Case No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA EX REL. DEPARTMENT OF TAXATION,

Petitioner,

v.

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,

NEVADA WELLNESS CENTER, LLC,

Real Party in Interest.

EMERGENCY PETITION FOR WRIT OF MANDAMUS OR PROHIBITION UNDER NRAP 21(a)(6)

IMMEDIATE ACTION REQUESTED BY MARCH 6, 2020

Respectfully submitted by:

AARON D. FORD
Nevada Attorney General
STEVE SHEVORSKI (Bar No. 8256)
Chief Litigation Counsel
KIEL B. IRELAND (Bar No. 15368C)
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for Petitioner
State of Nevada ex rel. Department of Taxation

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITY

ROUTING STATEMENT

The Nevada Supreme Court should retain this matter. It is true that "[p]retrial writ proceedings challenging discovery orders" are "presumptively assigned to the Court of Appeals." NEV. R. APP. P. 17(b)(13). However, this case raises a question of first impression and an issue of statewide importance regarding whether, for purposes of Nevada Rule of Civil Procedure 16.1(a)(1)(A)(ii), information stored on a nonparty former worker's personal cell phone is within the possession, custody or control of the government entity that had directed the worker.

ISSUE PRESENTED

Whether a litigant may compel the State to seize, duplicate and produce the contents of a nonparty's personal electronic device, where the nonparty was formerly engaged through a government contractor to do work for the State?

I. Introduction

This Court should reverse the district court's order compelling Petitioner Nevada Department of Taxation (the "Department"), a State agency, to seize, duplicate and produce the contents of the personal cell phones of eight nonparties that previously did work for the Department

through a third-party temp agency. The Department has no duty under Nevada Rule of Civil Procedure 16.1(a)(1)(A)(ii) to do so. The nonparty phone owners have never been subpoenaed and have never had a chance to object (or consent) to the seizure, search and production of the contents of their personal electronic devices.

The district court's order on a motion to compel was improper because the Department does not have possession, custody or control over the information that it has been ordered to obtain and distribute to the other litigants. That conclusion is consistent with federal caselaw on the same issue and would avoid the constitutional complications presented by the order below. Instead, the propounding party should have used the proper compulsory process available to it by subpoenaing the nonparties under Nevada Rule of Civil Procedure 45.

A separate and independent reason for reversing the order below is that the district court abused its discretion by applying the wrong standard. The order below is expressly based on a version of the Nevada Rules of Civil Procedure that is no longer operative. The current Rules are materially different, so the district court's analysis must be set aside.

Because the order below required the Department to "immediately" seize the cell phones and produce "all information" obtained from them, the Department seeks on an emergency basis a writ of prohibition or mandamus barring enforcement of the order. It also asks that this Court stay enforcement of the order while this petition is pending. This Court should grant the writ because the question of whether an employer (or party similarly situated to an employer) has possession, custody or control of information located on former workers' personal electronic devices is likely to recur in discovery disputes throughout Nevada. And by granting the writ, this Court could clarify the bounds of discovery and establish the proper procedure for obtaining relevant information in this context.

II. Facts supporting issuance of a writ

The Department oversaw the 2018 application process for retail recreational marijuana establishment licenses. App. 233, 244. An independent contractor engaged by the Department called Manpower contracted with eight individuals to score the 462 license applications the Department received. *Id.* at 1, 13, 254. The contract with Manpower provided that Manpower and its workers would not "be considered

employees, agents, or representatives of the State." *Id.* at 5. Along the same lines, the request for proposals attached to and incorporated in the Manpower contract clarified that Manpower's temporary workers "are not employees of the State." *Id.* at 17.

Plaintiff/Real Party in Interest Nevada Wellness Center, LLC was an unsuccessful applicant for one of those licenses. App. 246. Its first amended complaint names the Department, a former Department official and all other applicants as Defendants. *Id.* at 233. It generally alleges that the manner in which the Department applied its policies to Nevada Wellness's application was unlawful. *Id.* at 258-59. To that end, it contends that the Department misinterpreted or misapplied the applicable statutes and regulations. *Id.* at 259, 262. The first amended complaint also contends that the application procedures, as applied to Nevada Wellness, were unconstitutional. *Id.* at 260-61.

Nevada Wellness filed an emergency motion to require the preservation and/or production of electronically stored information kept on, among other things, cell phones. App. 114-15. In her report and recommendations, the discovery commissioner recommended that the Department "make all cell phones (personal – only if used for purposes –

and/or business) of each [nonparty] that assisted in the processing of applications and/or evaluated such license applications, available for copying in the 10 business days after notice of entry of this order." *Id.* at 116. She further recommended that "the State, in the presence of [Nevada Wellness's] computer expert, shall make 3 copies of the data from each cell phone." *Id.* at 116-17.

At the same time, the report and recommendations extended some protection to the Manpower nonparty former workers' privacy. It recommended that Nevada Wellness and its counsel not be permitted to access the phones' contents "until the State and [Nevada Wellness] agree[ ] to a procedure to protect non-discoverable confidential data or the Court allows such access by subsequent order." App. 117. And it recommended that "[i]n the event any such cell phones are not available, the State shall file a sworn declaration regarding any cell phone that is not available explaining why such cell phone is not available." *Id.*

In compliance with an order entered in a related, but separate, case, a Department cybercrime investigator contacted the nonparty former workers. App. 76-77. All of them either declined to return the investigator's voicemails or refused to turn over their personal phones.

Id. The Department filed a sworn declaration describing that effort. *Id.* at 75-77. The Department also sent a litigation-hold letter to Manpower. *Id.* at 64-65.

The Department objected to the discovery commissioner's report and recommendations. *See* App. 149. The district court overruled the objection without elaboration. *Id.* After that, Nevada Wellness moved to compel the seizure, duplication and production of the phones' contents. *Id.* at 154, 159.

The district court granted Nevada Wellness's motion to compel, over the Department's opposition, on February 5, 2020. App. 276-77. Notice of entry of the order was served five days later. *Id.* at 270. The court ordered that the Department "shall produce the cell phones, as identified in the [report and recommendations], and all information obtained from the cell phones immediately." *Id.* at 276. Unlike the report and recommendations, the order did not require any agreement between the parties before the contents of the phones would be produced. *See id.* at 276-77. Nor did it set out an alternative procedure in the case that the phones were unavailable. *See id.* At no time have the nonparty former

workers been served with a discovery request, or been provided an opportunity to object.[1]

Discovery in the underlying consolidated cases closes on March 13, 2020. Trial is set for April 20, 2020. The Department now petitions on an emergency basis for a writ of prohibition or mandamus barring enforcement of the district court's discovery order.[2]

III. Reasons for granting the petition

This Court should consider and grant this petition. A pretrial writ is appropriate because it is necessary to prevent irreparable harm. The

---

[1] Nevada Wellness also moved to compel the production of certain documents listed on one of the Department's privilege logs. App. 272-73. The district court denied without prejudice the motion to compel on that point, *id.* at 277, and it is not part of this appeal.

[2] The Department previously filed a separate writ petition in this Court on a similar issue. *See* Emergency Pet. for Writ of Mandamus, *State, Dep't of Taxation v. Eighth Judicial Dist. Court*, No. 79825 (Nev. filed Oct. 18, 2019). There, the district court ordered that the Department seize, duplicate and produce the contents of the personal cell phone of a current Department employee. *Id.* at 1-2. The underlying cases in that appeal and this one have since been consolidated. *See* Recorder's Tr. Joint Mot. to Consolidate 36-37, *ETW Mgmt. Grp., LLC v. State, Dep't of Taxation*, No. A-19-787004-B (8th Jud. Dist. Ct. Nev. Nov. 4, 2019). But this appeal involves a separate order, for the benefit of a distinct propounding party, involving different phone owners with a more attenuated legal relationship with the Department. Briefing remains pending in the other case.

order below is fatally flawed because the Department does not have possession, custody or control of the nonparty temporary workers' personal cell phones, which is a predicate for the Nevada Rule of Civil Procedure 16.1 disclosure obligations. Even if the Department did have possession, custody or control of the phones, the district court's order constituted an abuse of discretion because the court applied the wrong standard. And a temporary stay of the order and emergency relief are appropriate because the order requires that the Department seize, duplicate and produce the contents of the phones "immediately" and discovery will soon close.

A. This Court should consider this petition to prevent irreparable harm

1. This Court has discretion to grant a writ "to prevent improper discovery that would result in irreparable harm." *Okada v. Eighth Judicial Dist. Court*, 134 Nev. 6, 9 (2018). That is because, in those circumstances, the petitioner would have no "plain, speedy and adequate remedy" without the writ. *Id.* at 9 (quoting NEV. REV. STAT. 34.170).

Both a writ of mandamus, which corrects an abuse of discretion, and a writ of prohibition, which arrests proceedings held in excess of a lower court's jurisdiction, are appropriate remedies for improper

discovery orders. *See Okada*, 134 Nev. at 9 & n.3; *Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 171 n.5 (2011). While this Court generally reviews discovery orders for an abuse of discretion, it reviews de novo the district court's legal conclusions, including matters of statutory interpretation and the construction of the Nevada Rules of Civil Procedure. *See Cain v. Price*, 134 Nev. 193, 198 (2018); *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715 (2012).

2. The Department will suffer irreparable harm if the writ is not granted. The harm is the Department's being compelled to invade the privacy of nonparty private citizens, potentially in violation of the U.S. and Nevada Constitutions. Once the Department seizes the nonparties' phones, duplicates the contents and produces them, the damage is done – a post-production favorable decision from this Court would not unring the bell.

In that way this case is analogous to cases where this Court has considered petitions challenging discovery privilege decisions. *See, e.g.*, *Okada*, 134 Nev. at 9-10; *Valley Health Sys.*, 127 Nev. at 172. Just like in the privilege context, here "there is no adequate remedy at law that could restore the [private] nature of the information, because once such

information is disclosed, it is irretrievable." *See id.* The difference being, here the *seizure* of the information of nonparty private citizens' information by the Department is itself a harm – the *disclosure* of that information to Nevada Wellness simply compounds the harm.

3. Prudential factors also weigh in favor of considering the petition. *See Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. 445, 450 (2013) (discussing prudential factors that support granting a writ). This case raises an important issue of law: under what circumstances may an employer (or an entity similarly situated to an employer) be compelled to seize and produce the private phone of a former worker? The issue is urgent, as the Department has been ordered to "immediately" seize, duplicate and produce the phones' contents. It would promote judicial efficiency to consider this case because the issue is likely to recur as cell phones continue embedding themselves in workers' personal and professional lives. *See Riley v. California*, 573 U.S. 373, 385 (2014) (noting that cell phones are "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy").

Finally, strong public policy considerations support considering and granting the writ. Modern cell phones do not contain merely a few threads of a person's private life – they contain the entire quilt. *See Riley*, 573 U.S. at 394-95. The Department believes that such a startling invasion of privacy cannot be approved without the nonparty phone owner's being provided adequate notice and an opportunity to object. But if the Department is wrong, then this Court should be the one to announce this departure from ordinary rules of procedure and discovery.

B. The district court's order was improper because the Department does not have possession, custody or control of the nonparties' personal cell phones

Turning to the merits, the order below compelled the seizure, duplication and production of the phones' contents on the basis of Nevada Rule of Civil Procedure 16.1. App. 273.[3] The relevant clause of Rule 16.1 provides that a party must disclose:

---

[3] The order also cites Nevada Rule of Civil Procedure 34, which permits parties to demand that other parties produce certain documents. App. 273. But neither the order nor Nevada Wellness's underlying motion to compel identified a Rule 34 request for production of documents that called for the production of the cell phones' contents. Because a motion to compel must be premised on a "preexisting" discovery request and there was no preexisting Rule 34 request here, the only permissible basis for the district court's granting the motion to compel was Rule 16.1. *See Okada*, 134 Nev. at 12.

> [A] copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, including for impeachment or rebuttal, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the incident that gives rise to the lawsuit.

NEV. R. CIV. P. 16.1(a)(1)(A)(ii). Thus, a party is required to disclose information only if the information is within its "possession, custody or control." *Id.*; *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007). It is the propounding party's burden to show that a given document is within the responding party's possession, custody or control. *United States v. Int'l Union of Petrol. & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989).

The information on the nonparty former workers' phones is not within the possession, custody or control of the Department, so the district court erred in concluding that Rule 16.1 applied. Reversing the order below would follow the plain text of Rule 16.1, align with analogous federal-court rulings, avoid difficult constitutional issues and be consistent with the Manpower contract. And it would leave Nevada Wellness free to pursue the proper procedural course – a subpoena

directed at the nonparty former workers under Nevada Rule of Civil Procedure 45.

1. As an initial matter, the phones are outside the possession, custody or control of the Department under any traditional definition of that phrase. The Department has never had physical possession or custody of the phones. It did not provide the phones to the nonparty former workers. The nonparty former workers have never given the Department access to the phones or their data – despite the Department's previous request for them to do so.

The court below concluded that the Department has "control" over the personal phones of private citizens formerly engaged by a government contractor. *See* App. 273-74. "Control is defined as the legal right to obtain documents upon demand." *Int'l Union*, 870 F.2d at 1452. The problem with the district court's conclusion is that "a company does not possess or control the text messages from the personal phones of its employees and may not be compelled to disclose text messages from employees' personal phones." *Lalumiere v. Willow Springs Care, Inc.*, No. 1:16-cv-3133, 2017 WL 6943148, at *2 (E.D. Wash. Sept. 18, 2017); *accord*

Cotton v. Costco Wholesale Corp., No. 12-2731, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013).

Here, the relationship between the Department and the nonparty former workers is even more attenuated, since the Department never employed the former workers – the workers were engaged by Manpower, which was itself an independent contractor contracted by the Department. If even an employee-employer relationship is insufficient to constitute "control" of personal cell phones, then *a fortiori* the Department does not have "control" over personal cell phones belonging to private citizens it never employed.

2. Sound public policy reasons undergird the rule that an employer (or party similarly situated to an employer) does not have "control" over the personal cell phones of workers.

a. First of all, nonparties (by definition) do not have a stake in the matter being litigated, and for that reason courts limit discovery aimed at nonparties to "protect [them] from harassment, inconvenience, or disclosure of confidential documents." *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980). Indeed, a court may modify or quash a subpoena even for concededly relevant information if it finds

that the subpoena would impose an "undue burden" on the nonparty. *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683 (N.D. Cal. 2006); *see also* NEV. R. CIV. P. 45(c)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.").

Given the special protections extended to nonparties, it is critical that they are provided with adequate notice of the discovery demand and an opportunity to object. That is why Rule 45, which is the avenue for seeking discovery from nonparties, provides that a person subpoenaed to produce documents may object to the subpoena. NEV. R. CIV. P. 45(c)(2)(B). The objection automatically bars enforcement of the subpoena unless and until the court grants a motion to compel over the subpoenaed person's objection. *Id.*

Those principles apply with even greater force where the information sought is the contents of a personal cell phone. As discussed above, cell phones contain quantitatively more, and qualitatively more intimate and detailed, personal information than ordinary documents that might be subpoenaed. *See Riley*, 573 U.S. at 393. So even where a phone may contain discoverable information, it is important that the

phone owner receive adequate notice and have an opportunity to object in order for that person, the parties and the court to establish measures to prevent the disclosure of irrelevant personal information. *See Dart Indus.*, 649 F.2d at 649. Failure to do so would constitute an undue burden on the nonparty subject of the subpoena. *See Gonzalez*, 234 F.R.D. at 683.

By concluding that the nonparty former workers' phones are within the Department's control, the district court circumvented those protections. The order below compels the Department to seize the nonparties' phones, duplicate their contents in their entirety and then produce the information wholesale to Nevada Wellness. All without adequate notice to the nonparties and an opportunity for them to object.

b. The privacy concerns identified above become constitutional problems where, as here, the party ordered to seize the phones is a government agency. The U.S. Constitution recognizes that citizens have a special interest in protecting their privacy from government intrusion – that is why the Fourth Amendment applies only to government agents. *See Mooney v. State*, 134 Nev. 529, 534 (2018).

The order below foists into the State's (via the Department) hands information that could include a private citizen's political views, medical history, even his criminal activity – without a prior warrant or any kind of procedural protections. The result is the same government invasion of privacy that the Fourth Amendment is intended to protect against. *See Riley*, 573 U.S. at 403; *cf. In re 650 Fifth Ave. & Related Props.*, 830 F.3d 66, 98 (2d Cir. 2016) ("[D]iscovery or production obligations do not displace Fourth Amendment protections.").

The lack of procedural protections for the nonparty former workers is its own constitutional issue. Both the U.S. and Nevada Constitutions prohibit the deprivation of property or liberty without due process of law. *See* U.S. CONST. amends. V, XIV; NEV. CONST. art. 1, § 8(2). A citizen's phone is his property, and his privacy is a protected liberty interest. *Marsh v. Cty. of San Diego*, 680 F.3d 1148, 1153 (9th Cir. 2012). To the extent that the district court's order requires the Department to seize private citizens' phones and access the phones' contents, without the "key elements" of due process – notice and hearing – it presents serious

constitutional questions. *See Kochendorfer v. Bd. of Cty. Comm'rs*, 93 Nev. 419, 424 (1977).[4]

c. Those constitutional problems do not just make the order below imprudent. They also call into doubt the correctness of the district court's interpretation of Rule 16.1. "Wherever possible," courts should interpret laws "so as to avoid conflicts with the federal or state constitutions." *Mangarella v. State*, 117 Nev. 130, 134-35 (2001); *see also Ortiz v. Fibreboard Corp.*, 572 U.S. 815, 845-46 (adopting a construction of Federal Rule of Civil Procedure 23(b)(1)(B) because, among other reasons, it would avoid "serious constitutional concerns"). Interpreting Rule 16.1 such that the nonparty former workers' phones are not within the Department's "possession, custody or control" would avoid the constitutional questions presented by the order below.

3. Both of the arguments Nevada Wellness raised below are without merit.

---

[4] In an attempt to voluntarily obtain the phones, the Department did notify the nonparty former workers that their personal cell phones were being sought. App. 76-77. But that probably did not constitute adequate notice for due process purposes – the notification was by voicemail, not in writing; it did not contain the reasoning for the court's order; and it did not inform the nonparty former workers that they had the right to object. *See Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

a. The first argument was that this Court's decision in *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. 142 (2018), compelled the conclusion that the Department must disclose the contents of the nonparty former workers' personal phones. App. 157. In *Comstock* this Court held that the Nevada Public Records Act ("NPRA"), NEV. REV. STAT. 239.001-.340, "does not categorically exempt public records maintained on private devices or servers from disclosure." 134 Nev. at 149. Thus, communications stored on certain county commissioners' personal phones could potentially have been "public records" subject to disclosure under the NPRA. *Id.* at 148-49.

Even assuming that NPRA principles apply to civil discovery, *Comstock* has no bearing on this case. The Court's decision turned on the fact that "the commissioners themselves [we]re governmental entities" for NPRA purposes. *Comstock*, 134 Nev. at 148. Of course, the commissioners had possession, custody or control of their own phones, just as the nonparty former workers would be found to have possession, custody or control of their own phones if Nevada Wellness subpoenaed them directly. But *Comstock* does not purport to hold that a government has possession, custody or control of its employees' personal phones – let

alone of the personal phones of private citizens formerly engaged by a government contractor. *See id.* at 148-49.

b. The second argument was that the contract between Manpower and the Department gives the Department legal control over the personal phones of Manpower workers. App. 96-97. That argument relies on paragraph 9 of the Manpower contract, which requires Manpower to "keep and maintain under generally accepted accounting principles (GAAP) full, true and complete records, contracts, books, and documents" as are necessary to ensure compliance with State and federal law. App. 3. It further provides in relevant part:

> [Manpower] agrees that the relevant books, records (written, electronic, computer related or otherwise), including, without limitation, relevant accounting procedures and practices of [Manpower] or its subcontractors, financial statements and supporting documentation, and documentation related to the work product shall be subject, at any reasonable time, to inspection, examination, review, audit, and copying at any office or location of [Manpower] where such records may be found.

Id.

Those provisions do not give the Department the right or obligation to seize Manpower's former temporary workers' personal cell phones.

Most importantly, the contract is between Manpower and the State – Manpower's former workers are not party to it. For that reason the contract neither gives the Department the right to seize the former workers' personal phones nor obligates the former workers to turn over the phones to the Department. In addition, the contract limits the Department to reviewing the books and records kept at Manpower's "office or location"; not the books or records kept on personal electronic devices of former temporary workers. Finally, reading the two provisions together shows that the books and records referred to are *financial* books and records, kept in accordance with GAAP; they are not intended to give the Department access to stray comments about work that Manpower former temporary workers may have on their personal phones.

In fact, to the extent that the Manpower contract is relevant, it cuts against the case that the phones are within the Department's possession, custody or control. Both the Manpower contract and the attached request for proposals clarified that Manpower workers were not employees or agents of the State. App. 5, 17. That again reflects the attenuated relationship between the Department and the nonparty former workers, and reinforces the conclusion that the Department has never had legal

control over the contents of the nonparty former workers' personal phones.

4. All of that is not to say that Nevada Wellness should be categorically barred from obtaining discoverable information on the phones (if there is any). But Nevada Wellness must request the phones' contents in a manner that gives the nonparty former workers adequate notice and the opportunity to object, and in a way that does not commandeer the Department to arguably violate the nonparty former workers' constitutional rights.

Rule 45 provides the proper procedure for doing so. Under Rule 45, a party like Nevada Wellness is entitled to issue a subpoena commanding a nonparty to "produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control." NEV. R. CIV. P. 45(a)(1)(A)(iii); *see also id.* R. 34(c) (providing that Rule 45 subpoenas can be directed to nonparties). The nonparty receives notice because he must be served with the subpoena. NEV. R. CIV. P. 45(b). And the nonparty also has the right to object to protect his rights and prevent an undue burden from being imposed on him. *Id.* NEV. R. CIV. P. 45(c)(2)(B).

A Rule 45 subpoena would have not only avoided the procedural and constitutional deficiencies presented here. It also would have mooted the issue being litigated because there can be little doubt that the nonparty former workers have possession, custody or control of their own phones. Accordingly, Nevada Wellness should have subpoenaed the nonparty former workers – an action it is still free to take at any time. *See Shcherbakovskiy*, 490 F.3d at 138 (explaining that a responding party "need not" seek documents from third parties "if compulsory process against the third parties is available to the [propounding] party").

C. The district court's order was improper because the phones' contents are not within the scope of Rule 16.1

1. The order below should be reversed for the independent reason that the district court applied the wrong standard, which in and of itself constitutes an abuse of discretion. *In re Halverson*, 123 Nev. 493, 510 (2007); *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (2014) (explaining that applying the wrong legal standard is "a per se abuse of discretion"). Specifically, it based its order on a version of Rule 16.1 that is no longer operative.

The order below stated that:

> [Rule] 16.1(a)(1)(B) requires that a party 'must, without awaiting a discovery request, provide to

> other parties: (B) A copy of, or a description by category and location of, all documents, data compilations, tangible things that [are] in the possession, custody, or control of the party and which are discoverable under [Rule] 26(b).

App. 273. Since March 1, 2019 – about ten months before Nevada Wellness's motion to compel – Rule 16.1(a)(1)(B) has set out the list of "Proceedings Exempt From Initial Disclosure." Nev. R. Civ. P. 16.1(a)(1)(B); *see Amendments to the Nevada Rules of Civil Procedure*, Sup. Ct. of Nev., https://bit.ly/2T7Iz2b (last visited Feb. 18, 2020). Not the disclosure requirement that the order below quoted. The language quoted by the order was, instead, the old, no longer operative version of Rule 16.1(a)(1)(B). *See* NEV. R. CIV. P. 16.1(a)(1)(B) (2017) (repealed 2019).

The proper standard is materially different from the standard the district court applied. Rule 16.1(a)(1)(A)(ii), which is quoted in full in Part III.B above, no longer requires disclosure of all discoverable documents. Instead, assuming that the information is within a party's possession, custody or control, it requires disclosure only of (1) documents that the disclosing party "may use to support its claims or defenses," and

of (2) "record[s], report[s], or witness statement[s]" that "concern[ ] the incident that g[a]ve rise to the lawsuit." NEV. R. CIV. P. 16.1(a)(1)(A)(ii).

Nevada Wellness never raised Rule 16.1(a)(1)(A)(ii) in its meet and confer efforts or in its motion to compel. *See* NEV. R. CIV. P. 37(a)(1) (requiring meet and confer efforts before filing a motion to compel). And the district court never assessed whether the contents of the nonparty former workers' phones fell within one of those two categories. As a result, the district court's order constituted an abuse of discretion. *See Halverson*, 123 Nev. at 510.

2. Ordinarily, when a lower court applies the wrong standard it is appropriate to vacate and remand the order so that the lower court can consider the question in the first instance using the correct standard. *See, e.g.*, *Bergmann v. Boyce*, 109 Nev. 670, 682 (1993), *superseded by statute on other grounds by* NEV. REV. STAT. 18.005(17); *Arc of Cal. v. Douglas*, 757 F.3d 975, 994 (9th Cir. 2014). But due to the tight timeline in this case, this Court may prefer to decide whether the phone contents are subject to disclosure under Rule 16.1(a)(1)(A)(ii).

As explained in Part III.B, the contents are not within the Department's possession, custody and control, so the Department is not

obligated to disclose them under Rule 16.1(a)(1)(A)(ii). But putting aside that fatal flaw for now, the contents would still not be subject to disclosure because they do not fall into either category of obligatory disclosures in the Rule.

They are not in the first category because the Department will not use any information on the phones to support is claims or defenses. *See* NEV. R. CIV. P. 16.1(a)(1)(A)(ii). And they are not in the second category because they are not "record[s], report[s], or witness statement[s] . . . concerning the incident that g[a]ve rise to the lawsuit." *See id.*

The comments to the 2019 amendment – through which Rule 16.1(a)(1)(A)(ii) was added to the Rules – clarifies that the types of records and reports covered are "incident reports, records, logs and summaries, maintenance records, former repair and inspection records and receipts, sweep logs, and any written summaries of such documents." NEV. R. CIV. P. 16.1 advisory committee's note to 2019 amendment (subsection (a)). While that list is not exhaustive, it shows that the advisory committee intended that the Rule reach official records and reports related to incidents that resulted in personal injuries, like slip and falls and product defects. *See id.* There is no support for the

proposition that unofficial communications related to administrative matters held on third-party cell phones are within the ambit of Rule 16.1(a)(1)(A)(ii). Thus, the phones' contents are not in either category of obligatory disclosures under that Rule.

D. A temporary stay and emergency relief are appropriate

1. Nevada Rule of Appellate Procedure 8(a)(2) provides that this Court can stay enforcement of an order pending appeal. For the convenience of the parties and this Court, the Department is moving for a stay pending appeal by way of this section of the petition, instead of filing a separate motion. The Department already moved for a stay pending appeal in district court; the lower court denied that motion on February 20, 2020.

This Court considers four factors in determining whether a stay is warranted: (1) "whether the object of the appeal will be defeated if the stay is denied," (2) the irreparable harm that the moving party will suffer, (3) the irreparable harm that the nonmoving party will suffer and (4) whether the moving party is likely to succeed on the merits in the appeal. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (2004). No one fact carries more weight than the others. *Id.* While the Department need not

prove all four factors to be entitled to the relief sought, in this case all four factors do weigh in favor of granting the stay.

Most importantly, the object of the writ will be defeated if a stay is not granted. The district court ordered the Department to "immediately" seize the phones and produce "all information" obtained from them. App. 276. As a result, without a stay the Department will either have to risk violating the order or suffer the harm that this petition is intended to prevent. Once that occurs, it is possible that this petition would be moot, essentially insulating the order below from any appeal at any point.

The Department has already explained how the district court's order will cause irreparable harm. *See infra* Part III.A. Because the order requires the Department to act immediately, it is almost certain that that harm would occur before this Court could rule on the petition in the absence of a stay.

By contrast, Nevada Wellness would not suffer any irreparable harm if a stay is granted. This Court has recognized that "a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm." *Mikohn Gaming*, 120 Nev. at 253. Furthermore, the Department is seeking writ relief on an emergency basis to help ensure

that a decision is rendered before discovery closes in the underlying case. And Nevada Wellness could prevent any potential irreparable harm by simply subpoenaing the nonparty former workers, which would be the procedurally proper mechanism for obtaining discoverable information anyway.

Finally, for the reasons discussed in Parts III.B and C, the Department is likely to succeed on the merits. But even if it were not, it does not need to show a probability of success on the merits – a "substantial case on the merits" is enough if there is a "serious legal question" and the balance of equities weigh heavily in favor of granting the stay. *Fritz Hansen A/S v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659 (2000). The Department has presented a substantial case on the merits in connection with a serious legal question – the State's obligation to seize, duplicate and produce the contents of personal cell phones owned by private citizens who previously worked for a government contractor. And because the Department will be harmed substantially if a stay is denied while a grant will not injure Nevada Wellness, the balance of equities weigh heavily in favor of granting a stay.

2. This Court should grant emergency relief to avoid irreparable harm that would occur within 14 days. *See* NEV. R. APP. P. 27(e); *see also id.* NEV. R. APP. P. 21(a)(6) (permitting emergency petitions). A delay in granting the petition would harm the Department because it is currently under an order to immediately seize the phones. On the flipside, if this Court is going to ultimately deny the petition, doing so earlier would be preferable because discovery closes in three weeks, on March 13. The Department has complied with the requirements of Nevada Rule of Appellate Procedure 27(e), as detailed in the accompanying "NRAP 27(e) Certificate." The grounds for this petition were presented to the district court. *See generally* App. 161-71.

IV. Conclusion

A writ is appropriate because this petition presents an important question with serious consequences for discovery across the State and startling implications for this case. Allowing the order below to stand would subject nonparty private citizens to a substantial invasion of their privacy rights without formal notice or an opportunity to object. For those reasons, the Department respectfully requests that this Court relieve it from the obligation of seizing the nonparty former workers'

personal cell phones, duplicating the phones' contents and distributing them to other litigants. Because the order compels the immediate seizure and production of the phones' contents, and because of the tight timeline of this case, the Department also asks that this Court stay enforcement of the order and decide the merits of this petition on an emergency basis.

Respectfully submitted February 21, 2020.

AARON D. FORD
Attorney General

By: */s/ Steve Shevorski*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel

VERIFICATION

I, Kiel B. Ireland, declare as follows:

1. I am currently employed in the Office of the Attorney General as a deputy attorney general. I am counsel for the Petitioner named herein.

2. I verify that I have read the foregoing Emergency Petition 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 penalty of perjury under the law of Nevada that the foregoing is true and corrected.

Executed this 21st day of February, 2020, in Las Vegas, Nevada.

By: */s/ Kiel B. Ireland*
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General

NRAP 27(e) CERTIFICATE

I, Kiel B. Ireland, declare as follows:

1. I am currently employed in the Office of the Attorney General as a deputy attorney general. I am counsel for the Petitioner named herein.

2. The telephone numbers and office addresses of the attorneys for the parties are as follows:

Department of Taxation
Steve Shevorski, Esq.
Phone: 702-486-3783
Kiel B. Ireland, Esq.
Phone: 702-486-3795
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101

Nevada Wellness Center, LLC
Theodore Parker, III, Esq.
Phone: 702-868-8000
Parker, Nelson & Associates, Chtd.
2460 Professional Court, Ste. 200
Las Vegas, NV 89128

3. Emergency relief is proper because the district court has entered an order compelling Petitioner Department of Taxation (the "Department") to "immediately" seize the personal phones of private citizens, duplicate the phones' contents and produce the contents to other litigants. Thus, if this Court does not consider this petition on an emergency basis, either the Department will have to comply with the

order – causing irreparable harm and defeating the purpose of the appeal – or it will risk being in violation of the order.

4. Furthermore, discovery in the trial-court case closes on March 13, 2020. Unless this Court determines this petition on an emergency basis, its decision will likely issue after the close of discovery. That will prevent the parties from adjusting their discovery in light of this Court's decision. And if this Court denies the petition after the close of discovery, Nevada Wellness may be unable to obtain the discovery compelled by the court below.

5. On February 21, 2020 my colleague Steve Shevorski met in person with counsel for Nevada Wellness. Mr. Shevorski informed him that this office would soon be filing this petition. After that, I emailed Nevada Wellness's counsel this petition. Once we receive a file-stamped copy from this Court, this office will serve that copy on Nevada Wellness's counsel by U.S. mail and email.

6. Also on February 21, 2020, I contacted the Office of the Clerk of the Supreme Court of Nevada to notify it that the Department would

be filing this motion, in accordance with Nevada Rule of Appellate Procedure 27(e)(1).

Executed this 21st day of February, 2020, in Las Vegas, Nevada.

By: */s/ Kiel B. Ireland*
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. font and Century Schoolbook; or

□ This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

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

☒ Proportionately spaced, has a typeface of 14 points or more and contains 6,090 words; or

□ Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

□ Does not exceed ___ pages.

. . .

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of February, 2020.

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 21st day of February, 2020.

I certify that some of the participants in the case are not currently registered electronic filing system users. For those parties service was made by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada to the following unregistered participants:

Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

Honorable Elizabeth Gonzalez
Regional Justice Center
Department 11
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

Theodore Parker, III, Esq.
Mahogany Turfley, Esq.
Parker, Nelson & Associates, Chtd.
2460 Professional Ct., Ste. 200
Las Vegas, Nevada 89128
Attorneys for Real Party in Interest Nevada Wellness Center, LLC

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
Office of the Attorney General