IN THE SUPREME COURT OF THE STATE OF NEVADA

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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 COURT JUDGE,

Respondents,

and

ALVOGEN, INC.; HIKMA PHARMACEUTICALS USA INC.,

Real Parties in Interest.

Supreme Court Case No.: 76485
District Court Case No. A-18-777312-B

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REPLY IN SUPPORT OF PETITION TO DISSOLVE STAY OF EXECUTION UNDER NRS 176.492 AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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I. INTRODUCTION

This case is not about a "business dispute." It is about the practical abolishment of the death penalty, and the drug manufacturers can't avoid admitting it. For example, Hikma verbosely characterizes the State's lawful lethal injection regime "as an intentional instrument of death."[1] It concedes that this is a death penalty case[2] and it cites capital cases for the temporary restraining order standard.[3] And while feigning neutrality toward capital punishment, Hikma reveals that it, along with the other drug manufacturers, "have a substantial interest in knowing how the State intends to carry out the process of killing a human being under a death warrant."[4] Alvogen has made similar statements.[5] This is not the rhetoric of disinterested corporations trying to get their "property" back in a routine business quarrel. Rather, these statements echo those made by the Federal Public Defender's Office in the last Scott Dozier proceeding when, against its client's wishes, the FPD delayed long enough through discovery and an evidentiary hearing that lethal injection drugs expired.[6]

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1 Hikma Ans. Br. at 35.

2 *Id.* at ii (citing NRAP 17(a)(1) in routing statement).

3 *Id.* at 34 n.9 (citing *Landrigan v. Brewer*, 625 F.3d 1132, 1133 (9th Cir 2010) (Wardlaw, J. concurring in the denial of rehearing en banc)).

4 Hikma Opp'n to the State's Mot. to Stay & Joinder to Alvogen's Opp'n to Mot. Stay at 7, filed Aug. 13, 2018.

5 Alvogen Ans. Br. at 10 (asserting "the need for transparency on a matter of public concern."). The "matter of public concern" is the death penalty.

6 Denise Rosh, *Defense Attorney, ACLU Want Answers About Execution Cocktail Planned for Dozier*, 3 News Las Vegas (Aug. 29, 2017) *available at* https://news3lv.com/news/local/defense-attorney-aclu-want-answers-about-execution-cocktail-planned-for-dozier (quoting Federal Public Defender).

The drug manufacturers are attempting the same tactic here. Compared to their discussion of the merits, the drug manufacturers spill as much (if not more) ink trying to convince this Court to punt on the purely legal issues presented so that drug expiration dates get closer, day by day. They implore this Court to stall a decision until after discovery and a preliminary injunction hearing—only to restart the appellate processes in the exact same place months from now. But the threshold legal questions will not go away and further factual development will not change the answers. A remand will only accomplish a waste of time, judicial resources, and taxpayer money. In the meantime, more drugs will inevitably expire and Dozier's victims will wait longer for justice—real people that the drug manufacturers barely deign to mention.

No amount of discovery will alter the District Court's authority to stay an execution in violation of NRS 176.415. The District Court's TRO barred the State from using the first drug in its lethal injection protocol, Midazolam, and the State lost its ability to carry out the sentence as a consequence. The Nevada Department of Corrections[7] would have been in contempt of the execution order and warrant if it had not sought relief from Judge Togliatti. The TRO therefore had the substantive effect of staying Dozier's execution.

The State need not show the inaccessibility of other drugs that could replace the enjoined drug(s) before the TRO is actually considered what it is—a stay of execution.

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[7] This brief refers to Petitioners as the "State" or "NDOC" and Real Parties in Interest as the "drug manufacturers."

The Legislature has granted NDOC's Director the power to choose the drugs used in the State's lethal injection protocol and, under the United States Supreme Court's governing method of execution standard, the State is not required to prove that it has access to other drugs or other alternative methods. The challenger bears the burden to demonstrate an available, alternative drug combination. It would violate the separation of powers, and flip the burden on its head, for the Court to hold that the TRO is not *really* a stay of execution *unless the State* shows it has no other available drugs or because there are other drugs the Director has not selected. Such a requirement would replace the Director with the courts and give Big Pharma greater rights than condemned inmates. Even if the State had easy access to a replacement for Midazolam, nothing would prevent the new company from filing a cookie-cutter lawsuit. Indeed, *any* producer or manufacturer of *any* product remotely connected to an execution could sue to recover its purported "property," leaving the State stuck in the same quagmire.

That's why this Court should now determine, as a matter of law, whether drug manufacturers have a viable cause of action in the first place. Three courts—including two since this Petition was filed—have ruled that drug manufacturers do not have a claim for relief that allows them to obtain a *de facto* stay of execution or interfere with lawful capital sentences. Those courts reached this conclusion without the need for "further factual development" or an "evidentiary hearing." A contrary ruling or a rudderless remand will leave Nevada as the outlier State. Instead, this Court should join these other jurisdictions and reach the same result *in this proceeding*.

Allowing the District Court's TRO to remain in place, or delaying resolution of these issues until a later time, emboldens the seemingly endless nationwide "guerrilla war against the death penalty,"[8] as it did with the subsequent (but unsuccessful) copycat lawsuit in Nebraska. Currently, drug manufacturers opposed to the death penalty are appropriately losing the war in other States, but are winning the war in Nevada by delaying this case. The Court should not allow drug manufacturers to win through attrition any more than it should allow these companies to seek easy public relations points by disrupting lawful capital sentences, frustrating the will of the People, and delaying justice for victims.

II. ARGUMENT

A. The District Court's Injunction Had the Substantive Effect of Staying Dozier's Execution in Violation of NRS 176.415.

The drug manufacturers do not contend that the District Court's Order is among the circumstances in which NRS 176.415 authorizes a stay of execution. Rather, they retreat to their own self-serving descriptions of their requested relief and claim that the TRO is not *really* a stay simply because they "never requested any stay of the 'execution of a judgment of death.'" (Alvogen Ans. Br. at 13). But this Court considers an order or motion by what it "substantively accomplishes" and what it "'actually *does*, not what it is called'" by the Court or the parties. *Lee v. GNLV Corp.*, 116 Nev. 424, 427, 996

[8] *Amici Curiae* of 15 States at 7 (quoting question of Alito, J. at oral argument of *Glossip v. Gross*).

P.2d 416, 418 (2000) (quotations and citations omitted); *see also AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 584, 245 P.3d 1190, 1194 (2010) (analyzing motion's substantive effect, "regardless of its label," to determine if it was a tolling motion).

The District Court's Order imposed a stay of Dozier's execution in deed, if not word. It barred the State from using Midazolam, the first ingredient in the State's lethal injection cocktail, and the State could not proceed without it. The TRO thus deprived the State of its only method of execution. Without the TRO, the execution would have gone forward. The TRO is the *only* reason the execution was aborted.

Calling a stay by another name does not change its character. For instance, in *Kelley v. Griffen*, 472 S.W.3d 135, 136 (Ark. 2015), death row inmates obtained a TRO from an Arkansas circuit court. Like Nevada law, Arkansas narrows stays of execution to limited circumstances, which do not include circuit court injunctions, so the State sought extraordinary relief. *Id.* The inmates defended the TRO by arguing that "what was issued was an injunction and not a stay; therefore," the statutory limitations and case law "holding that circuit courts lack jurisdiction to stay an execution do not apply." *Id.*

As it inherently did in the *McKesson* case,[9] the *Kelley* court rebuffed this argument. It held that "we find that the argument put forth by the prisoners is purely a matter of

[9] As explained in the Petition, the Arkansas Supreme Court inherently reached the same result in the *McKesson* case. (Pet. at 22-24). *See also Workman v. Bredesen*, 486 F.3d 896, 904 (6th Cir. 2007) ("[T]he practical effect of an injunction, *which simultaneously*

semantics. A 'stay' is defined as the postponement or halting of a proceeding, judgment, or the like." *Id.* (quoting *Black's Law Dictionary*, 1639 (10th ed. 2014)). Because the TRO "effectively barred the executive branch from proceeding on the judgments of execution" the TRO was an improper stay of an execution, which the circuit court essentially acknowledged. *Id.* at 137. Similarly, the District Court's TRO here "effectively barred" NDOC from proceeding with the execution.

Hikma argues at length that NRS 33.010 provides blanket authorization for injunctions under all circumstances, even those that another statute prohibits. (Hikma Ans. Br. at 22-32).[10] But as the State explained in the Petition, courts cannot exercise their equitable powers to grant injunctive relief under NRS 33.010 when doing so will conflict with another more specific statute. (Pet. 20). Courts' equitable powers cannot contravene specific statutory provisions, and it is axiomatic "that a statute's general

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operates to stay Workman's long-delayed execution and to give us authority to review it.") (quotations omitted; emphasis added); *Boltz v. Jones,* 182 F. App'x 824, 825 (10th Cir. 2006) (vacating TRO that stayed execution in § 1983 action "challenging the pharmaceutical means by which the execution will be accomplished.").

[10] Hikma's hypothetical about the State confiscating drugs from a hospital and performing an execution in a Catholic church is as offensive as it is wrong. (Hikma Ans. Br. at 23 n.23). Hikma fails to understand the basics. For obvious reasons, occupying a church would raise a hoist of constitutional problems, including First Amendment violations for which an injunction is available. Confiscating drugs (i.e. property) from the hospital for an execution (i.e. a public use) may constitute a constitutional taking for which injunctive relief would also be possible. But notably, that claim would belong to the *hospital*, not the drug manufacturer. And, in any event, there is no plausible allegation that the State did not pay "just compensation" for the drugs at issue here. Setting all that aside, NRS 176.355(3) requires an execution to take place at the state prison.

permission to take actions of a certain type must yield to a specific prohibition found elsewhere." *Law v. Siegel*, 571 U.S. 415, 421 (2014) (citing *Morton v. Mancari*, 417 U.S. 535, 550-551(1974)). This Court held similarly in the previous Dozier proceeding when it said "courts should show 'restraint in resorting to inherent power,' particularly where the legislature has enacted a statute or rule covering a certain area." *NDOC v. Eighth Jud. Dist. C*t., 417 P.3d 1117, 2018 WL 2272873, at *3 (Nev. 2018).

NRS 176.415 completely governs when a stay of execution may issue. Thus, NRS 33.010's general grant of equitable authority to issue injunctions cannot conflict with NRS 176.415's specific limitations. NRS 176.415's more specific provisions control. *See Matter of N.J.*, 134 Nev. Adv. Op. 48, 420 P.3d 1029, 1032 (2018) (stating that "[u]nder general/specific cannon, the more specific statute will take precedence").[11]

Alvogen asserts that "the 'real world consequence' of the District Court's TRO is that it simply preserves the status quo" while its claims are considered. (Alvogen Ans. Br. at 16, 11). But as the federal District of Nebraska held in rejecting a copycat lawsuit filed after this case, the contention that "any temporary restraining order would merely delay things" is "laughable." *Fresenius Kabi USA, LLC v. State of Nebraska*, No.

[11] Hikma's reliance on *Coleman v. State*, 130 Nev. Adv. Op. 22, 321 P.3d 863 (2014) is odd. (Hikma Ans. Br. at 27-28). *Coleman* holds that a person subject to lifetime supervision pursuant to NRS 176.0931 is not under a sentence of imprisonment pursuant to NRS 34.724 and, consequently, cannot file a habeas petition. Instead, he can challenge his lifetime supervision through NRS 33.010 injunctive relief. Just because NRS 33.010 does not conflict with one NRS Chapter 176 provision does not mean that NRS 33.010 conflicts with *no* NRS Chapter 176 provision.

4:18CV3109, 2018 WL 3826681, at *5 (D. Neb. Aug. 10, 2018). The court recognized that a TRO is even worse than a stay of execution, it was "tantamount to nullifying Nebraska law." *Id.*

Equally laughable is the drug manufacturers' assertion that the TRO does not amount to a stay of execution because it only prohibits the use of one component of the protocol. (Alvogen Ans. Br. at 14; Hikma Ans. Br. at 32). This is like claiming that sawing off one leg of a three-legged stool doesn't stop a person from sitting on it. Yes, practically it does. And now that all three drug manufacturers are parties in the court below, if they each receive an injunction, the stool will have no legs. Would the manufacturers still claim that there has been no substantive stay of execution in that case? The manufacturers' argument is a legal fiction.

This is especially true for Midazolam, the first drug in the lethal injection protocol and the only drug currently enjoined. The first drug plays a particularly important role in ensuring that the inmate is sufficiently unconscious so that he does not experience constitutionally unacceptable pain from the subsequent drugs. *Baze v. Rees*, 553 U.S. 35, 53 (2008); *see also Glossip v. Gross*, 135 S. Ct. 2726, 2739, (2015) (affirming because "midazolam is highly likely to render a person unable to feel pain during an execution."). Without the first drug, not only did the TRO deprive the State of its only available means, it also prevented the State from using its *chosen* method of carrying out a humane execution.

An execution "stay" does not cease to be a "stay" because there may theoretically be other available substitute drugs. *Compare* Order Granting Temp. Stay at 4-5 (Aug. 8, 2018) (Hardesty, J., dissenting in part). NRS 176.355(2)(b) vests the Director of the Department of Corrections with the sole authority to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer." It is the Legislature's and, in this case, the Executive's prerogative to choose the State's lethal injection drugs. *See Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1319 (11th Cir. 2016)[12] ("[G]iving credence to Alabama's prerogative to choose any constitutional method of execution it deems appropriate."); *Beaty v. Brewer*, 649 F.3d 1071, 1075 (9th Cir. 2011) (Tallman, J., concurring in the denial of rehearing en banc) (recognizing the "legislative and executive prerogative in providing for humane methods of execution."). Any court order that prevents the State from using its selected drugs is, in substance, a stay of execution even if there were other drugs for purchase.

Courts cannot dictate the drugs that States select or use absent a demonstrated constitutional violation. *Baze*, 553 U.S. at 61-62; *Glossip*, 135 S. Ct. at 2740. "Such an approach … would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have

[12] cert. denied sub nom. *Arthur v. Dunn*, 137 S. Ct. 725, 197 L. Ed. 2d 225 (2017).

fulfilled with an earnest desire to provide for a progressively more humane manner of death." *Baze*, 553 U.S. at 51.

Nor is the State required "to demonstrate that it cannot conduct its responsibilities to carry out Dozier's execution through other medications." *Compare* Order Granting Temp. Stay at 4-5 (Aug. 8, 2018) (Hardesty, J., dissenting in part). In a constitutional method of execution challenge—where a condemned inmate is claiming that the State will subject him to cruel and unusual punishment—the inmate bears the burden to show that there are available alternative drugs that the State can use. *Glossip*, 135 S. Ct. at 2731. The inmate must prove that "the State actually has access" to the drugs and can carry out the execution with those drugs "relatively easily and reasonably quickly." *Arthur*, 840 F.3d at 1300. "[I]t is not the state's burden to plead and prove that it cannot acquire the drug." *Id.* at 1303 (quotations omitted). The State need not even "make a good faith effort" to obtain substitute drugs. *Id.* at 1302-03.

It would stand this constitutional standard on its head, in a lawsuit with a third-party drug manufacturer, to require *the State* to prove that there are no other available medications before an improper stay is considered an improper stay. Such a rule would make it easier for third-party drug manufacturers to stay an execution than it is for a condemned inmate claiming a constitutional violation. The rule would also make it harder for a State to protect its capital sentences from outside corporate interests than it is for the State to guard against last-minute inmate appeals. Drug manufacturers should not have greater rights to stop an execution than the inmate does.

Furthermore, it is no small task to obtain a supply of lethal injection drugs, let alone substitute drugs once they expire. The Supreme Court has documented the "practical obstacle[s that] soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences." *Glossip*, 135 S. Ct. at 2733; *id.* at 2733-34 (detailing the history of how each new drug eventually becomes unavailable). Alvogen, Hikma, and Sandoz highlight that, in 2016, Nevada requested bids for execution drugs and did not receive a single response. (App. 77; Hikma Ans. Br. at 5; Sandoz *Amicus Br.*, Ex. A ¶¶ 12, 27). More than 20 American and European drug manufacturers have agreed not to sell drugs to States for lethal injection purposes. (Hikma Ans. Br. at 4; Sandoz *Amicus Br.*, Ex. A ¶¶ 12, 29). In an article that Alvogen cites, (App. 77), the New York Times reports that "'all F.D.A.-approved manufacturers of any potential execution drug have now blocked their sale for this purpose.'" [13] By the drug manufacturers' own admissions, the State cannot easily find and order alternatives. It's not as simple as grabbing a different drug off the shelf. Quite the opposite. Developing, vetting, authorizing, training, and then putting into effect a multi-drug protocol is a massive undertaking.

Moreover, even if the State had ready access to other adequate drugs, nothing would prevent those new drug manufacturers from filing their own lawsuits based on

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[13] Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. Times (May 13, 2016) *available at* https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html (quoting Maya Foa).

the same erroneous legal theories that the District Court accepted. The State would be in the same position with each new company. Taking this view to its ultimate conclusion, an injunction on each drug would not act as a stay of execution until the State has been enjoined by literally every pharmaceutical manufacturer for every available product. This would exacerbate the already never-ending game of whack-a-mole and tie-up the State (and the courts) in litigation for years, abolishing lethal injection in all but name.

As with method of execution challenges, a State is not required to show the absence of other means or medications before an injunction on its drugs is considered a stay of execution *in fact*. This Court looks at the *effect* of the *order*, not what a party might be able to do to mitigate the order's damage. *See GNLV Corp.*, 116 Nev. at 427, 996 P.2d at 418. An order operates as an improper stay of execution in violation of NRS 176.415 anytime it delays an execution by barring a State from using one of its selected drugs for non-constitutional reasons. *See Kelley*, 472 S.W.3d at 136 (stating "[a] 'stay' is defined as the postponement or halting of a proceeding, judgment, or the like.") (quoting *Black's Law Dictionary*, 1639 (10th ed. 2014)).

Alvogen offers a different definition of a stay. It argues that "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." (Alvogen Ans. Br. at 14). But Alvogen wrongly focuses on a hypothetical violation of the District Court's Order instead of the very real possibility of contempt from Judge Togliatti's

Order and Warrant of Execution. After the District Court entered the TRO, the State lost its ability to carry out Dozier's execution but it was still subject to Judge Togliatti's Order to complete the sentence. The State was between a rock and a hard place. Had the State done nothing, it would have been in contempt of the Order and Warrant of Execution—especially because Dozier is a volunteer that wants his sentence carried out. The State was left with no choice but to seek relief from Judge Togliatti. *See Stock v. Stock*, 873 N.W.2d 38, 48 (N.D. 2016) (holding that threat of contempt rendered action involuntary).

On the post-TRO teleconference with Judge Togliatti, the State explained that "[b]ased upon the advice of medical folks here, they do not support going forward at this time with just Fentanyl and Cisatracurium. And so to avoid being in contempt of your order or for anything of that nature because we don't have the ability to carry out an execution this week, we ask that you lift or vacate your order of execution." (App. 435). Judge Togliatti understood that the TRO made it "impossible for today" to carry out the execution under the order that authorized it. (App. 441). The TRO forced the postponement of the Order and Warrant of Execution. It is therefore unsurprising that the order entered by Judge Togliatti is entitled a "Stay of Execution" and concludes that Dozier's "execution is stayed and [he] may pursue habeas relief." (App. 444, 446). Should this Court dissolve the TRO, a new execution order and warrant can promptly issue without obstacle.

Involuntarily coercing the State to ask for relief from an obligation to complete an execution unquestionably amounts to a stay of execution. And any order that makes an execution "impossible" has the substantive effect of staying an execution. The District Court's stay was not authorized by NRS 176.415 even though it was masquerading as, in Alvogen's words, "a garden-variety TRO." (Alvogen Ans. Br. at 17).

B. This Court Has Jurisdiction Under NRS 176.492.

Because the District Court's TRO is an improper stay of execution under NRS 176.415, this Court has jurisdiction to entertain this Petition according to NRS 176.492. The drug manufacturers do not seriously dispute that, if the TRO constitutes an improper stay of execution as discussed above, then this Court has *mandatory* jurisdiction. Alvogen correctly points out that this Court "'has jurisdiction to entertain an appeal only insofar as the appeal is authorized by statute or court rule.'" (Alvogen Ans. Br. at 10 (quoting *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994)). Here, NRS 176.492 grants statutory authority to the State to "file a petition with the appellate court of competent jurisdiction … to dissolve a stay which was improperly entered." Therefore, this Court has jurisdiction over the Petition and should dissolve the TRO as an improper stay of execution.[14]

[14] Since the TRO conflicts with NRS 176.415, the District Court lacked jurisdiction to enter it and a writ of prohibition is appropriate as well. NRS 34.320.

C. Alternatively, This Court Should Exercise Its Original Jurisdiction Because No Factual Development is Needed to Resolve Purely Legal Questions of Nationwide Public Importance.

Cognizant that they lack any viable claim on the merits, *see infra* §II(D)-(F), the drug manufacturers plead with the Court to delay ruling against them—and to defer resolving the important public policy issues involved in this case—until there is further "record development." But no factual development is required to resolve the issues that the Petition presents. The District Court's authority to stay an execution, the existence of a cause of action, and the existence of a property interest are pure questions of law that this Court reviews *de novo*. *See Kelley*, 472 S.W.3d at 136 (reviewing whether TRO constitutes an improper stay of execution as a question of statutory interpretation); *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 19, 293 P.3d 869, 871-72 (2013)(stating that whether a party stated a claim for relief is a question of law); *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. Adv. Op. 1, 341 P.3d 646, 649-50 (2015) (stating that creation of a property interest through an easement is a question of law reviewed *de novo*); *Int'l Union of Painters & Allied Trades Dist. Council 15 Local 159 v. Great Wash Park, LLC*, No. 67453, 2016 WL 4499940, at *2 (Nev. App. Aug. 18, 2016) (unpublished disposition) (assessing *de novo* whether a property right was invaded); *see also Franchise Tax Bd. v. Hyatt*, 133 Nev. Adv. Op. 102, 407 P.3d 717, 735-36 (2017) (recognizing a new cause of action for false light under Nevada law).

This Court often entertains mandamus petitions that involve purely legal issues. *See, e.g., Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1053 (2014) (entertaining

mandamus because "this petition presents a purely legal question"); *Ostman v. Eighth Jud. Dist. Ct.*, 107 Nev. 563, 565, 816 P.2d 458, 460 (1991) (entertaining mandamus because "[t]his case involves only a purely legal issue."). This Court even exercises its discretion to entertain legal issues that are raised for the first time on appeal. *Nev. Power Co. v. Haggerty*, 115 Nev. 353 n.9, 365, 989 P.2d 870, 877 n.9 (1999) (addressing statutory interpretation question for the first time on appeal and noting it serves judicial economy); *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 150 n.32, 179 P.3d 542, 550 n.32 (2008) (similar); *Schwartz v. Lopez*, 132 Nev. Adv. Op. 73, 382 P.3d 886, 901 (2016) (addressing constitutional issue for the first time on appeal); *O'Guinn v. State*, 118 Nev. 849, 851-52, 59 P.3d 488, 489-90 (2002) (court may review issue raised for first time on appeal where it "rests on legal rather than factual allegations."). There is no factual, legal, or procedural impediment preventing the Court from resolving the straightforward questions of law in this proceeding.

Despite repeatedly professing the need for discovery and building a record, Alvogen fails to identify a *single issue* that needs evidentiary development. Hikma doesn't do much better. It relegates its supposed factual issues to a single footnote. (Hikma Ans. Br. at 38 n.10). Hikma splices the issues into ten alleged "factual disputes" but, at bottom, they all relate to whether it implemented product controls and whether the State violated those controls by ordering its Fentanyl with knowledge of alleged restrictions such that the State did not obtain clear title from Cardinal Health. (*Id.*). Yet, as detailed in the Petition and below, even if Hikma had controls (it didn't) that the

State knew about when the State ordered, *as a matter of law* those controls do not run with the product through an intermediary distributor, act as personal property servitudes, bind the State, or cloud the State's title. For purposes of this Petition, the Court can view those facts in Hikma's favor and it still doesn't change the legal result.

Likewise, Hikma asserts that there are factual questions about whether the State violated NRS Chapter 453 and whether Hikma will suffer irreparable harm. (*Id.*) But, again, the Court must first determine whether Hikma has private causes of action under these statutes and whether it is within NRS 41.700's "zone of interest," assuming the State can even be liable. Until then, irreparable harm issues and questions about personnel and drugs are irrelevant and non-discoverable.

The State has never agreed that discovery is appropriate before this Court decides whether drug manufacturers have a cause of action or an enforceable property interest. The State has maintained that "substantial" discovery *will* be necessary *if and only if* the drug manufacturers have claims for relief to begin with. Absent claims for relief, the drug manufacturers are not entitled to unlock the courthouse doors and there is no need for (or right to) discovery. *See* Order Denying Stay and Scheduling Oral Argument at 5 (Aug. 16, 2018) (Stiglich, J., dissenting) (citing *In re Lombardi*, 741 F.3d 888, 896 (8th Cir. 2014) (cautioning against allowing sensitive discovery on the basis of an inadequately pleaded claim); *Jones v. Comm'r, Georgia Dep't of Corr.*, 812 F.3d 923, 925 (11th Cir. 2016) (Marcus, J., concurring) (noting that one must state a plausible claim before becoming entitled to discovery)).

Recognizing that there are no legitimate factual questions to explore—again, it neglects to describe any—Alvogen argues that the Court should delay because the State has an adequate legal remedy in the form of an appeal after the preliminary injunction hearing. (Alvogen Ans. Br. at 46-48). "But even when a legal remedy is available, this court may exercise its discretion to consider a writ petition when the petition presents a legal issue of statewide importance that needs clarification, and principles of judicial economy and public policy weigh in favor of considering the petition." *Lorton*, 130 Nev. Adv. Op. 8, 322 P.3d at 1053. "[T]he mere fact that other relief may be available does not necessarily supersede the remedy of mandamus." *State ex rel. Armstrong v. State Bd. of Exam'rs*, 78 Nev. 495, 497-98, 376 P.2d 492, 493 (1962) (citing cases); *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993) ("Nonetheless, despite the availability of an adequate legal remedy, this court has decided to exercise its constitutional prerogative to entertain the writ.").

This Court's decision in *Archon Corp. v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 101, 407 P.3d 702 (2017) also weighs in favor of answering these nationwide publically important issues now rather than waiting for another day. In *Archon*, this Court held that "[a]dvisory mandamus is appropriate when the issue presented is novel, of great public importance, and likely to recur … *prior to effective review*." *Id.* at 708 (internal citation and quotations omitted; emphasis added). There is no debate that this case presents novel legal issues of great importance, both within and without the State. Fifteen States have filed an *amici curiae* brief explaining this case's significance to their

respective States. This Court has "recognize[d] the importance of this matter, both to Dozier and to the citizens of the State of Nevada." *NDOC,* 2018 WL 2272873, at *3; Order Denying Stay and Scheduling Oral Argument at (Aug. 16, 2018) ("we agree that petitioners raise legal issues of substantial import"). Alvogen agrees there are "important interests … at stake in this case – for both sides." (Alvogen Ans. Br. at 51).

Given the lethal drug expiration dates, these issues are likely to recur without *effective* or *meaningful* review. *Archon Corp.* 407 P.3d at 708; *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1151 (2013) (stating that a future appeal is not an adequate or speedy remedy if it will not "permit this court to meaningfully review the issues presented."). Even if the State eventually prevails, the result may be meaningless if batch after batch of drugs continue to expire.[15] A favorable ruling that comes too late will be hollow for the State and the victims. The State is racing against time and the drug manufacturers know it. They hope the Court will remand for amorphous factual development toward nonexistent claims to help run out the clock and allow them to win through default.

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[15] Alvogen argues that the State "has sufficient supplies of Cisatracurium to carry out the execution of Dozier well into next year." (Alvogen Ans. Br. at 49, 23). Alvogen fails to account for the statutory deadlines to obtain a supplemental warrant of execution. *See* NRS 176.495. Alvogen also claims that there is no urgency because the State has not executed an inmate since 2006. (Alvogen Ans. Br. at 49). Alvogen ignores that eleven of the last twelve executions have involved "volunteers" like Dozier. Accordingly, to fulfill its statutory mandate, the State needs to have sufficient supplies on hand, to the extent possible. The District Court's TRO, and the drug manufacturers' lawsuit, impedes the State's statutory mandate.

Contrary to Alvogen's assertions, the State's time crunch is not self-imposed. (Alvogen Ans. Br. at 23-24, 49-50). The District Court's improper TRO—based on the drug manufacturers' meritless claims—should not have been entered in the first place. It is the TRO, not the State's response to it, that has interfered with the criminal justice system and created timing problems. A decision on this Petition is the quickest and most efficient path to a resolution. Judicial economy and the urgent circumstances tilt overwhelmingly in favor of a decision on this Petition.

The posture of this case does not render it unreviewable. The District Court's Order is a stay of execution dressed up as a TRO. Even so, this Court has reviewed mandamus petitions arising from TROs in the past. Alvogen acknowledges these cases but tries in vain to minimize them. (Alvogen Ans. Br. at 47-50). The District Court's TRO in violation of NRS 176.415 is improper just as a TRO issued without a bond is improper. *See State ex rel. Hersh v. First Jud. Dist. Ct.*, 86 Nev. 73, 464 P.2d 783 (1970); *State ex rel. Friedman v. Eighth Jud. Dist. Ct.*, 81 Nev. 131, 399 P.2d 632 (1965); *see also O'Callaghan v. Eighth Jud. Dist. Ct.*, 89 Nev. 33, 34, 505 P.2d 1215, 1215 (1973) (entertaining but dismissing writ from TRO).

Alvogen's attack on *Cox v. Eighth Judicial District Court*, 124 Nev. 918, 920, 193 P.3d 530 (2008) is even less persuasive. There, the same District Court that is involved here granted a TRO to halt actions regarding real property. *Id.* at 124 Nev. 922-23, 193 P.3d at 533. The District Court extended the TRO for 90 days—more time than it has allowed for "discovery" here—pending a consolidated preliminary injunction hearing

and trial. *Id.* at 923, 193 P.3d at 533. The parties aggrieved by the TRO filed for mandamus and this Court entertained the petition. A per curiam panel of this Court consisting of Justices Hardesty, Parraguirre, and Douglas held as a matter of first impression "that judicial sales to bona fide purchasers generally are not subject to later challenge if an underlying judgment is reversed on appeal." *Id.* at 924, 193 P.3d at 533. The Court also ruled that an earlier order was void due to NRCP 41(e)'s five-year rule. As a consequence, the Court ruled that "Department 11 manifestly abused its discretion when it entered the temporary restraining order to enjoin the Coxes from attempting to reacquire the property." *Id.* at 927, 193 P.3d at 535. This Court issued a writ of mandamus to Department 11 and directed "it to vacate its temporary restraining order." *Id.* Notably, the Court made these rulings without remanding for "further factual development" regarding the real parties in interests' "bona fide purchaser" status.

Alvogen fails to tarnish *Public Service Commission v. Eighth Judicial District Court*, 61 Nev. 245, 123 P.2d 237 (1942). Alvogen does not address the Court's holding that writ relief from a TRO was appropriate because later appeals would not be speedy and adequate remedies. *Id.* at 245, 123 P.2d at 240. An appeal "would consume many months" during which the governmental agency would not be able to enforce certain statutes. *Id.*[16]

[16] These decisions are not outweighed by Hikma's reliance on a single two-page unpublished disposition denying a mandamus petition from a TRO due to an under developed factual record. (Hikma Ans. Br. at 34, 37 (citing *Does 1-24 v. Eighth Jud. Dist. Ct.*, No. 64890, 2016 WL 374956, at *1 (Nev. Jan. 22, 2016)).

The Court should follow *Cox* and *Public Service Commission* and entertain the Petition to decide as a matter of first impression that the District Court's TRO offends NRS 176.415 and the drug manufacturers do not have causes of action or property interests. No record development is necessary and a later appeal will not be adequate or speedy. Returning to the District Court or restarting the appellate process will cause more drugs to expire and prevent the State from timely enforcing Dozier's capital sentence. *Baze*, 553 U.S. at 61 (recognizing the State's legitimate interest in carrying out a sentence of death in a timely manner."); *Ledford v. Comm'r, Georgia Dep't of Corr.*, 856 F.3d 1312, 1319 (11th Cir. 2017) ("Victims of crime also have an important interest in the timely enforcement of a sentence.") (quotations omitted).

Finally, unlike *Archon*, the parties have fully staked out their legal positions and the District Court ruled on them. 407 P.3d at 708. The parties have filed comprehensive and thorough briefing in this Court. The State, unlike the *Archon* petitioner, contends that the District Court *was* required to deny the injunction pursuant to clear authority and that a later appeal is not adequate or speedy. *Id.* at 707. The importance and rarity of executions ensures that this Petition will not "bring a flood of less important appeals in [its] wake." *Id.* (quotations omitted). And this Court's clarification of the law will affect the District Court's ruling. *Id.* at 709. A decision from this Court that the drug manufacturers do not have causes of action or property interests, or that the district courts cannot enter an injunction, will terminate the case. Hikma and Sandoz used the *stare decisis* effect of this Court's decision as a basis to intervene in the lower court so

they cannot deny the ruling's effect on them. Additionally, Hikma voluntarily intervened in this proceeding and directly subjected itself to the preclusive effect of this Court's decision.[17] Any decision in the State's favor will be outcome determinative.

D. The Drug Manufacturers Do Not Possess an Enforceable Property Interest in the Drugs Sold to the State Through Third-Party Intermediary Cardinal Health.

As an initial matter, the drug manufacturers frame the standard of review as whether the District Court abused its discretion in granting the TRO. (Alvogen Ans. Br. at 20, 25). However, a District Court does not have discretion to invent new causes of action or to disregard settled law. *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enterprises, LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (stating injunction will be reversed when "based on an erroneous legal standard"). Legal issues underlying injunctive relief are reviewed *de novo*. *Id.*

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[17] The State's Petition would not have "cut off Hikma's rights to pursue injunctive relief" until Hikma willingly became a party to this proceeding. (Hikma Ans. Br. at 39). Hikma could have sat on the sidelines or filed an *amicus* brief like Sandoz and the Petition would not have subjected Hikma to *res judicata* beyond normal *stare decisis* effects. Hikma's unilateral choice to intervene—which was granted before the State had the chance to oppose—cannot disrupt this proceeding.

Hikma cannot use its own lack of briefing in the District Court as a reason to delay this Petition. (*Id.* at 21, 39, 42). Hikma has filed a fulsome brief in this Court along with Alvogen and Sandoz. Hikma remains free to amend its complaint regardless of the outcome in this Court, although the United States District Court for the District of Nebraska and the Eighth Circuit rejected the claim it intends to add. *Fresenius Kabi USA, LLC*, 2018 WL 3826681, aff'd sub nom. 2018 WL 3831007 (rejecting tortious interference claim).

A party seeking replevin must have a "property or right of possession in himself." *Perkins v. Barnes*, 3 Nev. 557, 559 (1867). Alvogen and Hikma make no effort to address or distinguish the long line of common law precedent establishing that producers, including drug manufacturers, do not possess enforceable personal property servitudes or restrictive covenants on goods sold to end-users through intermediaries, even if the end-users have notice of the supposed restriction.[18] Such restrictions are impermissible restraints on alienation and void as against public policy. (Pet. at 41-50 (citing and discussing *John D. Park & Sons Co. v. Hartman*, 153 F. 24 6th Cir. 1907); *Garst v. Hall & Lyon Co.*, 61 N.E. 219 (Mass. 1901); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

Rather than confront this wall of authority, the drug manufacturers call it "outdated" and "ancient." (Alvogen Ans. Br. at 27, 30; Hikma Ans. Br. at 57). Setting aside that the United States Supreme Court relied on this same line of cases just last year,[19] the drug manufacturers rely on the same "dusty" progeny—the so-called *Colgate* Doctrine—to proclaim the limitless "discretion to choose with whom [they] will deal; and of course, to announce the circumstances under which [they] will refuse to sell." (Alvogen Ans. Br. at 25; Hikma Ans. Br. at 56 (both quoting *United States v. Colgate*, 250 U.S. 300, 307 (1919)).

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[18] The drug manufacturers do not cite any authority showing that their letters had any legal effect.

[19] *Impression Prod., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1532 (2017).

Nonetheless, the Supreme Court has made clear that *Colgate* did not alter this established common law rule. After *Colgate*, the Supreme Court held, that in *Colgate* "[w]e had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements." *United States v. A. Schrader's Son*, 252 U.S. 85, 99 (1920). The Court noted the obvious difference between *Colgate*, on one hand, and the drug manufacturers in this case, on the other:

> It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements-whether express or implied from a course of dealing or other circumstances-with all customers throughout the different states which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. *In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the states.*

Id. at 99-100 (emphasis added).

"American law … has generally thought that competition, including freedom to resell, can work to the advantage of the consumer." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013). Yet the drug manufacturers claim that the Uniform Commercial Code managed to erase this country's longstanding tradition of free alienability by creating an enforceable personal property servitude or reversionary

interest in movable goods. (Alvogen Ans. Br. at 27-30; Hikma Ans. Br. at 57-58). The UCC does no such thing.

"The Uniform Commercial Code (UCC) is not intended to supplant remedies such as replevin; rather, it serves to supplement them." 66 Am. Jur. 2d *Replevin* § 1 (2018) (citing *Johnson v. Creager*, 76 P.3d 799, 51 U.C.C. Rep. Serv. 2d 833 (Wyo. 2003)). "[T]he law of replevin has not been displaced by the UCC." *Johnson*, 76 P.3d at 804 (citing *Brown v. Green*, 618 P.2d 140, 144 (Wyo. 1980)). Nevada's Uniform Commercial Code expressly provides that "[u]nless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity … *supplement* its provisions." NRS 104.1103(2) (emphasis added). The UCC did not change the burden of proving title in a replevin action. *Everett Nat. Bank v. Deschuiteneer*, 244 A.2d 196, 199 (N.H. 1968).

The UCC contains a provision governing a *buyer's* right to replevin, but it does not contain a corresponding provision for a *seller's* right to replevin. NRS 104.2716. The UCC sets forth a seller's general remedies in some circumstances but none cover a situation where, as here, a seller is attempting to recover goods from a third-party under an alleged resale servitude. *See* NRS 104.2701-.2710. Therefore, this case is controlled by common law principles, not the UCC. *See Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. Adv. Op. 78, 335 P.3d 190, 197 n.5 (2014) ("We express no opinion as to whether NRS 104.8401 and NRS 104.8407 displace the common law remedies available against a transfer agent for misfeasance.").

Even if the UCC applied, the drug manufacturers still would not have an enforceable property interest in the drugs that the State purchased from Cardinal Health. NRS 104.2401 cabins a seller's ability to retain title or restrict use or resale of goods after they are sold. It provides "[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on secured transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." NRS 104.2401(1). Every contract for the sale of goods contains "a warranty by the seller that [t]he title conveyed shall be good, and its transfer rightful and [t]he good shall be delivered free from any security interest or … encumbrance of which the buyer at the time of contracting has no knowledge." NRS 104.2312(1).

In other words, "[u]nder the UCC, if a transaction is a sale, then a purported retention of title does not prevent title from passing, but only creates a security interest." John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 39 (2004) (footnotes omitted); *id.* at 62 ("Under the UCC, if a transaction is a sale, then a purported retention of title is ineffective."); John F. Duffy, Richard Hynes, *Statutory Domain and the Commercial Law of Intellectual Property*, 102 VA. L. REV. 1, 71 (2016) ("the UCC recognizes the buyer as owner of the goods,

and the seller's attempt to retain title merely creates a security interest.").[20] This provision's purpose is to prevent "'hidden-title subterfuge" that defeats the expectations of subsequent purchasers. Rothchild, 57 RUTGERS L. REV. at 62 n.210 (quoting *Kinetics Tech. Int'l Corp. v. Fourth Nat'l Bank*, 705 F.2d 396, 399 (10th Cir. 1983)).

"Therefore, a bare statement in the distribution agreement that the title to the [the goods] remains in the [manufacturer] does not prevent the first-level distributor from acquiring title to the [the goods]. Since the distributor holds title, its subsequent sale to the retailer conveys that title, as does the retailer's sale to the end user." *Id.* at 39; *id.* at 58 ("a mere statement, in an agreement between any two participants in the chain of distribution … that the seller retains ownership of the copy is effective only to create a security interest, and does not prevent title from passing.").

Should a manufacturer seek to contractually limit the customers to whom the distributor may sell, a distributor's failure to comply with the manufacturer's limitations does not prevent the end user from gaining ownership of the goods, even though it may be a breach of contract between the distributor and manufacturer. *Id.* at 41, 57-59. A retailer's breach of its contract with the manufacturer does not prevent the purchaser from gaining ownership. *Id.* at 58-59. "[U]se restrictions that run with chattels are generally unenforceable under the common law … ***They are no more valid if***

[20] "Title is an issue to be decided separately from the issue of security interest preferences." *Everett Nat. Bank*, 244 A.2d at 199.

deployed in a retail chain of distribution than in any other context." *Id.* at 59. (emphasis added).

The drug manufacturers ignore these foundational UCC provisions and jump straight to NRS 104.2403 and claims about voidable title. (Alvogen Ans. Br. at 27-30). But NRS 104.2403 only applies when the first downstream purchaser or possessor does not have full title. Rothchild, 57 RUTGERS L. REV. at 39-40 ("Section 2-403 of the UCC governs the authority of a seller of goods to transfer good title to a purchaser under various circumstances in which the seller does not hold title."); Thomas C. Mitchell, *The Negative Pledge Clause and the Classification of Financing Devices-A Question of Perspective*, 60 AM. BANKR. L.J. 153, 183 (1986) ("§ 2-403 applies only if the person attempting to sell does not have valid title."). Alvogen neglects to explain how its alleged restrictive contract conveyed only voidable title to Cardinal Health, and Alvogen does not offer any authority for that proposition. Nor could it. As shown above, the drug manufacturers' use restrictions did not prevent Cardinal Health from obtaining full title to the drugs under the UCC.[21] Thus, Cardinal Health did not merely have voidable title and the State did not obtain voidable title from Cardinal Health. The State acquired full title to the drugs and the manufacturers' purported resale conditions did not travel down the stream of commerce to bind the State.

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[21] None of the drug manufacturers actually had a restrictive contract in place with Cardinal Health when the State purchased the drugs. Nonetheless, the Court need not resolve this factual issue and can assume for purposes of this Petition that the drug manufacturers had agreements in place.

Although Alvogen now admits that it mis-cited authority to the District Court to obtain the TRO, its new case law fairs no better. (Alvogen Ans. Br. at 28 n.9 ("Alvogen's brief in the underlying litigation mistakenly included the citation to an earlier decision in the same litigation); App. 70 (promising "to supplement the record" regarding the *McKesson* case.")). Alvogen's updated *Tempur-Pedic* cases are easily distinguishable because the mattresses were donated (not sold), the subsequent purchasers bought below market value from the intermediary, the terms of the sale were suspicious, the intermediary's corporate charter was revoked at the time, and the purchaser's own research revealed negative information about the intermediary. *Tempur-Pedic Int'l, Inc. v. Waste to Charity, Inc.*, 483 F. Supp. 2d 766, 775 (W.D. Ark. 2007). The case did not turn solely on the purchaser's knowledge of purported resale conditions. *Id.* Similarly, the vehicle transaction in *Cooper v. Pacific Automobile Insurance Co.*, 95 Nev. 798, 801, 603 P.2d 281, 283 (1979) occurred on a weekend, at night, in a bar, for cash, without any verification.

In the other *Tempur-Pedic* case, the court denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment, in part, because there were "genuine issues of fact exist, including but not limited to, whether Defendants were on notice of facts sufficient to preclude them from being good faith purchasers for value." *Tempur-Pedic Int'l, Inc. v. Waste to Charity, Inc.*, No. CIV.07-2015, 2008 WL 343417, at *5 (W.D. Ark. Feb. 6, 2008). This case does not hold that resale

conditions imposed on intermediaries create reversionary property interests in the manufacturer.

This case is more like the recent computer software cases where companies try to impose resale restraints on computer programs through "clickwrap" and "shrinkwrap." *See SoftMan Prod. Co., LLC v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1083-89 (C.D. Cal. 2001) (finding that software was subject to the UCC and because it was sold, not licensed, the restrictions on resale were not enforceable); *see also* Rothchild, 57 RUTGERS L. REV. at at 42-43 (collecting cases) ("Thus, if a software publisher sells software copies to a distributor, who is bound contractually to distribute the copies only to specified users or under specified circumstances, but who faithlessly distributes the copies in violation of the contract, the transaction nonetheless transfers good title to the acquirer.").

Ironically, Alvogen indicts the State for trying to "distract" the Court with the *McKesson* case. (Alvogen Ans. Br. at 17; Hikma Ans. Br. at 24). *McKesson* was Alvogen's primary authority in the District Court, even though it omitted the crucial fact that the Arkansas Supreme Court summarily reversed the lower court's TRO. (App. 177 (citing *McKesson*), 179, 182, 337-41, 364-65, 411(promising to supplement record about the trial judge's removal and appellate court's reversal), 412). It's not surprising that the drug manufacturers want to distance themselves from the outcome. But they make the incredible claim that the Arkansas Supreme Court reversed—*and allowed four executions to go forward*—only because it found the trial judge biased and not because the court found

the merits lacking. (Alvogen Ans. Br. at 17-18; Hikma Ans. Br. at 25). It is safe to assume that no court would allow executions to proceed while harboring doubts about the inmates' likelihood of success on the merits.

After *McKesson*, and since this lawsuit started, two more courts have rejected a drug manufacturer's nearly identical claims, including replevin. In *Fresenius Kabi USA, LLC v. State of Nebraska*, 2018 WL 3826681 (D. Neb. Aug. 10, 2018), a drug manufacturer filed an eleventh hour suit in Nebraska federal court on August 7, 2018 seeking to halt the use of its drugs in an execution scheduled for Tuesday, August 14, 2018. *Id.* at **1-2. Like the drug companies in this case, the manufacturer asserted that Nebraska improperly obtained the drugs from the manufacturer's distributors in violation of the manufacturer's policies and distribution agreements. *Id.* at *2. The manufacturer requested injunctive and declaratory relief and asserted six causes of action, including replevin. *Id.*

Notably, like Scott Dozier, the condemned inmate in Nebraska, Carey Dean Moore, "want[ed] his death sentence to be carried out, and he ha[d] directed his court-appointed lawyers to do nothing." *Id.* at *1. The federal court noted at the outset, that "[w]hile he is not a party, [Moore] is at the center of this lawsuit. Legal realism and common decency require that he not be forgotten …. There is absolutely no doubt of his competence or his guilt. I will not allow the Plaintiff to frustrate Mr. Moore and the laws of the State of Nebraska by Plaintiff's last-minute lawsuit." *Id.* So unlike the District Court in this case, the Nebraska federal court rightly realized that this type of

suit is not simply a "business dispute;" it has real-world consequences for Dozier as well as his victims' families.

The Nebraska federal court held that the drug manufacturer did not establish irreparable harm warranting a preliminary injunction. *Id.* at *3. Among other reasons, the court determined that the harm was far too speculative based on the manufacturer's "worries that if it is in any way associated with the execution, its reputation will be harmed because many health care professionals, investors, much of the public, and indeed even the European Union, detest the death penalty." *Id.* at *4. The manufacturer had taken steps to restrict its products' use, had written letters to governors, and indeed filed the much publicized lawsuit to avoid association with the death penalty. *Id.* Under these circumstances, "there is no reason for a rational actor to conclude that the Plaintiff will bear any responsibility for Mr. Moore's death, and thus, there is no rational basis to conclude that Plaintiff will suffer irreparable injury." *Id.*

On the balance of the hardships prong, the court reasoned that the "the harm to Plaintiff if I do nothing seems vanishingly small to none at all. On the other hand, the State of Nebraska will be greatly and irreparably harmed if I grant the Plaintiff the relief it seeks." *Id.* The court recognized that Nebraskans had recently passed a referendum to reinstate capital punishment by an overwhelming margin. *Id.* Therefore, the will of the people was plain and staying the execution would frustrate their will. *Id.*

The upcoming drug expiration dates were also significant. The court characterized as "laughable" the manufacturer's argument that a TRO would "merely

delay things." *Id.* at *5. The court observed that numerous lawsuits have been initiated around the country to pressure drug companies to refuse to supply the States as part of a campaign to undermine the States' ability to carry out executions. *Id.* "It would simply be impossible to implement the death penalty before that expiration date if I granted the temporary restraining order at this time given the administrative and legal hoops that would have to be jumped through." *Id.* at *4. In effect, the TRO would be "tantamount to nullifying Nebraska law." *Id.* at *5.

On the merits, which the drug manufacturers gloss over,[22] the court observed "to say the least, this is a very strange suit." *Id.* The court found that "[t]here is virtually no legal authority that is directly on point regarding any counts in the complaint." *Id.* The manufacturer was unlikely to prevail under either a "substantial probability" test or the lower "fair chance of prevailing" standard. *Id.* With regard to the replevin claim, the State of Nebraska successfully asserted legal arguments virtually identical to those made by the State here. (Reply App. 199-204).

Finally, the court held that the public interest weighs heavily in favor of the State. *Id.* The court could not "say with a straight face that the public interest in any way favors the Plaintiff. Sure, the Plaintiff just might, although it is very doubtful, suffer harm to its reputation. But the public interest is far broader than corporate self-interest. In this case, it has everything to do with the functioning of democracy." *Id.*

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[22] Alvogen Ans. Br. at 24 n.8.

The Eighth Circuit affirmed the district court in short order. *Fresenius Kabi USA, LLC v. Nebraska*, No. 18-2717, 2018 WL 3831007 (8th Cir. Aug. 13, 2018). The appellate court found "nothing inappropriate in the district court's recognition that a preliminary injunction would frustrate Nebraska's plans to execute Mr. Moore." *Id.* at *2. The court determined that the district court properly considered the merits and the speculative potential for irreparable harm. *Id.*

In total, three separate courts in two other jurisdictions have examined drug manufacturers' replevin and other similar claims and those courts have resoundingly found them wanting. Not a single court required discovery or additional record-making. *See Fresenius Kabi*, 2018 WL 3826681, at *2 n.4 (denying manufacturer's request for expedited discovery). All three courts have acknowledged the disruption and hardship caused by drug manufacturers' last-second injunctions. This new wave of asymmetric warfare against capital punishment delays justice, harms victims, and frustrates the will of Nevadans—a majority of whom support the death penalty. Riley Synder, *Nevada Voters Overwhelmingly Support the Death Penalty*, Nev. Independent (Jan. 20, 2017) (noting 66% of voters polled supported keeping the death penalty in place with 59% percent "strongly" supporting it).[23]

[23] *Available at* https://thenevadaindependent.com/article/independent-poll-nevada-voters-overwhelmingly-support-death-penalty.

E. The Drug Manufacturers Do Not Have a Claim Under NRS 41.700.

At the outset, the Court should note that Sandoz only pleads common law claims and wisely abandons the statutory claims alleged by Alvogen and Hikma. (Reply App. 232-50). As for Alvogen and Hikma, their statutory claims are without merit. First, drug manufacturers lack standing as they are not within the "zone of interests" that NRS 41.700 protects. That statute establishes civil liability for a "person" who "[k]nowingly and unlawfully serves, sells or otherwise furnishes a controlled substance to another person" or "[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." NRS 41.700(1). Damages are limited to those "caused as a result of the person using the controlled substance." *Id.*

NRS 41.700's legislative history unequivocally establishes that the statute was designed as a "social hosting" law to impose liability on adults that knowingly allow minors to consume alcohol or controlled substances. (Pet. at 33-36). There is not a single mention of capital punishment, lethal injection, or drug manufacturers. Still, Alvogen and Hikma would have this Court believe that Legislature enacted NRS 41.700 to grant pharmaceutical companies a cause of action to grind the death penalty to a halt without so much as a word. The Legislature does not make such monumental policy and legal changes through silence. It "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

Without any support in legislative history, Alvogen urges the Court to pretend it does not exist. (Alvogen Ans. Br. at 40-41). But this Court has "concluded that statutory interpretation necessarily begins with consideration of the legislative history to uncover any indications of legislative intent." *A.J. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 28, 394 P.3d 1209, 1213 (2017) (quoting 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 48:1, at 556 (7th ed. 2014)). "[T]he plain meaning rule ... is not to be used to thwart or distort the intent of [the Legislature] by excluding from consideration enlightening material from the legislative history." *Id.* (quotations omitted). "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *Id.* (quotations omitted).

Here, the Legislature's intent is clear from its committee hearings and debates. NRS 41.700 is a "social host" law meant to protect individuals hurt by minors that were plied with drugs and alcohol. If any uncertainty remains, it is evaporated by other related statutory provisions. For instance, NRS 453.377(6) provides that "[a] controlled substance may be dispensed by: a pharmacy in an institution of the Department of Corrections *to a person designated by the Director of the Department of Corrections to administer a lethal injection to a person who has been sentenced to death*." (emphasis added). Hikma misreads this statute as *only* permitting a pharmacist to dispense a controlled substance for lethal injection. (Hikma Ans. Br. at 54-55). The second half of the provision expressly allows

"a person designated by the [Director] to *administer a lethal injection to a person who has been sentenced to death*." (emphasis added).[24]

The Court should analyze the legislative materials and context even under Alvogen's view of statutory interpretation. If NRS 41.700 is ambiguous, this Court looks to legislative history to interpret an ambiguous statute. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). A statute is ambiguous when it is susceptible to two or more reasonable interpretations. *Coleman v. State*, 134 Nev. Adv. Op. 28, 416 P.3d 238, 240 (2018). Whether an ambiguity exists is itself a question of law. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013).

NRS 41.700 uses the words and phrases "another person," "otherwise furnishes," "serves," "allows another person to use," "premises," "person allowing the use or over which the person has control," and "damages caused as a result of the

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[24] Hikma also misapprehends other applicable statutes. *See* NRS 454.213(1)(k) ("a drug or medicine referred to in NRS 454.181 to 454.371, inclusive, may be possessed and administered by: Any person designated by the head of a correctional institution."); NRS 454.215 (setting forth when NDOC employees may dispense a dangerous drug); NRS 454.221(2)(f) (exempting from dangerous drug criminal penalties "[a] pharmacy in a correctional institution to a person designated by the Director of the Department of Corrections to administer a lethal injection to a person who has been sentenced to death."); NRS 454.201(1) (defining "dangerous drug" as "[a]ny drug which has been approved by the Food and Drug Administration for general distribution"); *Williams v. Hobbs*, 658 F.3d 842 (8th Cir. 2011) (holding that condemned inmates had no private right of action under FDCA or CSA to challenge alleged use of lethal injection drugs without FDA approval or a prescription. Congress vested the Executive Branch with complete discretion to enforce those statutes); *Durr v. Strickland*, 602 F.3d 788, 789 (6th Cir. 2010) (holding that condemned inmate had no private right of action under FDCA or CSA to challenge use of Midazolam "without a prescription from a licensed medical practitioner and distributed without authorization").

person using the controlled substance." If it were possible to read these terms as Alvogen proposes, then they would be ambiguous (because they could just as easily be limited to the social hosting context), and resort to legislative history would be appropriate and settle the matter. The State is not "serving" or "furnishing" controlled substances, the state prison is not the relevant "premises," Dozier is not being "allowed to use" (the State has been ordered), and the "persons" to whom NRS 41.700 refers are not large drug manufacturers. Hence, drug manufacturers like Alvogen and Hikma are not within the statute's zone of interest and they do not have standing to invoke it. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387-88 (2014).

Assuming, drug manufacturers could invoke NRS 41.700 (they can't), the State, its departments, officials, and contractors, are not liable under NRS 41.700 because NRS 0.039 excludes them from the definition of "person." NRS 0.039's definition is consistent with the "common usage" that "the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 64 (1989) (citing *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604, (1941); *United States v. Mine Workers*, 330 U.S. 258, 275 (1947)). "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Id.* at 71.

Alvogen endeavors to render NRS 0.039's definition superfluous by resorting to NRS 41.031, the State's sovereign immunity waiver statute. (Alvogen Ans. Br. at 42).

Alvogen argues that the State's limited immunity waiver has broken down all distinctions between the government and private individuals for liability purposes. But the inquiry into the persons that are potentially liable is not wholly separate from the "zone of interest" inquiry. The Legislature enacted NRS 41.700 to impose liability on social hosts, not State actors (acting in their official capacity) carrying out lethal injection. *See Will,* 491 U.S. at 64-67 (1989) (holding "that the State is not a person within the meaning of § 1983" and stating that the scope of a statutory cause of action and immunity are separate but that when "deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it.").

Sovereign immunity would be waived for NRS 41.700 purposes (if at all) *only if* the State was acting as a social host. This does not lead to an absurd result. (*Cf.* Alvogen Ans. Br. at 43). The State is only liable "in accordance with the same rules of law as are applied to civil actions against natural persons." NRS 41.031(1). Social hosts are the persons held responsible for violating NRS 41.700. The State has not waived its sovereign immunity for any activities related to lethal injection. "Nevada's waiver only extends to governmental actions 'like those' that private citizens could also be sued for, and the government is liable in the same way that a private actor would be." *Glover-Armont v. Cargile*, 134 Nev. Adv. Op. 49, 2018 WL 3491412, at *12 (Nev. App. 2018) (Tao, J., concurring in part and dissenting in part). There is no "private analogue" to capital punishment and sovereign immunity cannot be waived for it. *Id.* at **12-13.

Alvogen's interpretation of "person" against the backdrop of NRS 41.031 would render all government-specific definitions redundant. For example, there would be no need to provide a separate definition for "political subdivision" in NRS 41.0305 or a definition for "public officer" and "official" in NRS 41.0307 even though these provisions are in NRS Chapter 41 too. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 n.11 (2010) (explaining that it is appropriate to rely on a statute's structure in interpreting it).

Or, as Hikma emphasizes, NRS 453.113 would be unnecessary because it specifically states "'[p]erson' includes a government or a government subdivision or agency." (Hikma Ans. Br. at 44).[25] If Alvogen is correct, all statutes creating liability could refer generically to "persons" and the waiver of sovereign immunity would automatically include the State. This interpretation would render myriad statutes nugatory. *See Clark Cty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012) (stating that statutes should be read as a whole, in context, and so as not to render provisions nugatory).

[25] Hikma builds up, and then knocks down, an argument that the State did not make. Hikma wrongly asserts that the State applied NRS 0.039's definition of "person" to NRS Chapter 453, which has its own definition. (Hikma Ans. Br. at 44 & n.13). The State did not, though Alvogen did. (Alvogen Ans. Br. at 32 (discussing NRS Chapter 453 and citing NRS 0.039)).

F. NRS Chapter 453 Does Not Provide for Private Cause of Action and Cannot Provide Predicates for NRS 41.700.

Neither Alvogen nor Hikma contest that NRS Chapter 453 only provides for criminal penalties and not any express private right of action. NRS 453.331(2) ("A person who violates this section is guilty of a category C felony and shall be punished as provided in NRS 193.130."); NRS 453.421 ("A person who violates any provision of NRS 453.371 to 453.391, inclusive, is guilty of a category C felony and shall be punished as provided in NRS 193.130.").[26] In the absence of a private right of action, they cannot serve as the predicates for NRS 41.700.

Neville v. Eighth Judicial Dist. Court, 133 Nev. Adv. Op. 95, 406 P.3d 499, 504 (2017) is inapposite. It does not hold that statutes without a private cause of action can be the predicates for *other* statutes with a private enforcement mechanism. *Neville* holds that a statute allowing attorneys' fees demonstrates a legislative intent to create an implied cause of action. *Id.* 504. This is the exact illustration that Scalia and Garner give to demonstrate an implied claim for relief:

> Does this mean that a private remedy can never be implied by the text of the statute? Not never. Imagine, for example, a statute that does not explicitly create one but that says: "In any private suit for violation of this statute, the victorious plaintiff will be entitled to attorney's fees." But textual acknowledgement of the existence of a private action is a far cry

[26] *See* NRS 453.281(3) ("No liability is imposed by the provisions of NRS 453.011 to 453.552, inclusive, upon any authorized state, county or municipal officer engaged in the lawful performance of his or her duties.").

> from the mere facts that the statutory prohibition protects a particular class ….

See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 316 (2012).[27]

Undeterred, Hikma maintains that it can bring a private suit for an injunction against the State because otherwise "the State is free to violate the entire chapter …." (Hikma Ans. Br. at 43). Hikma disagrees with Alvogen and gleans a legislative intent to create an implied cause of action. (*Id.* at 50-51). Alvogen, at least, forthrightly acknowledges that it "is not aware of any legislative history that speaks" to any legislative intention to create a private remedy. (App. 170, 172, 274); *see Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958-59, 194 P.3d 96, 100-01 (2008) (setting forth factors to determine whether there is an implied cause of action).

To bolster its legislative revisionism, Hikma launches into a tangential parade of horribles premised on the notion that no one can enforce NRS Chapter 453 against the State even though the State is included within the definition of a "person" in NRS 453.113. (Hikma Ans. Br. at 44-53). Hikma scoffs at the idea that the State Board of Pharmacy and Attorney General can bring an action against other State actors to enjoin a violation of NRS Chapter 453, in addition to civil enforcement through district attorneys. NRS 453.276; NRS 453.553. Hikma also fails to consider that NRS 453.271

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[27] Alvogen's reliance on a lone statutory scheme (RICO) does not negate the State's more varied examples. (Alvogen Ans. Br. at 36 n.12; Pet. at 39-40).

authorizes the Investigation Division of the Department of Public Safety to enforce NRS Chapter 453.

Nothing prevents the Board, the Attorney General, or a district attorney from bringing a criminal or civil action for injunctive relief against another State actor who is violating NRS Chapter 453, subject to prosecutorial discretion (and immunities). *See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 146, 127 P.3d 1088, 1098 (2006) (discussing the Executive Branch's prosecutorial discretion). In this way, NRS Chapter 453 is no different than any other criminal law or civil enforcement regulation.

Like most statutes with criminal and civil penalties, NRS Chapter 453 identifies the entities that may enforce it. The specification of those entities indicates the exclusion of all others. *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 521 (2014) ("'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another."). Hikma reads the statutes backwards: it considers everyone an enforcer who is not expressly prohibited, even where the statute does not provide an express private cause of action. Hikma's reasoning would turn every criminal statute into a roving commission for private individuals to wield the law for their own special interests. *See Reading Law* at 316 (stating that implied private actions "take responsibility for suit out of the hands of public officials, who will presumably exercise their discretion in the public interest, and place it in the hands of those who would use it for private gain."). Nevada's laws are structured to bring justice to victims, not facilitate drug manufacturers' public relation campaigns.

III. CONCLUSION AND RELIEF SOUGHT

For these reasons, Petitioners respectfully request that the Court dissolve the District Court's stay of Dozier's execution under NRS 176.492 or, alternatively, issue a writ of mandamus or prohibition vacating the District Court's temporary restraining order.

Dated: August 27, 2018.

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VERIFICATION

I, Jordan T. Smith, declare as follows:

1. I am currently employed in the Office of the Attorney General as the deputy solicitor general. I am counsel for Petitioners named herein.

2. I verify that I have read the foregoing Reply in Support of Petition to Dissolve Stay of Execution Under NRS 176.492 and Petition for Writ of Mandamus or Prohibition; and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under the penalty of perjury of the laws of Nevada that the foregoing is true and correct.

Executed on this 27th day of August, 2018 in Las Vegas, Nevada.

/s/ Jordan T. Smith
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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) and the requirements of NRAP 21 because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Garamond. 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.

Dated: August 27, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REPLY IN SUPPORT OF PETITION TO DISSOLVE STAY OF EXECUTION UNDER NRS 176.492 AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on August 27, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that a courtesy copy was emailed to counsel for Respondents simultaneously with the filing of the foregoing.

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