IN THE SUPREME COURT OF THE STATE OF NEVADA

TEVA PHARMACEUTICALS USA, INC., MCKESSON CORPORATION, AMERISOURCEBERGEN DRUG CORPORATION, CARDINAL HEALTH, INC., CARDINAL HEALTH 6 INC., CARDINAL HEALTH TECHNOLOGIES LLC, CARDINAL HEALTH 108 LLC d/b/a METRO MEDICAL SUPPLY, CEPHALON, INC., ENDO HEALTH SOLUTIONS INC., ENDO PHARMACEUTICALS INC., ALLERGAN USA, INC., ALLERGAN FINANCE, LLC f/k/a ACTAVIS, INC. f/k/a WATSON PHARMACEUTICALS, INC., WATSON LABORATORIES, INC., ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC., ACTAVIS LLC, and MALLINCKRODT, LLC,

Petitioners,

v.

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Washoe, and the HONORABLE BARRY L. BRESLOW, DISTRICT JUDGE,

Respondents,

and

CITY OF RENO,

Real Party in Interest.

Supreme Court Case No.

District Court Case No. CV18-01895

PETITION FOR WRIT OF MANDAMUS

PAT LUNDVALL (NSBN 3761)
AMANDA C. YEN (NSBN 9726)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
plundvall@mcdonaldcarano.com
ayen@mcdonaldcarano.com

JOHN D. LOMBARDO
JAKE R. MILLER
ARNOLD & PORTER KAYE SCHOLER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Fax: (213) 243-4199
john.lombardo@arnoldporter.com
jake.miller@arnoldporter.com
Pro Hac Vice

Attorneys for Petitioners
Endo Pharmaceuticals Inc. and Endo Health Solutions Inc.

[Additional Counsel for Petitioners Identified In Signature Pages]

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 and must be disclosed:

Petitioners Endo Pharmaceuticals Inc. and Endo Health Solutions Inc. are indirect subsidiaries of Endo International plc, a publicly held company that is not a party to this action, and that indirectly owns more than 10% of the stock of Endo Health Solutions Inc. and Endo Pharmaceuticals Inc.

The following law firms had partners or associates who appeared on behalf of Petitioners and are expected to appear on their behalf in this Court:

Pat Lundvall and Amanda C. Yen of McDonald Carano LLP, and John D. Lombardo and Jake R. Miller of Arnold & Porter Kaye Scholer LLP, for Endo Pharmaceuticals Inc. and Endo Health Solutions Inc.

Additionally, the following parties and their counsel of record who joined Petitioners' position in the district court and who join in this petition include: Philip M. Hymanson of Hymanson & Hymanson PLLC, and Collie F. James, IV of Morgan, Lewis & Bockius LLP, for Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.; Steven E. Guinn of Laxalt & Nomura, Ltd., and Rocky Tsai of Ropes & Gray LLP, for Mallinckrodt LLC; Max E. Corrick, II of Olson Cannon Gormley & Stoberski for Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson

Pharmaceuticals, Inc. and Allergan USA, Inc.; Steve Morris and Rosa Solis-Rainey of Morris Law Group, and Nathan Shafroth of Covington & Burling LLP, for McKesson Corporation; Lawrence Semenza, III, Christopher Kircher, and Jarrod Rickard of Semenza Kircher Rickard, and Rachel Weil and Steven Boranian of Reed Smith LLP, for AmerisourceBergen Drug Corporation; and Daniel Polsenberg, Joel Henriod, J. Christopher Jorgensen, and Abraham Smith of Lewis Roca Rothgerber Christie LLP, and Suzanne M. Salgado and Joseph S. Bushur of Williams & Connolly LLP, for Cardinal Health, Inc., Cardinal Health 6 Inc., Cardinal Health Technologies LLC, and Cardinal Health 108 LLC d/b/a Metro Medical Supply.

These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

RESPECTFULLY SUBMITTED this 1st day of May, 2020.

McDONALD CARANO LLP

By: */s/Pat Lundvall*

PAT LUNDVALL (NSBN 3761)
AMANDA C. YEN (NSBN 9726)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
plundvall@mcdonaldcarano.com
ayen@mcdonaldcarano.com

John D. Lombardo
Jake R. Miller
ARNOLD & PORTER
KAYE SCHOLER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Fax: (213) 243-4199
john.lombardo@arnoldporter.com
jake.miller@arnoldporter.com
Pro Hac Vice

[Additional Counsel for Petitioners Identified In Signature Pages]

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NRAP 21(a)(3) Routing Statement

The Nevada Supreme Court respectfully should retain this writ proceeding pursuant to NRAP 17(a)(9) (cases originating in business court) and (12) (matter raising as a principal issue a question of statewide public importance).

NRAP 21(a)(3) Statement of Relief Sought

Petitioners respectfully request a writ of mandamus compelling the district court to dismiss this lawsuit in its entirety as *ultra vires* under Dillon's Rule.

NRAP 21(a)(3) Statement of Issue Presented

Whether Dillon's Rule bars political subdivisions from bringing multiple, separate lawsuits seeking to address a matter of statewide concern, particularly when the State has filed its own similar lawsuit seeking similar statewide relief.

I. INTRODUCTION

This case presents a recurring and important legal question of statewide concern warranting this Court's immediate review.

The City of Reno (the "City") brought this lawsuit against the undersigned manufacturers and distributors of lawful, FDA-approved prescription opioid medications, seeking to recover millions of dollars in governmental expenditures the City allegedly incurred to address opioid abuse. This case is one of many opioid lawsuits brought by Nevada cities and counties asserting the same claims against largely the same defendants. In July 2019, this Court ordered full briefing on a writ petition in the opioid lawsuit brought by Clark County, which presented a threshold legal question common to all these cases: whether, under Nevada law, political subdivisions lack authority to bring lawsuits like this one involving matters of statewide rather than local concern. (*See* XVI PA02050-02052.)[1]

Before this Court could resolve that writ petition, the Clark County case was removed to federal court by a party not named here, and the petition was dismissed without prejudice. (*See* XVIII PA02588-02591.) The present case gives this Court the opportunity to consider this threshold, dispositive issue anew.

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[1] Petitioners will use this format for citations to the Appendix, which should be understood as follows: "XVI" identifies the volume number of the Appendix; "PA" refers to Petitioners' Appendix; and "02050-02052" identifies the page numbers of the Appendix. To the extent a document in Petitioners' Appendix includes line numbers, line numbers will be identified after a colon, *e.g.*, 02050:1-2.

Under a longstanding legal doctrine known as Dillon's Rule, political subdivisions possess only those powers specifically delineated in NRS 268.001—"and no others." NRS 268.001(3). The City did not and cannot identify any enumerated grant of power authorizing this lawsuit. Nevertheless, the district court held that the filing of lawsuits is categorically exempt from Dillon's Rule, and thus the City can bring this lawsuit—and any others—without legislative authorization. The district court declared that Dillon's Rule limits only the power to pass "local ordinances" or undertake "other non-litigious activities," but does not limit a city or county's power to "file[] a lawsuit." (XXI PA03039:4-11, 03040:17-21.) That ruling contradicts the longstanding common-law approach to Dillon's Rule and the plain meaning of NRS 268.001. And it would result in duplicative lawsuits by cities and counties across Nevada, even when, as here, the State brings its own suit to address the same alleged conduct targeted by the cities' and counties' lawsuits.

The district court alternatively held that this lawsuit falls within the statutory exception to Dillon's Rule for "matters of local concern." NRS 268.003. But the statute expressly defines a "matter of local concern," and this case does not fit the bill. As the City itself alleges, this lawsuit seeks to address "a widespread problem in the State of Nevada"—one with "far-reaching financial, social, and deadly consequences . . . throughout Nevada" and "across our country." (II PA00169:23-25, 00171:5-7, 00171:23-25.) That is why the State filed its own opioid lawsuit

seeking statewide relief and previously urged the City not to pursue these issues in piecemeal fashion. This Court's immediate review is needed to clarify that a matter of *statewide* concern is not a matter of *local* concern exempt from Dillon's Rule under NRS 268.003.

To promote judicial economy by resolving whether the Defendants' alleged conduct will be litigated in dozens of cases brought by cities and counties, or resolved in a single suit by the State, the Court, respectfully, should grant the writ.

II. FACTS NECESSARY TO UNDERSTAND THE RELIEF SOUGHT

A. The Nevada Opioid Lawsuits

This case is one of multiple lawsuits brought by Nevada cities and counties against the undersigned manufacturers and distributors of certain FDA-approved prescription opioid medications. In December 2017, Clark County filed the first such action. (*See* I PA00001-00050.) Since then, four other political subdivisions, all represented by the same private law firm, have filed separate but materially identical suits.[2] The private law firm has indicated that it expects to file additional suits on behalf of at least eight more political subdivisions across Nevada.[3]

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[2] *See* II PA00168-00225 (Reno); XVI PA02053-02144 (Henderson); XVI PA02145-02235 (Las Vegas); XVII PA02236-02326 (North Las Vegas).

[3] *See* Eglet Adams, *The Case Against Opioid Manufacturers*, https://www.egletlaw.com/complaint-against-opioid-manufacturers (listing "Counties and Cities represented by Eglet Adams") (last visited Apr. 30, 2020).

On September 18, 2018, the City brought this action asserting various tort claims against the undersigned Manufacturer and Distributor Defendants. (II PA00110-00166.) Relevant here, the City alleges that the Manufacturer Defendants "falsely portray[ed] both the risks of addiction and abuse and the safety and benefits of long-term use" of their opioid medications. (II PA00170:6-9.) The City alleges that the Distributor Defendants "unlawfully fill[ed] suspicious orders [of opioid medications] . . . which [they] knew or should have known were likely to be . . . diverted . . . ." (II PA00199:23-26.)

The City alleges that opioid abuse is "a widespread problem in the State of Nevada" and "has had far-reaching financial, social, and deadly consequences . . . throughout Nevada" and "across our country." (II PA00169:23-25, 00171:5-7, 00171:23-25; *see also, e.g.*, II PA00169:21-22, 00171:3-4, 00171:10-12, 00171:16-17, 00172:7-24 (similar allegations of statewide and nationwide impact).) The City further asserts that the Defendants' alleged conduct—marketing or distribution of prescription opioid medications—was nationwide in scope, with no unique nexus to the City or any other individual city or county.[4] (*See* II PA00170:6-9, 00171:5-7, 00188:7-17.) And the City acknowledges that the marketing and distribution of

[4] The City asserts no factual allegations that the Distributor Defendants—who neither promote opioid medications to doctors nor provide them to patients—misled doctors or the public about the risks or effectiveness of opioid medications.

opioid medications is comprehensively regulated by federal agencies. (*See, e.g.*, II PA00186:14-17, 00186:23-27, 00195:17-23.)

In addition to seeking millions of dollars in compensatory and punitive damages, the City seeks statewide "injunctive relief" to "stop . . . promotion and marketing of opioids for inappropriate uses in Nevada, currently and in the future." (II PA00223:19-24, 00224:22-25.)

All of the suits brought by other Nevada cities and counties similarly allege that opioid abuse is a matter of statewide concern throughout Nevada. For instance, every city and county's complaint states, nearly verbatim: "In Nevada, the opioid epidemic is widespread, not localized to any particular city or county." (XVII PA02371:1-2 (Clark County); *accord* XVI PA02095:24-25 ("In Nevada, the opioid epidemic is widespread, not localized to only one particular city or county.") (Henderson); XVI PA02187:4-5 (same) (Las Vegas); XVII PA02278:4-5 (same) (North Las Vegas).)

Separately, in June 2019, the State of Nevada, also represented by the same private law firm here, brought its own opioid lawsuit alleging the same conduct by largely the same defendants. (*See* XI PA01286-XII PA01535.) Like all of the individual cities and counties, the State alleges that "widespread use of" opioid medications "has resulted in a national epidemic" which "Nevada has been greatly

impacted by," and seeks statewide injunctive relief. (XIII PA01546:8-9, 01546:16-17; XIV PA01797:24-28.)

B. The District Court's Decision

The Defendants moved to dismiss on several grounds, including that this action is *ultra vires* under Dillon's Rule. (*See* III PA00237:2-00239:11; VIII PA00966:20-00976:4; XVIII PA02568:19-02569:5; III PA00300:20-00301:2; X PA01231:5-01234:2.) The district court granted in part and denied in part the motion. (*See* XXI PA03035-03051.) As relevant here, the district court held that Dillon's Rule was not a bar to this action for two reasons.

First, while recognizing that Dillon's Rule "defin[es] and limit[s] the powers of local governments," the district court announced a bright-line rule that "Dillon's Rule . . . does not limit[] the City's ability to litigate." (XXI PA03039:2-3, 03041:5-7.) According to the district court, Dillon's Rule applies only when a city or county has taken "non-litigious" actions like "pass[ing] an ordinance or adopt[ing] a regulation," or "attempt[ing] to traverse a state law or mak[ing] Nevada responsible for the [subdivision's] obligations"—but not when a city or county has "filed a lawsuit." (XXI PA03039:8-11, 03040:18-21 (stating that Dillon's Rule does not "limit a City's ability to litigate as opposed to the passage of local ordinances, signing of contracts, and the conduct of other non-litigious activities in which a city might participate.").)

Second, the district court alternatively held that the City's lawsuit falls within an exception to Dillon's Rule under NRS 268.001(3) and (6), which grants authority to cities to address "matters of local concern." The district court noted that opioid abuse "is not merely a matter of local concern because it has a significant impact or effect on areas located in other cities or counties," and because "the manufacture, distribution, sales, and the prescribing and dispensing of opioids is subject to substantial regulation by a federal or state agency." (XXI PA03040:10-14.) Nevertheless, the district court held that "Reno states a cognizable local concern by virtue of the impact the alleged conduct has had on its citizens' health, safety and welfare, including the concomitant stress placed on its police, fire, and social services." (XXI PA03041:11-13.)

III. REASONS WHY THE WRIT SHOULD ISSUE

A writ of mandamus is warranted when either "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Chur v. Eighth Judicial Dist. Ct.*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 339 (2020) (quotation source and marks omitted). Both factors are satisfied here.

A. No Factual Dispute Exists and the District Court Was Clearly Obligated to Dismiss this Action Under Dillon's Rule

1. The District Court Should Have Dismissed this Action Under a Straightforward Application of Dillon's Rule

Under Dillon's Rule, "[n]either [a municipal] corporation nor its officers can do any act . . . not authorized" by the Legislature; "[a]ll acts beyond the scope of the powers granted are void"; and "[a]ny fair, reasonable, substantial doubt concerning the existence of power is resolved . . . against the [municipal] corporation, and the power is denied." *Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133, 136 (1937) (quotation source and marks omitted). This longstanding rule flows from a fundamental recognition that "a municipal corporation . . . is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication." *Id.* (quotation source and marks omitted). As a consequence, "a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation[]—not simply convenient, but indispensable." *Id.* (emphasis omitted).

In 2015, the Legislature codified Dillon's Rule, reaffirming that it "serves an important function in defining the powers of city government and remains a vital component of Nevada law." NRS 268.001(5). As codified, "Dillon's Rule provides

that the governing body of an incorporated city possesses and may exercise only the following powers and no others: (a) Those powers granted in express terms by the Nevada Constitution, statute or city charter; (b) Those powers necessarily or fairly implied in or incident to the powers expressly granted; and (c) Those powers essential to the accomplishment of the declared objects and purposes of the city and not merely convenient but indispensable." NRS 268.001(3). The codification further provides that "if there is any fair or reasonable doubt concerning the existence of a power, that doubt is resolved against the governing body of an incorporated city and the power is denied." NRS 268.001(4).

The Legislature in 2015 also modified Dillon's Rule, but only with respect to "matters of local concern." NRS 268.001(5). Under this modification, "if there is any fair or reasonable doubt concerning the existence of a power of the governing body to address a matter of local concern, it must be presumed that the governing body has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature." NRS 268.001(6)(b). As described in further detail below, the statute defines "matter of local concern" with particularity. NRS 268.003(1).

Notwithstanding the plain language of NRS 268.001, the district court held that Dillon's Rule categorically does not apply to a political subdivision's power to bring lawsuits. (*See* XXI PA03041:5-7 (stating that "Dillon's Rule . . . does not

limit[] the City's ability to litigate."); *see also* XXI PA03039:8-11, 03040:18-21.) But there is no such "lawsuit exception" to Dillon's Rule.

First, notwithstanding nearly a century of common-law precedent interpreting and applying Dillon's Rule, the City did not and cannot identify any exception for filing lawsuits. To the contrary, this Court has unequivocally established that Dillon's Rule applies to *all* asserted city powers, and *any* unauthorized action is invalid. As this Court explained in *Ronnow*, "[n]either the [municipal] corporation nor its officers can do *any* act . . . not authorized," and "[*a*]*ll* acts beyond the scope of the powers granted are void." 57 Nev. 332, 65 P.2d at 136 (emphases added). *Cf. Babb v. Wilkie*, 140 S. Ct. 1168, 1173 n.3 (2020) ("We have repeatedly explained that the word 'any' has an expansive meaning.") (quotation source and marks omitted); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quotation source omitted); *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (the word "'all' is a term of great breadth") (quotation source and marks omitted).

Second, the Legislature's 2015 codification of Dillon's Rule contains no exception permitting cities and counties freely to bring lawsuits. Instead, by declaring that cities "may exercise *only*" the enumerated powers "and *no others*," the Legislature made clear that Dillon's Rule applies to any and all powers a city

wishes to exercise. NRS 268.001(3) (emphases added). By categorically exempting lawsuits from Dillon's Rule, the district court did precisely what this Court's precedent forbids: it "create[d] an exception to [a] statute when, based on its plain and ordinary meaning, none exists." *Cote H. v. Eighth Judicial Dist. Ct.*, 124 Nev. 36, 40-41, 175 P.3d 906, 909 (2008) (footnote omitted).

Third, the district court erred in stating that Dillon's Rule has not "been utilized to limit a [political subdivision's] ability to litigate as opposed to the passage of local ordinances . . . ." (XXI PA03040:18-21.) For starters, the purported distinction is meaningless. As the U.S. Supreme Court has explained, governmental "power may be exercised as much by . . . a civil lawsuit as by a statute." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 & n.17 (1996); *see also Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 521 (1992) (observing that "regulation can be as effectively exerted through an award of damages").

Moreover, the high courts of other states applying Dillon's Rule confirm that the doctrine restricts a political subdivision's power to sue. *See, e.g., Premium Standard Farms, Inc. v. Lincoln Twp. of Putnam Cty.*, 946 S.W.2d 234, 240-41 (Mo. 1997); *Bd. of Cty. Comm'rs of Dolores Cty. v. Love*, 172 Colo. 121, 126-27, 470 P.2d 861, 863 (Colo. 1970). In *Premium Standard Farms*, the Missouri Supreme Court addressed whether a township was authorized to "commence a public nuisance action." 946 S.W.2d at 235. Under Dillon's Rule, the court explained, "[t]he issues

are whether [the township] has been granted express power to bring a public nuisance action or, alternatively, whether the power to prosecute a nuisance action is necessary to the exercise of some express township power." *Id.* at 240. The court held that the township was not authorized to bring a public nuisance action. *Id.*

The court explained that "[n]o express authority to prosecute a nuisance action has been granted townships." *Id.* It next concluded that the powers that *had* been expressly granted—like the power to "impose regulations for the purpose of promoting health, safety, morals, comfort or the general welfare of" the township, or the power to "bring an action to enforce zoning regulations"—did not "necessarily or fairly impl[y]" a power to bring a public nuisance action. *Id.* (internal quotation marks omitted). Those powers, the court held, simply authorized "enforcement of township regulations," not the filing of public nuisance lawsuits. *Id.* at 241.

The Colorado Supreme Court's *Love* decision is in accord. There, a Board of County Commissioners brought a lawsuit alleging that the State Board of Equalization abused its discretion in reviewing property appraisals. 172 Colo. at 124, 470 P.2d at 862. The state high court affirmed the dismissal of the lawsuit as *ultra vires*, holding that the Board of County Commissioners lacked "legal authority to maintain th[e] action." *Id.*, 172 Colo. at 124-25, 470 P.2d at 862. The court explained that counties "possess only such powers as are expressly conferred upon them by the constitution and statutes, and such incidental implied powers as are

reasonably necessary to carry out such express powers." *Id.*, 172 Colo. at 125, 470 P.2d at 862 (citation source omitted). But "[n]o constitutional or statutory provision . . . grants any express or implied powers to boards of county commissioners . . . to challenge in court the findings and orders of the . . . the State Board of Equalization." *Id.*, 172 Colo. at 125, 470 P.2d at 863. Put simply, "[s]ince the legislature has not seen fit to grant such power and authority, we necessarily conclude that the [Board of County Commissioners] w[as] without standing to bring the instant action." *Id.*, 172 Colo. at 126-27, 470 P.2d at 863.

Here, as in *Premium Standard Farms* and *Love*, "[n]o express authority to prosecute" this action has been granted to the City. *Premium Standard Farms*, 946 S.W.2d at 240; *see also Love*, 172 Colo. at 124-27, 470 P.2d at 862-63 (similar; County Board lacked express authority to sue). Neither the City nor the district court identified any authority expressly or impliedly authorizing this lawsuit, which, like the *Premium Standard Farms* case, includes public nuisance claims. That should end the inquiry; the City lacks power to file this action under Dillon's Rule. *See* NRS 268.001(1)-(4); *Ronnow*, 57 Nev. 332, 65 P.2d at 136.

Fourth, the district court erred in stating that NRS 266.190(2)(e) "requires that the city's mayor shall cause legal proceedings to be instituted or defended . . . where necessary or proper to protect the interests of the city." (XXI PA03041:3-5 (internal quotation marks omitted).) That statute does no such thing. It provides, rather, that

a city mayor "shall . . . [s]ee that all *contracts* are fully kept and faithfully performed, and, *to that end and in any such case* where necessary or proper to protect the interests of the city, shall cause legal proceedings to be instituted or defended at the expense of the city." NRS 266.190(2)(e) (emphases added). In other words, the statute authorizes lawsuits to enforce city contracts, *i.e.*, actions to ensure "that all contracts are fully kept and faithfully performed." It does not indiscriminately authorize *any* lawsuit "necessary or proper to protect the interests of the city." (XXI PA03041:3-5 (internal quotation marks omitted).) Moreover, construed properly, NRS 266.190(2)(e) supports the conclusion that Dillon's Rule applies to a city's power to sue: if lawsuits were categorically exempt from Dillon's Rule, as the district court held, then NRS 266.190(2)(e)—as well as other statutes granting cities limited enforcement powers—would be superfluous. *See, e.g.*, NRS 266.335 (authorizing city councils to "determine by ordinance what shall be deemed nuisances" and to perfect a "lien upon the property upon which the nuisance is located" in order to "abate[], prevent[] and remov[e] . . . the nuisance[] at the expense of the person" who created it).

Finally, broadly exempting lawsuits from Dillon's Rule would permit local governments to accomplish through litigation the very ends they are prohibited from achieving through legislation. At the motion to dismiss hearing, the City's counsel conceded that "the City would have no business" "pass[ing] an ordinance or a

regulation preventing the distribution of prescription opiates in Reno[] or levying a tax against companies that manufacture and distribute opiates within Reno." (XIX PA02724:19-02725:6.) Yet, through this lawsuit, the City seeks to directly regulate the Manufacturer Defendants' business activities by enjoining their "promotion and marketing of opioids for inappropriate uses in Nevada, currently and in the future." (II PA00224:22-25.) Moreover, the City's attempt to impose civil damages on the Defendants for their alleged conduct represents a "potent" form of regulation, as the U.S. Supreme Court has long recognized. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). If permitted to stand, the district court's holding would allow political subdivisions to circumvent limitations on their regulatory power simply by exercising an unfettered power to sue.

2. The "Matter of Local Concern" Exception to Dillon's Rule Does Not Apply

In codifying Dillon's Rule, the Legislature created an exception for "matters of local concern." NRS 268.001(5). The statute thus grants cities "all powers necessary or proper to address matters of local concern . . . ." NRS 268.001(6)(a). It further "[m]odif[ies] Dillon's Rule . . . so that if there is any fair or reasonable doubt concerning the existence of a power of the governing body to address a matter

of local concern, it must be presumed that the governing body has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature." NRS 268.001(6)(b).

The district court erred in holding that the City "states a cognizable local concern by virtue of the impact the alleged conduct has had" in Reno. (XXI PA03041:11-13.) The notion that this lawsuit addresses a matter of local concern in Reno is flatly contradicted by the City's own allegations, as well as the allegations of other cities, other counties, and the State in their separate opioid lawsuits.

The Legislature did not leave the phrase "matter of local concern" an empty vessel for courts to fill based on their varying conceptions of what is "local." Rather, it precisely set forth particular elements that must be satisfied. Specifically, the Legislature defined a "matter of local concern" as one that:

> (a) Primarily affects or impacts areas located in the incorporated city, or persons who reside, work, visit or are otherwise present in areas located in the city, *and* does not have a significant effect or impact on areas located in other cities or counties;
>
> (b) Is not within the exclusive jurisdiction of another governmental entity; *and*
>
> (c) Does not concern:
>
> (1) A state interest that requires statewide uniformity of regulation;

> (2) The regulation of business activities that are subject to substantial regulation by a federal or state agency; *or*
>
> (3) Any other federal or state interest that is committed by the Constitution, statutes or regulations of the United States or this State to federal or state regulation that preempts local regulation.

NRS 268.003(1) (emphases added). Thus, to invoke the "matter of local concern" exception, the City must establish all three of these subdivisions (a), (b), and (c). *Cf. State Dep't of Emp't, Training & Rehab., Emp't Sec. Div. v. Reliable Health Care Servs. of S. Nev., Inc.*, 115 Nev. 253, 257-58, 983 P.2d 414, 417 (1999) (holding that a party must satisfy all three criteria of NRS 612.085, which has three statutory requisites conjoined by "and"). Under subdivision (c), if the "matter" concerns the subject of any of the three discrete subparts, the "matter" is *not* one of local concern. *Cf. Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993) (disjunctive "or" requires "one or the other, but not necessarily both").

For a multitude of reasons set forth below, this lawsuit does not address a "matter of local concern" within the meaning of NRS 268.003(1).

a. *The City's First Amended Complaint Fails to Satisfy the Local "Impact" Requirement of Subdivision (1)(a)*

To establish a "matter of local concern," the statute requires the City to plead and prove that the alleged wrongdoing (i) "[p]rimarily affects or impacts" persons or areas within the City, and (ii) "does not have a significant effect or impact on

areas located in other cities or counties." NRS 268.003(1)(a). The First Amended Complaint on its face forecloses the City from making either showing.

Nothing in the City's First Amended Complaint suggests that the Defendants' alleged conduct "[p]rimarily affects or impacts" persons or areas within Reno. *Id.* And the complaints filed by other cities and counties explicitly allege that "[i]n Nevada, the opioid epidemic is widespread, *not localized to any particular city or county*." (XVII PA02371:1-2 (emphasis added) (Clark County); *accord* XVI PA02095:24-25, PA02187:4-5, XVII PA02278:4-5 (virtually identical allegations by Henderson, Las Vegas, and North Las Vegas).)

Nor could the City allege that opioid abuse "does not have a significant effect or impact on areas located in other cities or counties." NRS 268.003(1)(a). The City's First Amended Complaint explicitly alleges that "[t]he abuse of opioids is a widespread problem" that "has had far-reaching financial, social, and deadly consequences . . . *throughout Nevada*" and "*across our country*." (II PA00169:23-25, 00171:5-7, 00171:23-25 (emphases added); *see also, e.g.*, II PA00169:21-22, 00171:3-4, 00171:10-12, 00171:16-17, 00172:7-24.) According to the City, the alleged conduct at issue was statewide and nationwide in scope, with no unique nexus to the City: "Defendants employed . . . the same marketing plans and strategies and deployed the same messages in Nevada as they did nationwide," and "ensured . . . marketing consistency" through "nationally coordinated advertising."

(II PA00188:7-17; *see also, e.g.*, II PA00182:7-9 ("Distributors purchased opioids from manufacturers . . . and distributed them to pharmacies throughout . . . the State of Nevada.").) During the motion to dismiss hearing, the City's private lawyer asserted that "it was the same marketing plan everywhere. It wasn't different in Reno than it was in Dayton, Ohio, or . . . Baton Rouge, Louisiana. It was all the same." (XX PA02739:10-14; *see also* XXI PA02882:2-5 ("[T]here's no indication that anything was any different [in] Nevada tha[n] was being done around the rest of the country with these companies.").)

Moreover, the same private law firm representing the City has filed virtually identical opioid lawsuits on behalf of both the State and other Nevada cities and counties, all arising from the purported impact of the same alleged conduct.[5] And that firm claims to represent other localities that will file similar lawsuits.[6]

Nevertheless, in concluding that the "local concern" exception applied, the district court erroneously focused exclusively on the alleged impact in Reno, without regard to the similar alleged impact elsewhere. (*See* XXI PA03041:11-13.) In doing so, the district court jettisoned the statutory requirements of NRS 268.003(1) and

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[5] *See* XIII PA01536-XIV PA01799 (State of Nevada); XVI PA02053-02144 (Henderson); XVI PA02145-02235 (Las Vegas); XVII PA02236-02326 (North Las Vegas); XVII PA02327-02423 (Clark County).

[6] *See* Eglet Adams, *The Case Against Opioid Manufacturers*, https://www.egletlaw.com/complaint-against-opioid-manufacturers (listing "Counties and Cities represented by Eglet Adams") (last visited Apr. 30, 2020).

replaced them with its subjective vision of what should constitute a "local concern." This stripped NRS 268.003(1) of any meaning. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 371, 252 P.3d 206, 210 (2011) ("[W]e must not render any of the phrases of [a statute] superfluous.") (citation omitted).

b. ***The City's First Amended Complaint Fails to Satisfy the "No Substantial Regulation" or "Statewide Uniformity" Requirements of Subdivision (1)(c)***

The City is also unable to show that this case "[d]oes not concern . . . [t]he regulation of business activities that are subject to substantial regulation by a federal or state agency." NRS 268.003(1)(c)(2). The "business activities" here are the manufacture, distribution, and "promotion and marketing of" FDA-approved prescription opioid medications. (*See* II PA00224:22-25; *see also* II PA00170:6-9, 00186:19-22, 00216:4-21.) These activities are comprehensively regulated by federal laws and federal agencies. The City's First Amended Complaint thus alleges that "opioids have been regulated as controlled substances by the U.S. Drug Enforcement Administration . . . since 1970," (II PA00186:14-15), and the U.S. Food and Drug Administration exercises regulatory oversight over the manufacture, marketing, and sale of pharmaceutical products (*see* II PA00186:23-27, 00195:17-23); *see generally* 21 C.F.R. Parts 201-203, 310, 312, 314 *et seq.* (FDA regulations

regarding the manufacture, marketing, distribution, and sale of prescription opioid medications).[7]

The City is likewise unable to show that this lawsuit does not concern "[a] state interest that requires statewide uniformity of regulation." NRS 268.003(1)(c)(1). The Legislature has declared that "the practice of pharmacy"—including "activities associated with manufacturing, compounding, labeling, dispensing and distributing of a drug"—is "subject to protection and regulation by the State." NRS 639.213, 639.0124(1). To that end, Nevada law requires pharmaceutical manufacturers to "[a]dopt a written marketing code of conduct" "based on applicable legal standards"; to train "appropriate employees" on and "monitor compliance with" that code of conduct; to "investigat[e] instances of noncompliance"; and to annually submit materials to the State Board of Pharmacy demonstrating compliance with these requirements. NRS 639.570(1)-(2). The State's ability to "protect[] and regulat[e]" these activities would be undermined if

[7] *See also United States v. Harkonen*, No. C 08-00164 MHP, 2009 WL 1578712, at *11 (N.D. Cal. June 4, 2009) ("FDA regulations and the case law make clear that labeling under the [federal Food, Drug, and Cosmetic Act] is construed expansively, such that it may encompass nearly every form of promotional activity, including package inserts, pamphlets, mailing pieces, fax bulletins, reprints of press releases, and all other literature that supplements, explains, or is otherwise textually related to the product."); *Strayhorn v. Wyeth Pharm., Inc.*, 737 F.3d 378, 394 (6th Cir. 2013) (similar); *Del Valle v. PLIVA, Inc.*, No. B:11-113, 2011 WL 7168620, at *4 (S.D. Tex. Dec. 21, 2011) ("In essence, virtually all communication with medical professionals concerning a drug constitutes labeling.").

cities and counties, without any legislative authorization, could impose their own regulatory regimes on the "practice of pharmacy," through litigation or otherwise, as the City attempts to do here. Thus, the City's lawsuit concerns "[a] state interest that requires statewide uniformity of regulation." NRS 268.003(1)(c)(1).

Underscoring the need for statewide uniformity of regulation, the Nevada Attorney General's Office initially discouraged the City from filing this lawsuit. In a November 2017 letter to Reno mayor Hillary Schieve, then-Attorney General Adam Laxalt wrote that "coordinated action is taking place at the appropriate statewide level" to address opioid abuse that would "benefit[] all Nevadans, municipalities, counties, and the State." (IX PA01208.) He "invite[d]" the City "to commit to battle Nevada's opioid crisis with our office, in a unified front, not separately," (*id.*), explaining that the State was pursuing statewide "injunctive relief to keep the opioid crisis from getting worse" and "funding to help the State of Nevada as a whole, and each of its residents, municipalities, and counties, address the crisis." (IX PA01210.) He cautioned that "a lawsuit by the City of Reno could thwart" his office's ability to "uniformly address the opioid crisis in Nevada," stressing that "patchwork litigation" by political subdivisions "has never been attempted in Nevada and . . . the stakes are too high to start now." (*Id.*) In its own pending opioid lawsuit, the State asserts that "there is no other plaintiff better suited

[than the State] to seek a remedy for the economic harms at issue here." (XIV PA01788:13-14.)

Other state attorneys general also have stressed the importance of a uniform, statewide response to opioid abuse. In a brief filed in the federal opioid multidistrict litigation, attorneys general from 13 states and the District of Columbia stressed that "an ineffective piecemeal approach is the only result when various inferior instrumentalities of the State pursue conflicting or overlapping claims. Those localities' efforts hinder, rather than help, global, statewide resolution." *Amicus* Br. in Supp. of Writ of Mandamus, *In re Nat'l Prescription Opiate Litig.*, No. 19-3827, 2019 WL 4390968, at *14 (6th Cir. Sept. 6, 2019), ECF No. 7.

Here, the district court acknowledged that (1) opioid abuse "has a significant impact or effect on areas located in other cities or counties," and (2) "the manufacture, distribution, sales, and the prescribing and dispensing of opioids is subject to substantial regulation by a federal or state agency." (XXI PA03040:10-14.) Such determinations should have been dispositive, as they meant the City failed to show that its suit concerned a "matter of local concern," as required under NRS 268.003(1), and that the suit was therefore barred under Dillon's Rule.

B. Considerations of Sound Judicial Economy and Administration Favor Granting this Petition to Clarify Important Issues of Law

The Dillon's Rule issue here transcends this lawsuit. Presently, five Nevada cities and counties have filed materially identical lawsuits against largely the same

defendants,[8] and the private law firm representing all of those localities has indicated that more will follow.[9] The writ is warranted where, as here, a case "presents . . . the first opportunity to consider . . . an important issue of law that could potentially affect other litigants statewide." *Okada v. Eighth Judicial Dist. Ct.*, 134 Nev. 6, 10, 408 P.3d 566, 570 (2018) (accepting writ petition). Beyond the opioid context, resolution of the Dillon's Rule issue here would provide important guidance for all future litigation involving matters that affect citizens across Nevada.

Most importantly, early review will provide this Court the opportunity to correct the district court's erroneous decision categorically exempting city and county lawsuits from the longstanding limitation imposed by Dillon's Rule.

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[8] *See* II PA00168-00225 (Reno); XVI PA02053-02144 (Henderson); XVI PA02145-02235 (Las Vegas); XVII PA02236-02326 (North Las Vegas); XVII PA02327-02423 (Clark County).

[9] *See* Eglet Adams, *The Case Against Opioid Manufacturers*, https://www.egletlaw.com/complaint-against-opioid-manufacturers (listing "Counties and Cities represented by Eglet Adams") (last visited Apr. 30, 2020).

IV. CONCLUSION

For the reasons stated herein, petitioners respectfully request a writ of mandamus compelling the district court to dismiss this lawsuit in its entirety as *ultra vires* under Dillon's Rule.

RESPECTFULLY SUBMITTED this 1st of May, 2020.

McDONALD CARANO LLP

By: */s/ Pat Lundvall*

PAT LUNDVALL (NSBN 3761)
AMANDA C. YEN (NSBN 9726)
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
plundvall@mcdonaldcarano.com
ayen@mcdonaldcarano.com

John D. Lombardo
Jake R. Miller
ARNOLD & PORTER KAYE SCHOLER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Fax: (213) 243-4199
john.lombardo@arnoldporter.com
jake.miller@arnoldporter.com
Pro Hac Vice

Attorneys for Petitioners Endo Pharmaceuticals Inc. and Endo Health Solutions Inc.

OLSON CANNON GORMLEY & STOBERSKI

By: */s/ Max E. Corrick, II*

MAX E. CORRICK, II (NSBN 6609)
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Telephone: (702) 384-4012
Fax: (702) 383-0701
mcorrick@ocgas.com

Attorney for Petitioners Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc. and Allergan USA, Inc.

LAXALT & NOMURA, LTD.

By: */s/ Steven E. Guinn*

STEVEN E. GUINN (NSBN 5341)
RYAN W. LEARY (NSBN 11630)
9790 Gateway Drive, Suite 200
Reno, NV 89521
Telephone: (775) 322-1170
Fax: (775) 322-1865
sguinn@laxalt-nomura.com
rleary@laxalt-nomura.com

Rocky Tsai
ROPES & GRAY LLP
Three Embarcadero Center
San Francisco, CA 94111-4006
Telephone: (415) 315-6300
Fax: (415) 315-6350
rocky.tsai@ropesgray.com
Pro Hac Vice

Attorneys for Petitioner Mallinckrodt LLC

HYMANSON & HYMANSON PLLC

By: */s/ Philip M. Hymanson*

PHILIP M. HYMANSON (NSBN 2253)
8816 Spanish Ridge Avenue
Las Vegas, NV 89148
Telephone: (702) 629-3300
Fax: (702) 629-3332
phil@hymansonlawnv.com

Collie F. James, IV
MORGAN, LEWIS & BOCKIUS LLP
600 Anton Boulevard, Suite 1800
Costa Mesa, CA 92626
Telephone: (714) 830-0600
Fax: (714) 830-0700
collie.james@morganlewis.com
Pro Hac Vice

Attorneys for Petitioners Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.

SEMENZA KIRCHER RICKARD

By: */s/ Jarrod L. Rickard*
LAWRENCE J. SEMENZA, III (NSBN 7174)
CHRISTOPHER D. KIRCHER (NSBN 11176)
JARROD L. RICKARD (NSBN 10203)
10161 Park Run Dr., Ste. 150
Las Vegas, Nevada 89145
Telephone: (702) 835-6803
ljs@skrlawyers.com
cdk@skrlawyers.com
jlr@skrlawyers.com

Rachel B. Weil (PA. Bar No. 49844)
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
Telephone: (215) 851-8100
rweil@reedsmith.com
Pro Hac Vice

Steven J. Boranian (CA. Bar No. 174183)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Telephone: (415) 543-8700
sboranian@reedsmith.com
Pro Hac Vice

Attorneys for Petitioner AmerisourceBergen Drug Corporation

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (NSBN 2376)
JOEL D. HENRIOD (NSBN 8492)
J. CHRISTOPHER JORGENSEN (NSBN 5382)
ABRAHAM G. SMITH (NSBN 13250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169
Telephone: (702) 949-8200
dpolsenberg@lrrc.com
jhenriod@lrrc.com
cjorgensen@lrrc.com
asmith@lrrc.com

Suzanne M. Salgado
Joseph S. Bushur
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
Telephone: (202) 434-5232
ssalgado@wc.com
jbushur@wc.com
Pro Hac Vice

Attorneys for Petitioners Cardinal Health, Inc., Cardinal Health 6 Inc., Cardinal Health Technologies LLC, and Cardinal Health 108 LLC d/b/a Metro Medical Supply

MORRIS LAW GROUP

By: */s/ Steve Morris*

STEVE MORRIS (NSBN 1543)
ROSA SOLIS-RAINEY (NSBN 7921)
411 E. Bonneville Ave., Suite 360
Las Vegas, NV 89101
Telephone: (702) 474-9400
sm@morrislawgroup.com
rsr@morrislawgroup.com

Nathan Shafroth
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
Telephone: (415) 591-6000
nshafroth@cov.com
Pro Hac Vice

Attorneys for Petitioner McKesson Corporation

VERIFICATION

STATE OF NEVADA)

) ss.

COUNTY OF CLARK)

Pat Lundvall, being first duly sworn, deposes and says:

1. I am over the age of 18 years and am personally familiar with the facts stated in this verification. Pursuant to NRAP 21(a)(5), NRS 15.010 and NRS 34.170, I am co-counsel for Petitioners Endo Pharmaceuticals Inc. and Endo Health Solutions Inc. I know the contents of this writ petition.

2. The facts stated in this writ petition are true and correct to the best of my knowledge or based on information and belief. The relevant facts are largely procedural and drawn from the proceedings before the district court and therefore are within my knowledge as co-counsel for Petitioners Endo Pharmaceuticals Inc. and Endo Health Solutions Inc.

DATED this 1st day of May, 2020.

Pat Lundvall

Subscribed and sworn to before me
this 1st of May, 2020.

Notary Public

TUBOU NELSON
Notary Public, State of Nevada
No. 93-1487-1
My Appt. Exp. May 15, 2022

Certificate of Compliance

I 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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7). Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 5,550 words.

I further 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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.

RESPECTFULLY SUBMITTED this 1st day of May, 2020.

McDONALD CARANO LLP

By: */s/Pat Lundvall*

PAT LUNDVALL (NSBN 3761)
AMANDA C. YEN (NSBN 9726)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
plundvall@mcdonaldcarano.com
ayen@mcdonaldcarano.com

John D. Lombardo
Jake R. Miller
ARNOLD & PORTER
KAYE SCHOLER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Fax: (213) 243-4199
john.lombardo@arnoldporter.com
jake.miller@arnoldporter.com
Pro Hac Vice

Attorneys for Petitioners
Endo Pharmaceuticals Inc. and
Endo Health Solutions Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 1st day of May, 2020, a copy of the foregoing Petition for Writ of Mandamus was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex) and served via U.S. Mail, postage prepaid, on the following individuals:

Robert T. Eglet
Robert Adams
Richard K. Hy
Cassandra S.M. Cummings
Eglet Prince
400 S. 7th Street, 4th Floor
Las Vegas, Nevada 89101

Bill Bradley
Bradley, Drendel & Jeanney
6900 S. McCarran Blvd., Suite 2000
Reno, Nevada 89509

Attorneys for Plaintiff City of Reno

Steve Morris
Rosa Solis-Rainey
Morris Law Group
411 E. Bonneville Ave., Suite 360
Las Vegas, Nevada 89101

Nathan E. Shafroth
Covington & Burling LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, California 94105-2533

Attorneys for Defendant McKesson Corporation

Rand Family Care, LLC
c/o Robert Gene Rand, M.D.
3901 Klein Blvd.
Lompoc, California 93436

Robert Gene Rand, M.D.
3901 Klein Blvd.
Lompoc, California 93436

Philip M. Hymanson, Esq.
Hymanson & Hymanson PLLC
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

Steven A. Reed, Esq.
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103

Collie F. James, IV, Esq.
Adam D. Teichter, Esq.
Morgan, Lewis & Bockius LLP
600 Anton Blvd., Ste. 1800
Costa Mesa, CA 92626-7653

Brian M. Ercole, Esq.
Morgan, Lewis & Bockius LLP
200 South Biscayne Blvd., Suite 5300
Miami, FL 33131

Attorneys for Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Watson Laboratories, Inc.; Actavis LLC; and Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.

Lawrence J. Semenza III
Christopher D. Kircher
Jarrod L. Rickard
Katie L. Cannata
SEMENZA KIRCHER RICKARD
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

Steven J. Boranian
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, California 94105

Sarah B. Johansen, Esq.
Reed Smith LLP
355 South Grand Avenue, Suite 2900

Rachel B. Weil
Reed Smith LLP
Three Logan Square
1717 Arch Street. Suite 3100
Philadelphia, Pennsylvania 19103

Attorneys for Defendant AmerisourceBergen Drug Corporation

Steven E. Guinn
Ryan W. Leary
Laxalt & Nomura, LTD.
9790 Gateway Dr., Suite 200
Reno, Nevada 89521

Rocky Tsai
Ropes & Gray LLP
Three Embarcadero Center
San Francisco, California 94111-4006

Attorneys for Defendant Mallinckrodt LLC

Daniel F. Polsenberg
J. Christopher Jorgensen
Joel D. Henriod
Abraham G. Smith
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Pkwy
Suite 600
Las Vegas, Nevada 89169-5996

Suzanne Marguerite Salgado
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington D.C. 20005

Attorneys for Defendants Cardinal Health, Inc.; Cardinal Health 6 Inc.; Cardinal Health Technologies LLC; Cardinal Health 108 LLC d/b/a Metro Medical Supply

Max E. Corrick II
Olson Cannon Gormley &
Stoberski
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129

Attorney for Defendants Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc. and Allergan USA, Inc.

In addition, in compliance with NRAP 21(a)(1) and Administrative Order 2020-05, a copy of this Petition for Writ of Mandamus was served upon the Honorable Barry Breslow, District Judge via electronic service and email to Christine.Kuhl@washoecourts.us.

By: /s/ Pat Lundvall
An Employee of McDonald Carano LLP