class of persons who may bring a claim, the Court applies "traditional principles of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 (2014). "The starting point for determining legislative intent is the statute's plain meaning; when a statute 'is clear on its face, a court cannot go beyond the statute in determining legislative intent.'" *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (citation omitted). As NRS 41.700

contains a provision for attorney fees, it clearly creates an individual right of action. *See Neville*, 133 Nev. Adv. Op. 95, 406 P.3d at 504. Moreover, the statute itself does not contain any limitations about which persons are entitled to bring an action. Rather, it is affords relief to any "person who prevails in an action brought pursuant to subsection 1," which imposes liability for "any damages caused as a result of" conduct enumerated in subsections (a) and (b). The State does not dispute that Alvogen qualifies as a "person" for purposes of the statute. Given the foregoing, Alvogen plainly falls within the zone of interest established by the plain meaning of NRS 41.700.

Despite the statute's clear language, the State nevertheless claims that the statute is ambiguous as to who may bring a claim, suggesting that the statute only provides a cause of action against those who provide alcohol to minors. (Pet. at 33.) "A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." *Robert E. v. Justice Ct.*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983) (quoting *Madison Metro. Sewerage Dist. v. Dep't of Nat. Res.*, 216 N.W.2d 533, 535 (Wis. 1974)). When the language is ambiguous, only then do courts look to legislative history. *See Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) (en banc) ("When the language of a statute is plain and subject to only one interpretation, we will give effect to that meaning and will not consider sources

beyond that statute."). Furthermore, the party seeking extraordinary relief, here the State, carries the burden of showing how the statute is ambiguous. *See Pan v. Eighth Judicial Dist. Ct*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (per curiam).

The State has failed to identify, either in the District Court or in its Petition, which portion of the ***statute*** is supposedly ambiguous. Instead, the State argues that NRS 41.700 is ambiguous because of its read of the ***legislative history***. (Pet. at 32.) But that is hardly the appropriate inquiry. Again, the inquiry centers on the plain meaning of the statute – a meaning that is eminently clear. The statute unambiguously imposes liability "in a civil action for any damages caused as a result of the person using the controlled substance." NRS 41.700(1). The statute does not even mention, nor is it even limited to, the provision of alcohol to minors. While legislative history may be consulted to help a court understand an ambiguous statute, it cannot be used to manufacture ambiguity in an otherwise clear statute. And to the extent that the State invites this Court to declare that "controlled substance" should be limited to alcohol, that would work a drastic and unauthorized judicial revision to the legislation.

Besides, the State also misconstrues the legislative history. Senate Bill 7 contained two sections, and the State draws this Court's attention to only the ***second*** section, which modified then-existing NRS 41.1305 to provide that one purpose of NRS 41.700 is to allow individuals to bring causes of action against those who

provide alcohol to minors. *See* S.B. 7, 2007 Leg. 74th Sess. (Nev. 2007);[13] *see also* 2007 Nev. Stat. 589.[14] The ***first*** section, which the States notably omits, provides that NRS 41.700:

> makes a person liable in a civil action for damages caused as a result of the use of a controlled substance by another person if the person unlawfully served, sold, or furnished the controlled substance or allowed the other person to use a controlled substance in an unlawful manner on premises or in a conveyance belonging to the person allowing the use or over which he has control.

See S.B. 7, 2007 Leg. 74th Sess. (Nev. 2007); *see also* 2007 Nev. Stat. 588. Thus, although the plain language of NRS 41.700 alone clearly describes who may seek relief under the statute – and this Court need look no further – the legislative history in fact supports Alvogen's standing to bring a claim under NRS 41.700. The District Court did not misinterpret NRS 41.700, and the State is not entitled to extraordinary writ relief on this basis.

(c) Petitioners are natural persons under the statute.

The State argues that "its departments, officials, and contractors are not 'persons' who can be liable under NRS 41.700," citing NRS 0.039. (Pet. at 31.) This too is wrong.

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13 *Available at* https://www.leg.state.nv.us/Session/74th2007/Bills/SB/SB7.pdf (bill as introduced).

14 *Available at* https://www.leg.state.nv.us/Statutes/74th/Stats200705.html#Stats200705page588.

First, the definition of "person" in NRS 0.039 refers to "a government, government agency, or political subdivision of a government." It makes no references to state "officials and contractors," as the State suggests.

Second, the State's argument that the general definition of "person" excludes governmental entities (Pet. at 31 (citing NRS 0.039)), likewise fails. Nevada law makes clear that the State of Nevada and its political subdivisions are subject to tort liability "in accordance with the same rules of law as are applied to civil actions against ***natural persons and corporations.***" NRS 41.031(1) (emphasis added). This waiver of its sovereign status comes with a limited set of exceptions not applicable in this case. *Id.* Therefore, Petitioners may be sued as "person[s] who [k]nowingly and unlawfully serve[], sell[] or otherwise furnish[] a controlled substance to another person." NRS 41.700(1).

The State is attempting to use a general definition to overcome the specific statutory language stating that Nevada is subject to having its liability determined as would any natural person or corporation. This is inappropriate because "it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally." *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. Adv. Op. 56, 399 P.3d 352, 355 (2017) (en banc) (citation omitted). Indeed, NRS 0.039 itself makes clear that it does not

apply if the definition is "otherwise expressly provided in a particular statute ***or required by context***" (emphasis added).

This is such a scenario. Here, not only does the waiver of sovereign immunity apply specifically to issues of liability, but it is in the same chapter of the code as NRS 41.700. NRS 41.031(1); *see also*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 n.11, 130 S.Ct. 1605, 1617 n.11 (2010) (explaining that it is appropriate to rely on a statute's structure in interpreting it). Thus, the fact that the general Nevada Revised Statute definition of person excludes government entities is not sufficient to overcome the Legislature's specific statement in the context of tort liability that Nevada should be treated "in accordance with the same rules of law as are applied to civil actions against natural persons and corporations." NRS 41.031(1).

The State's argument also fails because applying the general definition of person here, without regard to context, would lead to an absurd result. Chapter 41 of the NRS lists numerous "Actions and Proceedings in Particular Cases ***Concerning Persons***." NRS Ch. 41 (emphasis added). In that Chapter, Section 41.031 makes the State amenable to suit for various torts as any other person would be, subject to a limited set of specific exceptions. The State's reading of the definition of person would swallow not only those exceptions, but the entire rule.

Thus, Chapter 41 contains a litany of provisions creating and limiting civil liability for certain persons. *See, e.g.*, NRS 41.130 (Liability for Personal Injury) and NRS 41.580 (Liability of Receiver of Stolen Property). These statutes repeatedly use the word "person" to describe the putative defendant. *See, e.g.*, NRS 41.130 ("whenever any person shall suffer personal injury by wrongful act, neglect or default of another, ***the person causing the injury is liable*** to the person injured for damages") (emphasis added). Notably, at least one court has already granted a preliminary injunction against the NDOC on the basis of, *inter alia*, NRS 41.130, a ruling supporting the notion that the NDOC is a person for the purposes of Chapter 41. *See Randolph v. Nevada ex rel. Nev. Dep't of Corr.*, No. 13-CV-00148, 2014 WL 5364118 at *2, *5 (D. Nev. Oct. 21, 2014).

Reading the general definition of person into the statutes in Chapter 41 would arguably immunize the State from whole swathes of suit, including claims for personal injury under NRS 41.130. That would be an absurd result that cannot be squared with the limited exceptions found in NRS 41.031. *See Tarango*, 117 Nev. at 452 n.21, 25 P.3d at 180 n.21 ("Statutory interpretation should avoid absurd or unreasonable results.")

But even if the State of Nevada and its subdivisions are not suable, the state officials named in this suit would still be liable. Chapter 453 itself, the portion of the criminal code that makes Petitioners' predicate conduct unlawful, specifically

contemplates violations by a "state, county, or municipal officer." NRS 453.281(3). That section of Chapter 453 provides limited immunity to such government officers, so long as they are "engaged in the lawful performance" of their duties. *Id.* Here, as explained above, Petitioners' performance was unlawful both because they violated certain portions of Chapter 453 by obtaining Alvogen Midazolam by subterfuge and by doing so in derogation of Alvogen's property rights in the Product. (*See supra* 25-30, 32-34.) In light of the fact that Petitioners do not qualify for the specific, limited immunity contemplated by Chapter 453, the officers named must be amendable to suit as any other natural person would be.

Because Alvogen has demonstrated that the State unlawfully obtained its product in violation of Chapter 453 and Alvogen's property rights, and because Alvogen is likely to suffer harm as a result, the District Court did not abuse its discretion in finding that Alvogen was likely to succeed on its NRS 41.700 claim.[15]

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[15] Although the Clark County District Attorney (the "DA") has raised the issue of sovereign immunity as an amicus (Amicus Curiae Br. of the Clark Cty. DA in Supp. of Pet. at 12, No. 76485 (July 26, 2018)), the parties are in agreement that the Court need not address that defense at this juncture. (Pet. at 40 n. 24 (preserving the Petitioners' position that sovereign immunity applies but that the Court "need not address this issue.").) Even if the DA were correct that this decision is eligible for discretionary-act immunity – which Alvogen disputes – there would still be factual disputes that render the issue of sovereign immunity unripe for decision by this Court. Discretionary-act immunity cannot preclude liability for "intentional torts or bad-faith misconduct," which is exactly what Alvogen alleges here regarding the State's acquisition of its product. *See Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. Adv. Op. 102, 407 P.3d 717, 733 (2017) (en banc) (citation omitted), *cert granted*, 138 S. Ct 2710 (2018) (No. 17-1299). The State disputes this characterization of its

3. Other factors militate against extraordinary relief.

Other factors militate heavily against granting the State's request for extraordinary relief as well.

a. The State has an adequate alternative remedy.

As this Court has recognized, mandamus petitions are disruptive to both the legal process and the final judgment rule, and writ relief therefore should not be granted where an appeal is otherwise available. *See Archon Corp. v. Eighth Judicial Dist. Ct.*, 133 Nev. Adv. Op. 101, 407 P.3d 702, 709-10 (2017) (discussing the disruption caused by mandamus relief). Even where an appeal is not immediately available because, as here, the challenged order is interlocutory, the fact that the order may ultimately be challenged on appeal generally precludes writ relief. *See* NRS 34.170; NRS 34.330; *Aspen Fin. Servs.*, 128 Nev. at 639, 289 P.3d at 204; *Pan*, 120 Nev. at 225, 88 P.3d at 841. Here, it is undisputed that the State will have the right to appeal any preliminary injunction entered against it, NRAP 3A(b)(3), and the District Court limited the discovery period to facilitate holding the preliminary injunction in short order. (RP App. Vol. III, 395:7-9.) There is therefore no compelling reason to subvert the orderly course of the legal process by extraordinary relief now, at this preliminary stage.

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conduct, but there has been no discovery on this issue. Without a well-developed factual record, this Court cannot determine if discretionary-act immunity applies.

The cases cited by the State in which this Court has entertained writ petitions arising from TROs are inapposite. In two of the State's cases, this Court granted relief and declared the TROs void simply because a proper bond had not been posted by the applicant, as mandated under NRCP 65(c). *See State ex rel. Hersh v. First Judicial Dist. Ct.*, 86 Nev. 73, 76-77, 464 P.2d 783, 785 (1970); *State ex rel. Friedman v. Eighth Judicial Dist. Ct.*, 81 Nev. 131, 132-34, 399 P.2d 632, 632-34 (1965). As the bond requirement was indisputably observed here (App. Vol. II, 415:25-416:24, 430), these cases lend no support to the State's request.

In *Cox v. Eighth Judicial District Court*, a case involving a judicial land sale, writ relief was warranted because the district court had a mandatory duty to dismiss the case under NRCP 41(e) for want of prosecution, as the matter had not been brought to trial within the requisite five years. 124 Nev. 918, 925-26, 193 P.3d 530, 534-35 (2008) (per curiam). Because the original order that resulted in the sale was void, the TRO issued by another district court preventing the petitioners from seeking to reacquire the property was also void. *Id.* But here, there is no argument that Alvogen's action was required to be dismissed for want of prosecution or failure to comply with applicable time limits.

Finally, *Public Service Commission v. Eighth Judicial District Court*, 61 Nev. 245, 123 P.2d 237 (1942) is equally inapplicable. There, the plaintiff brought suit in the district court to prevent the Public Service Commission from

holding a hearing on a complaint the Commission had issued against him, and the district court entered a TRO stopping the hearing. *Public Serv. Comm'n*, 61 Nev. 245, 123 P.2d at 238-39. This Court concluded that the district court lacked jurisdiction to interfere with "the discretion of an administrative body's exercise of legislative powers," and that the plaintiff had other adequate remedies by which to challenge the Commission's orders – *i.e.*, through the administrative process. *Id.*, 123 P.2d at 239-40.

Here, of course, there is no interference with an administrative body's legislative or adjudicative functions. Indeed, there is no administrative process through which Alvogen could seek to vindicate its legal rights in the first place, and Alvogen thus has no adequate alternative remedy or process to pursue. Moreover, Alvogen, unlike the plaintiff in *Public Service Commission*, is not charged with violating the law, and there is thus no risk that any such violations will continue for "many months" while court proceedings are ongoing. *See id.*, 123 P.2d at 240.

b. There is no need for hurried, preemptive review in this Court.

The State claims that urgency warrants disposing with the ordinary rules of discovery and an evidentiary hearing, (Pet. at 26-27), but there is no urgency to resolve this matter before the parties have had a chance to more fully develop their facts and arguments in the District Court.

The State claims that a batch of Cisatracurium will expire on November 30, 2018, and thus it will suffer harm because it will lose the ability to carry out "an" execution. (Mot. to Expedite Decision, July 27, 2018, at 1, on file.) But the State has conceded that it has sufficient supplies of Cisatracurium to carry out the execution of Dozier well into next year. (*See supra* 23.) And according to publicly available information, Nevada has no other executions scheduled for this year.[16] Accordingly, the State will not suffer any cognizable harm if this matter is not resolved before November 30.

Dozier, moreover, has been on death row since his conviction and sentence over a decade ago (App. Vol. I, 2-3), and the State of Nevada has not executed an inmate since 2006 (*id.* at 51). The State therefore cannot credibly claim that it must carry out Dozier's death sentence now – even at the risk of violating Alvogen's rights by resorting to subterfuge in order to obtain and misuse its products. (*See* App. Vol. II, 414:23-415:20 (reciting findings and issuing restraining order).) And again, under the terms of the TRO, the State is free to pursue Dozier's execution by other means that do not involve the misuse of Alvogen's products. (*Id.* at 415:18-20, 430:22-23.) In light of these facts, the State's loud claims of urgency ring false.

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[16] *See* Death Penalty Information Center, *Executions Scheduled for 2018*, https://deathpenaltyinfo.org/upcoming-executions#year2018 (updated Aug. 14, 2018).

Furthermore, it is the State's own actions – not the District Court – that are causing the delay. The original timeline for the preliminary injunction hearing was based on the parties' requests for discovery, including the Petitioners' request for – in their words – "substantial" discovery and time in which to conduct that discovery before the hearing. (*Id.* at 418:10-419:12.) Perversely, the State has now sought a stay of that discovery, further delaying the preliminary injunction hearing – and has only recently informed the District Court of the need to expedite the preliminary injunction hearing before the supposed expiration date of the batch of Cisatracurium on November 30. (*See* RP App. Vol. II, 278-85; *see also* RP App. Vol. III, 392:6-8.)

Alvogen, on the other hand, has sought to shorten discovery in order to expedite the preliminary injunction hearing, and ensure that a hearing can be held, with a fully developed factual record, well in advance of the State's November date. (*Id.* at 357-58.) As a result, discovery has been shortened considerably, which means this matter can be resolved well before the State's supposed deadline. (*Id.* at 395:7-10.) The "urgency" the State claims in this appeal is therefore contrived, as there is no risk of harm to the State in allowing proceedings to continue below.

c. Judicial economy and sound judicial administration weigh against granting mandamus relief.

A writ of mandamus is not appropriate where considerations of judicial economy and sound judicial administration militate against extraordinary relief.

See generally State v. Eighth Judicial Dist. Ct., 127 Nev. 927, 931, 267 P.3d 777, 779-80 (2011) (en banc). Here, judicial economy and sound judicial administration weigh in favor of allowing the District Court to continue – and complete – its work in the ongoing preliminary injunction proceeding.

This case clearly raises significant legal and factual issues, and the accelerated timetable on which this case has so far been litigated means that the parties have not had a chance to fully develop their legal and factual arguments. Indeed, the mandamus proceedings before this Court will be the first time that this matter has been actually briefed by both parties, as the State did not file a brief below. As the State has acknowledged, important interests are at stake in this case (Pet. at 26) – for both sides. While Nevada undoubtedly has a legitimate interest in being able to carry out criminal sentences, Alvogen likewise has a strong interest in preventing damage to its reputation and business relationships caused by the State's improper acquisition and threatened misuse of its products. This Court has recognized that "[t]o efficiently and thoughtfully resolve . . . 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.*, 133 Nev. Adv. Op. 101, 407 P.3d at 708; *see also Reno Hilton Resort Corp.*, 121 Nev. at 5-6, 106 P.3d at 136-37 (noting the importance of a developed record). Given the

immature stage of the proceedings in the District Court, that record is lacking here and should be developed.

V. CONCLUSION

There is no basis for this Court to short-circuit the normal judicial process and jump into the thicket that this complex and sensitive case presents now. For the foregoing reasons, the State's request to dissolve the non-existent "stay" of Dozier's execution should be denied. Likewise, the State's request for a writ of mandamus or prohibition should be denied, and the District Court's temporary restraining order allowed to stand pending the preliminary injunction hearing.

DATED this 16th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21(d).

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

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I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 16th day of August, 2018, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **ALVOGEN, INC.'S ANSWER TO PETITION TO DISSOLVE STAY OF EXECUTION UNDER NRS 176.492 AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** properly addressed to the following:

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