

IN THE SUPREME COURT OF THE STATE OF NEVADA

SONJIA MACK,

Appellant,

v.

BRIAN WILLIAMS; JAMES
DZURENDA; ARTHUR EMLING,
JR.; and MYRA LAURIAN,

Respondents.

Case No. 81513

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Elizabeth A. Brown
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**MOTION FOR LEAVE TO FILE
AMICI CURIAE BRIEF
PURSUANT TO NRAP 29 AND
FOR LEAVE TO FILE LATE
BRIEF**

Amici Stephen Lara and the Institute for Justice (IJ) respectfully move this Honorable Court for leave to file their attached amicus brief and for leave to file it late. *See* NRAP 29.

INTRODUCTION

Amici Stephen Lara and IJ wish to submit a short brief to aid in answering the certified questions.

Lara is uniquely invested in the outcome. He is currently suing the Nevada Highway Patrol over the unlawful seizure of his life savings. *See* Ex. 1, *Lara v. State*, No. CV21-01595 (Second Judicial Dist., Washoe Cty., filed Aug. 31, 2021). His lawsuit alleges that NHP violated his rights under Article I, Sections 8 and 18 of the Nevada Constitution and seeks declaratory and injunctive relief, monetary damages, and nominal damages. The state

defendants in *Lara* recently moved to stay all proceedings pending the outcome of this case. *See* Ex. 2, Defs.' Mot. to Stay (filed Oct. 14, 2021).

Lara is represented *pro bono* by the Institute for Justice (IJ) and its associated attorneys in Nevada. IJ is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society. Government accountability is a cornerstone of any free society. Therefore, a key part of IJ's mission is litigating cases involving private enforcement of constitutional rights at the state, local, and national level.

Amici regret that they must ask for leave to file a late brief. We only learned of this case on October 14, 2021, when the state defendants in *Lara* moved to stay proceedings until this Court answers the certified questions. Over the last two weeks, we have briefed the stay motion in the trial court, educated ourselves about certified questions, and composed the attached brief. IJ counsel have already been admitted *pro hac vice* in the district court. *See* Ex. 3, Order, dated Oct. 25, 2021. However, to comply with NRAP 29(b), IJ counsel are expeditiously filing for admission before this Court as required under SCR 42 and SCR 46(a). Under the circumstances, amici respectfully ask the Court to permit them to file their brief out-of-time.

ARGUMENT

Amici are currently litigating a case that may turn on the outcome of this case. They have a special interest in the Court's answers to the certified questions and their brief would be helpful to the Court. Under these unique circumstances, the Court should permit them to file their brief out-of-time.

The Rules provide that an amicus brief may be filed with leave of Court based on: "(1) the movant's interest; and (2) the reasons why an amicus brief is desirable." NRAP 29(c). And the Court "may grant leave for later filing" of an amicus brief. NRAP 29(f); *see also* NRAP 26(b) (permitting late filings "for good cause shown"). Good cause exists for amici's motion. As shown below, Lara has a direct personal stake in the outcome of this case and IJ has experience litigating the issues raised by the certified questions in federal and state courts. Additionally, amici diligently prepared and filed their brief as quickly as possible after learning of this case.

I. IJ Works To Vindicate People's Constitutional Rights—People Like Stephen Lara.

IJ is a nonprofit, public interest law firm dedicated to defending the foundations of a free society. One such cornerstone of freedom is the ability to hold the government and its officials accountable. A key part of IJ's mission, therefore, is to remove procedural barriers to enforcing individual

constitutional rights.¹ IJ represents clients in cases about government accountability for rights violations,² and it regularly files amicus briefs on the topic.³

Central to that mission is promoting accountability for government officials when they violate the Constitution, which IJ accomplishes, in large part, through strategic litigation. State constitutions are an important source of rights and remedies and a focus of IJ's Project on Immunity and Accountability. See <https://bit.ly/2Y33F8s>.

As part of this project, IJ is currently representing Stephen Lara in Nevada state court. Stephen had over \$86,000 seized from him recently by a Sergeant of the Nevada Highway Patrol. The stated purpose for the seizure was so that the money could be turned over, without legal authorization, to

¹ See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (holding that the Excessive Fines Clause applies to state and local forfeitures); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (striking down economic regulations based on the substantive-due-process protections of the Texas Constitution and rejecting a series of justiciability and immunity arguments from the government).

² See, e.g., *Brownback v. King*, 141 S. Ct. 740 (2021); *Serrano v. Customs & Border Patrol*, 975 F.3d 488 (5th Cir. 2020), cert. denied, 141 S. Ct. 2511 (2021); *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), cert. denied, 141 S. Ct. 111 (2020); *Lech v. Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019), cert. denied, 141 S. Ct. 160 (2020).

³ See, e.g., *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); *Hernandez v. Mesa*, 140 S. Ct. 735 (2020); *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), cert. denied, 140 S. Ct. 2793 (2020).

the U.S. Drug Enforcement Administration. Stephen is challenging this seizure under Article I, Sections 8 and 18 of the Nevada Constitution—the same articles at issue in the certified questions. The Court's answers therefore bear directly on Lara's case and IJ's broader mission.

On behalf of Stephen Lara and its many other clients, IJ has composed the attached amicus brief for the Court's benefit. The brief seeks to demonstrate the historical and legal basis for Nevadans' right to enforce the individual rights guaranteed by the Nevada Constitution and speaks to the remedies and immunities available to them. We believe this analysis is critical to a full understanding of the certified questions.

II. IJ Has Experience Litigating The Issues Raised By The Certified Questions.

The certified questions raise vital questions for anyone who, like Stephen Lara, depends on the Nevada Constitution for protection of their individual rights. The answers, however, are not easily gleaned from case law. But IJ has a deep well of experience litigating these types of issues, and it wishes to share its expertise with the Court.

The issue of private cause of actions against a sovereign for violation of constitutional or fundamental rights has a long history dating back to the Magna Carta. That history, as it was folded into the common law, became intertwined with questions of remedies and immunities. IJ has extensive

experience researching, analyzing, and briefing these issues at the state and national level. We therefore believe we can offer valuable insight for this Court. *See* n.1 *above*.

III. Amici Should Be Allowed To File Their Brief Late.

We only learned about this case two weeks ago when, on October 14, the defendants in *Lara* filed a motion to stay all proceedings in lieu of responding to the Complaint.

As soon as we became aware of the gravity of this case, we began working to ensure this Court would have an opportunity to hear our unique perspective. We have studied the federal district court case that prompted the certified questions, researched Nevada law, conferred with local attorneys, prepared *pro hac* motions for IJ's out-of-state attorneys, reached out to the other side, responded to the stay motion in the trial court, and composed our brief. We also communicated with Amicus Roderick and Solange MacArthur Justice Center to ensure that our respective briefs would not be redundant, but rather helpfully address separate issues.

We also contacted counsel for the Appellants and Respondents. Appellants consent to the filing of our amicus brief under NRAP 29(a), including out of time. Respondents do not consent to the filing out time. Respondents also requested that we file the amicus brief as early as

possible and more than a week before their answering brief is due. We have therefore worked quickly to file our amicus brief 7 days before Respondents' brief is due.

CONCLUSION

The Court should allow the late filing of the amicus brief attached to this motion.

DATED this 1st day of November 2021.

/s/ Jordan T. Smith

Jordan T. Smith, Esq., Bar No. 12097
John A. Fortin, Esq., Bar No. 15221
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Wesley Hottot, Esq.
(*pro hac vice pending*)
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, Washington 98101

Benjamin A. Field, Esq.
(*pro hac vice pending*)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203

*Attorneys for Amici Stephen Lara &
Institute for Justice*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of PISANELLI BICE PLLC and that, on the 1st day of November 2021, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF PURSUANT TO NRAP 29 AND FOR LEAVE TO FILE LATE BRIEF** to:

/s/ Cinda Towne

An employee of PISANELLI BICE PLLC

EXHIBIT 1

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

\$1425
Jordan T. Smith, Esq., NV Bar no. 12097
jts@pisanellibice.com
John A. Fortin, Esq., NV Bar no. 15221
jaf@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
(702) 214-2100

Wesley Hottot, Esq., (*pro hac vice* forthcoming)
whottot@ij.org
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, Washington 98101
(206) 957-1300

Benjamin A. Field, Esq., (*pro hac vice* forthcoming)
bfield@ij.org
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320

Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STEPHEN LARA,

Plaintiff,

v.

STATE OF NEVADA ex rel. Department of
Public Safety, Highway Patrol Division;
COLONEL ANNE CARPENTER, in her
official capacity as Chief of the Nevada
Highway Patrol; and SERGEANT GLENN
RIGDON, in his official capacity as an officer
of the Nevada Highway Patrol; and JOHN
DOES I-X,

Defendants.

Case No.

Dept. No.

COMPLAINT

JURY TRIAL DEMANDED

**(Exempt from Arbitration per NAR 3(A)
Declaratory Relief Requested)**

///

Plaintiff Stephen Lara makes the following Complaint against Defendants the State of Nevada ex rel. Department of Public Safety, Highway Patrol Division; Colonel Anne Carpenter, in her official capacity as Chief of the Nevada Highway Patrol; Sergeant Glenn Rigdon, in his official capacity as an officer of the Nevada Highway Patrol; and JOHN DOES I-X (collectively “Defendants”). Plaintiff alleges the following:

INTRODUCTION

1. Stephen Lara files this lawsuit to establish that officers of the Nevada Highway Patrol (“NHP”) unconstitutionally seized his life savings—\$86,900—without probable cause, and did so for the purpose of turning his money over to the U.S. Drug Enforcement Administration (“DEA”) for federal “adoption” and “equitable sharing” of the proceeds for the benefit of NHP and DEA.

2. Under the U.S. Department of Justice’s (“DOJ’s”) “equitable sharing” program, federal law enforcement agencies can “adopt” property seized by state and local agencies. An adoption occurs after state officers seize property, under state law, and a federal agency handles the investigation and prosecution, under federal law. The federal agency keeps 20 percent of the resulting proceeds and returns 80 percent to the state agency, assuming the government forfeits the property by one of several means—for example, the owner defaults by missing a deadline, the government wins a civil forfeiture case (in rare cases) or wins administrative forfeiture with zero judicial involvement (in most cases). In 2019, more than 85 percent of federal seizures were disposed of through the administrative process.

3. In this case, Lara’s money is no longer subject to federal forfeiture. All administrative and judicial forfeiture routes are now closed. Under the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), the government had to do one of three things before, at the latest, July 26, 2021: (1) obtain a criminal indictment, (2) obtain an extension, or (3) begin civil forfeiture proceedings. Having done none of these things, DEA was required to “promptly” return Lara’s money 36 days ago.

4. Lara still does not have his money. He has filed a motion in the U.S. District Court for the District of Nevada seeking its immediate return based on CAFRA. *See Lara v. U.S. Drug*

5. Based on Nevada law, Lara urges this Court to (1) declare that state law does not authorize NHP's participation in federal adoption and equitable sharing; and, regardless, (2) declare that the due process protections of the Nevada Constitution prohibit NHP's participation because it creates a substantial financial incentive to seize property without probable cause; (3) enjoin NHP's continued participation; (4) award compensatory and nominal damages to Lara; (5) declare that he was entitled to an interim probable-cause hearing before a neutral magistrate; and (6) enjoin the state and require interim hearings, in all cases, within 30 days of seizure.

6. Stephen Patrick Lara is a 39-year-old retired Marine sergeant from Lubbock, Texas. He was honorably discharged after 17 years of active-duty service, including tours in Iraq and Afghanistan as a data and cyber security specialist.

8. The current custody arrangement requires Lara to travel regularly between his home in Rockport, Texas, and Portola, California, where his children and ex-wife live.

9. For this reason, Lara drives through Reno at least once a month, sometimes while driving west toward California, sometimes east toward Texas, sometimes once in both directions over the course of the last four days.

10. He is a United States citizen and resident of the State of Texas.

11. He can be served through the undersigned attorneys.

12. The State of Nevada ex rel. Department of Public Safety, Highway Patrol Division, is a governmental agency created under the laws of the State of Nevada. NHP is charged with patrolling the state's highways and enforcing its laws.

13. Colonel Anne Carpenter is Chief of NHP. Her duties include ultimate command over NHP's training of officers and its compliance with legal obligations. She is sued in her official capacity.

15. The true names and capacities of Defendants sued as DOES I through X, inclusive and each of them, are unknown to Lara, who therefore sues by fictitious names. Lara will seek to amend this Complaint to set forth the true names and capacities of the fictitiously named Defendants when they have been fully ascertained. Lara is informed and believes, and thereon alleges, that each of the Defendants named as DOES are legally responsible in some manner for the unlawful acts alleged herein and the injuries and damages caused thereby.

JURISDICTION & VENUE

18. Venue is proper in this Court under NRS 13.020 and NRS 41.031 because the seizure of Plaintiff's money occurred in Washoe County and Defendants' illegal and unconstitutional actions occurred, in part, in Washoe County. The amount in controversy exceeds \$15,000.00

Unconstitutional Stop

20. On February 19, 2021, Lara was on the last leg of a drive from Lubbock, Texas, to Portola, California to visit his two children, when he was pulled over on Interstate 80 just outside of Sparks, Nevada.

1 21. Trooper Chris Brown of the Nevada Highway Patrol (badge no. 250) conducted the
2 traffic stop.¹

3 22. Lara—who is Hispanic—was driving a rental car with Texas plates.

4 23. The day before—during an unprecedented cold snap in Texas—Lara discovered he
5 had a flat tire. Thinking he had a slow leak, he took the car to a tire shop, where he learned that the
6 wheel was cracked. Needing to get on the road early that morning to make it to California by Friday,
7 Lara rented a car from the airport with his father’s help and placed the cracked wheel and flat tire
8 in the trunk.

9 24. Under NRS Chapter 239, *et seq.*, Nevada’s Open Records Act, Lara obtained dash
10 and bodycam recordings of the encounter from the perspective of four NHP officers, including
11 Trooper Brown. Plaintiff bases many of his allegations below on those recordings. All quotations
12 are based on counsel’s true and correct transcription of the recordings.

13 25. From his time living just west of Reno, Lara knew a reliable shop in Sparks where
14 he could drop off the wheel and pick it up on his return trip.

15 26. As Lara approached Sparks, Trooper Brown was parked in the median along a two-
16 lane stretch of westbound I-80. Trooper Brown began following in a marked NHP patrol vehicle.
17 With Lara traveling in the right lane, Trooper Brown shadowed him from the left lane. Trooper
18 Brown matched Lara’s speed so that the two vehicles were driving below the speed limit in
19 formation.

20 27. As they approached a tractor-trailer in the right lane, Lara waited for Trooper
21 Brown’s patrol car to pass by in the left lane. Instead, Trooper Brown waited several moments for
22 Lara to make the first move. Lara eventually signaled and moved into the left lane, in front of the
23 patrol vehicle. “There you go,” Trooper Brown was recording saying as Lara changed lanes.

24 28. Maintaining his speed, Lara went around the tractor-trailer, signaled again, and
25 returned to the right lane.

26 29. Trooper Brown followed, explaining (seemingly to himself), “the driver of this
27 vehicle is following that red and blue semi-truck too closely, less than a second following distance.

28

¹ Plaintiff does not know the precise spelling of Brown’s first name.

1 Also driving under the speed limit which is really odd.” Deciding he would “make sure everything
2 is okay,” Trooper Brown called in the plates on Lara’s car, turned on his emergency lights and
3 pulled him over, directing him to a safe turnout.

4 30. Trooper Brown approached Lara’s vehicle and initially praised his driving, saying
5 “first, applaud you on your driving. You drive great Appears that you’re driving, trying to
6 drive safely under the speed limit. I appreciate that.” But, “the reason I am stopping you [is] we
7 have a special enforcement campaign going on. We’re trying to educate drivers about violations
8 they may not realize they’re committing”

9 31. Trooper Brown continued: “I just want to talk to you about your following distance,
10 especially around commercial vehicles. You came up behind a red and blue tanker truck a little bit
11 too close behind him before you made that lane change to go around him . . . I was waiting for you
12 to—trying to give you room to get over there.”

13 32. Trooper Brown took Lara’s driver’s license and rental agreement (in lieu of the
14 vehicle’s registration). He confirmed that Lara had no weapons and ordered him out of the vehicle.
15 Directing Lara to stand beside his patrol vehicle, Trooper Brown reassured him that “as long as
16 everything is valid, my intention is to get you on down the road.”

17 *Unconstitutional Seizure*

18 33. Instead, Lara was detained for more than 90 minutes, as Trooper Brown, three
19 officers from an NHP highway-interdiction unit, a police dog, and a Washoe County Sheriff’s
20 deputy investigated.

21 34. Lara cooperated with the investigation. He answered all of Trooper Brown’s
22 questions about his travels, background, family, bank accounts, monthly expenses, sources of
23 income, and other topics. Lara readily answered questions from the other officers, invariably calling
24 them “sir” and trying to clear up what appeared to him to be a misunderstanding.

25 35. Lara volunteered that he had a large amount of cash in a backpack in his truck, telling
26 officers it was “about 100,000.” He gave consent to search the vehicle and directed Trooper Brown
27 to the money. Lara explained its legitimate sources—including military retirement benefits and
28

1 income from a hospital job that ended during the COVID-19 pandemic. He told officers the money
2 represented his “life savings,” cobbled together over 20 years.

3 36. Lara gave officers contact information for relatives he said could confirm his story
4 and he showed them receipts for every bank withdrawal over a three-year period.

5 37. After inspecting the receipts, Trooper Brown called his superior, Sergeant Glenn
6 Rigdon. Over the phone, Trooper Brown told Sergeant Rigdon: “I’m looking at the receipts. I mean,
7 it’s not a vacuum seal, but it’s a big bundle of money, in a Ziploc baggy, in a backpack in the trunk
8 in a two-day rental from Texas to Portola, returning on Monday. Nervous behavior, et cetera, et
9 cetera. So, I mean, the elements are all there.”

10 38. Roughly 30 minutes later, Sergeant Rigdon arrived at the scene. After finishing a
11 phone conversation in his patrol car, *see infra* ¶¶ 55–58, Sergeant Rigdon asked Trooper Brown
12 what he thought about Lara. The two officers privately agreed that “as odd as it is, everything lines
13 up” and that Lara’s banking information “jives with his story.”

14 39. At this point, roughly an hour into the stop, Trooper Brown appeared ready to let
15 Lara go with his money.

16 ***Dog Alert***

17 40. Sergeant Rigdon instructed Trooper Brown to “put the dog on the currency.”

18 41. While Trooper Brown went back to his patrol vehicle to fetch the dog, Sergeant
19 Rigdon placed Lara’s money in an open Ziploc bag (apparently the same one Lara had used) and
20 threw the open package to the ground on the side of the road less than 40 yards from Lara’s car.

21 42. Trooper Brown came back with the dog and asked Sergeant Rigdon where the
22 money was located. Rigdon gave him a ballpark (“from about 10 yards in front of his car to probably
23 about 10 yards behind that sign post right there.”).

24 43. Trooper Brown ran with the dog around the area once and, when the dog found the
25 money, Trooper Brown gave her a toy, called her a “good girl,” and, returning to his patrol vehicle,
26 said to Sergeant Rigdon simply, “positive alert.”

27 44. Sergeant Rigdon replied: “We’ll go forward with it.”

28 45. The entire process involving the dog lasted just two minutes.

Unconstitutional Incentive to Seize for Federal Adoption

46. The decision to seize Lara’s life savings on a freeway outside of Reno was motivated by the prospect of federal adoption and payment to NHP through the DOJ’s equitable sharing program.

47. The program distributes the proceeds of seizures and forfeitures to cooperating state and local law enforcement agencies. There are several ways to qualify for equitable sharing. The method used in this case was adoption—a process by which a federal agency takes control of property seized by state authorities, based on state law, and then investigates and prosecutes the case under federal law.

48. State and local law enforcement agencies collect hundreds of millions of dollars in this way each year. In 2019 alone, the federal government made \$333.8 million in equitable sharing payments to state and local law enforcement. From 2000 to 2019, that figure was \$8.8 billion nationwide.

49. In this case, NHP stood to gain \$69,520 from adoption and equitable sharing.

50. Trooper Brown called his counterpart at DEA within the first 25 minutes of the 90-minute traffic stop.

51. On information and belief, Trooper Brown called DEA Agent Shane Murray.

52. Trooper Brown can be heard on his bodycam calling someone named Shane and asking, “can you head out to a traffic stop or are you busy on that other stuff?” After a brief pause (presumably for Agent Murray to speak), Trooper Brown responded: “so far, I’m still searching the car but, a big bundle of money. He says probably at least 100,000.” As the call ended, Trooper Brown asked: “will you just let me know ASAP? Okay. All right. Bye.”

53. Eight minutes later, Trooper Brown called his supervisor (Sergeant Rigdon) on the phone and described the circumstances of the stop and his investigation.

54. While Trooper Brown was on the phone with Sergeant Rigdon, Agent Murray called back. Trooper Brown put his sergeant on hold and clicked over to speak with the other man. He listened for several seconds, said goodbye, and clicked back, saying: “You still there, Sarge? Yeah, Shane’s not coming out.”

1 55. Half an hour later, as Sergeant Rigdon arrived on the scene, he received a call from
2 Agent Murray. Sergeant Rigdon put the call on speaker and his bodycam recorded both men.

3 56. Sergeant Rigdon began the call: “What’s up, Shane?”

4 57. Agent Murray apologized for not being able to make it to the scene personally.
5 Sergeant Rigdon reassured him there would be “no issues” because “it’s too easy to do an adoption”
6 and “I think everything’s going to be okay.” He told Agent Murray he would “text you the money
7 count after we get it.” Agent Murray responded he would “look for the adoption.”

8 58. That is, Sergeant Rigdon arrived at the scene and, even before getting out of his car,
9 he had assured a DEA Agent there would be “no issues” because “it’s too easy to do an adoption”
10 and he would “text you the money count after we get it.”

11 59. As Sergeant Rigdon began his investigation, he asked Trooper Brown, “what are
12 your thoughts, Chris?” Trooper Brown responded: “I’m leaning more towards . . . it’s odd but”
13 Sergeant Rigdon interjected: “It’s odd but it’s not packed like normal,” seeming to refer to how
14 drug proceeds are normally packaged. Trooper Brown replied: “no and he’s answering the
15 questions, there’s receipts here.”

16 60. In response, Sergeant Rigdon told Trooper Brown to “put the dog on the currency.”
17 *See supra* ¶ 40.

18 61. In the next breath, Sergeant Rigdon observed that Lara’s bank receipts “are all
19 zeroed out [and] it jives with his story.” Trooper Brown replied: “Yes . . . as odd as it is, everything
20 lines up.”

21 62. Sergeant Rigdon asked Lara a few questions, including how long he had been saving
22 the money. Lara responded that he “started saving since I was in the Marine Corps, 20 years.”

23 63. Sergeant Rigdon and Trooper Brown conferred again, agreeing that they found the
24 age of the bills suspicious. Sergeant Rigdon: “Not old bills. Claims that he’s been saving it up over
25 20 years.” Trooper Brown: “That’s not 20-year-old bills.” Sergeant Rigdon: “All current bills,
26 so . . . consistent with what we see with drug traffickers.”

27 64. Neither officer seemed to consider that a person might “save” money over a 20-year-
28 period, at various points deposit money in a bank, and at various points take money out as cash. In

1 other words, saving money over a 20-year period does not necessarily mean stockpiling currency
2 for 20 years. And Lara's banking receipts showed that was not what he did.

3 65. After Trooper Brown "put the dog on the currency," *see supra* ¶ 40, Sergeant Rigdon
4 responded, "we'll go forward with it." Trooper Brown responded, "okay," and that ended the
5 discussion.

6 66. As Sergeant Rigdon explained to Lara, "we're going to seize it today, but that
7 doesn't mean we're going to make a final judgment on it. It's going to go through the DEA. So the
8 DEA is going to contact you, and the DEA will provide you with a means to fighting. You're going
9 to have to provide your pay stubs, you're going to have to provide your other receipts and stuff like
10 that, and we'll give you all the information for contacting them as well."

11 67. Sergeant Rigdon continued: "If it is legitimately earned income, you're going to be
12 able to provide those paystubs, and they will give you all your money back, but I believe it's drug
13 proceeds."

14 68. As Trooper Brown and Sergeant Rigdon prepared paperwork, another officer asked
15 "no Shane?" And Sergeant Rigdon replied, "no, Shane said he couldn't come out today, so we'll
16 do an adoption."

17 69. Lara was given an NHP receipt for an "unknown amount of U.S. Currency" with
18 instructions to "contact Agent Murray DEA Reno." (*See* Ex. 2, NHP Receipt, dated Feb. 19, 2021.)
19 Exhibit 3 is a true and correct copy.

20 70. DEA formally adopted NHP's seizure and initiated administrative forfeiture
21 proceedings just two weeks later. (*See* Ex. 3, Adoption Notice, dated Apr. 5, 2021 (providing notice
22 that the seizure of Lara's money was "adopted by the DEA on Marc[h] 4, 2021."). Exhibit 3 is a
23 true and correct copy.

24 ***Unconstitutional Detention***

25 71. As of today, Lara's \$86,900 has been in custody for 193 days.

26 72. Even if NHP had probable cause (which it did not) to seize Lara's money, the
27 continued detention of his money is unreasonable and lacks probable cause.
28

1 73. To the best of Lara’s knowledge, no judicial officer (federal or state) has been
2 involved at any point to determine the constitutionality of the government’s actions. Rather, NHP
3 and DEA have determined, on their own authority, that there is probable cause to hold Lara’s money
4 for so long.

5 74. In response to DEA’s notice of seizure, Lara mailed a verified claim invoking his
6 right to federal court proceedings. (*See* Ex. 4, Verified Claim, dated Apr. 21, 2021.) Exhibit 4 is a
7 true and correct copy.

8 75. DEA received Lara’s claim no later than July 26, 2021, and deemed it filed the same
9 day.

10 76. DEA responded that his “claim ha[d] been accepted and this matter has been referred
11 to the [District of Nevada].” (*See* Ex. 5, DEA Response to Lara’s Verified Claim, dated May 21,
12 2021.) Exhibit 5 is a true and correct copy.

13 77. Based on the dates of these exchanges, the federal government had until July 26,
14 2021, at the latest, to decide whether to return Lara’s money, obtain a criminal indictment, obtain
15 an extension, or initiate federal civil forfeiture proceedings. *See* 18 U.S.C. § 983(a)(3) (requiring
16 the government to do one of those things within 90 days of the date on which the property owner
17 files a valid claim to the property).

18 78. DEA satisfied none of these requirements. It has not returned Lara’s money. It has
19 not obtained a criminal indictment. It has not obtained an extension. And it has not filed a federal
20 civil forfeiture case.

21 79. That is why, earlier today, Lara filed a motion in federal court seeking the immediate
22 return of his \$86,900 from DEA. . *See Lara v. U.S. Drug Enf’t Admin.*, Case No. 3:21-ms-00002
23 (ECF No. 1) (D. Nev. Aug. 31, 2021).

24 80. But regardless of the federal government’s decisions in the federal matter, NHP’s
25 primary—if not its sole—purpose for seizing Lara’s money was turning it over to DEA for federal
26 adoption and equitable sharing. Thus, NHP’s actions constitute an unconstitutional perversion of
27 probable cause under which all that mattered was that Lara had a lot of money which DEA was
28 willing to adopt.

1 81. As Sergeant Rigdon put it in explaining DEA’s process to Lara, “if it is legitimately
2 earned income, you’re going to be able to provide those paystubs, and they’ll give you all your
3 money back, but I believe it’s drug proceeds.”

4 82. Sergeant Rigdon was explaining DEA’s administrative forfeiture process, which
5 operates at the discretion of the agency. The federal administrative process is more favorable to the
6 government than the judicial forfeiture process, which requires a preponderance of evidence linking
7 property to crime. *See* 18 U.S.C. § 983(c).

8 83. But both federal avenues are more favorable than Nevada’s forfeiture procedures.
9 Nevada law mandates that property may not be forfeited without a criminal conviction. *See*
10 NRS 179.1173(2). Nevada also requires the government to satisfy a burden of clear and convincing
11 evidence connecting the property to a crime. *See* NRS 179.1173.

12 84. Another reason why NHP might prefer federal adoption to state proceedings: At the
13 close of each fiscal year, if the state government’s forfeiture account contains more than \$100,000,
14 70 percent of the excess must be given to the school district in the judicial district where the property
15 was seized. *See* NRS 179.1187. By contrast, there is no limit in Nevada law for what state agencies
16 can make through equitable sharing.

17 85. Further incentivizing adoption and equitable sharing with the federal government,
18 forfeitures under Nevada law generally “must not be used to pay the ordinary operating expenses
19 of the agency.” NRS 179.1187(2)(a). (While there is an exception for proceeds seized through a
20 “task force on narcotics operated by the Department of Public Safety in conjunction with other local
21 or federal law enforcement agencies,” NRS 179.1187(3), this exception does not apply where, as
22 here, the federal government instead adopts a state seizure.)

23 ***Unconstitutional Deprivation of Interim Hearing***

24 86. NHP has never identified what crime it believes Lara committed and to which his
25 money is traceable.

26 87. DEA has identified a laundry list of possible statutes, including the general drug
27 forfeiture statute and a collection of customs laws. But, like NHP, DEA has never articulated what
28 specific crime it believes Lara committed and to which his money is traceable.

1 88. No officer—state or federal—has made any sworn statements to the effect that Lara
2 and his money can be connected to a forfeitable crime under Nevada or federal law.

3 89. At no point was Lara given an opportunity to contest the seizure before a neutral
4 magistrate.

5 90. Lara was detained for an unreasonable period—more than 90 minutes—for a traffic
6 stop that began with Trooper Brown wanting to “make sure everything is okay” and “talk to [Lara]
7 about [his] following distance.”

8 91. Lara was not ticketed nor issued a warning.

9 92. He was not arrested.

10 93. He has not been charged with any crime.

11 94. On information and belief, no indictment has been requested or returned against him.

12 95. To the best of his knowledge, Lara has not been so much as investigated by NHP,
13 DEA, or any other law enforcement agency based on a suspicion that he committed a crime.

14 96. On information and belief, the government’s investigation into Lara ended with the
15 seizure of his money. Neither the state nor federal government has opened an investigation against
16 him for anything beyond the roadside seizure of his life savings.

17 97. Nevertheless, Lara has not gotten his money back. All \$86,900 remains in the
18 custody of DEA at least 36 days after federal law required DEA to promptly return it.

19 98. The risk of erroneous deprivation under these circumstances is extremely high. At
20 this point, it is not only unlikely—it is legally impossible—that Lara’s money will be forfeited as
21 the proceeds or instrumentality of a crime because federal proceedings are now time barred. *See* 18
22 U.S.C. § 983(a)(3)(A)-(B).

23 99. The burden of providing property owners a means of holding an interim hearing
24 before a neutral magistrate is acceptable. Not everyone will want or need an interim hearing. But,
25 as this case illustrates, without some neutral procedure, property owners can be made to wait more
26 than six months for federal procedures to run their course—a potentially catastrophic burden for
27 the financially insecure.

101. In cases of federal adoption, at a minimum, it would not be unduly burdensome for Nevada to provide some means of contesting the probable-cause determination of state officers, in state court, before a neutral state magistrate, within 30 days of seizure.

102. A seizure of 193 days, without any means of contesting probable cause, carries with it an unacceptable risk of erroneous deprivation of a person's property rights without notice and an opportunity to be heard.

103. Lara incorporates the factual allegations in ¶¶ 1–102 above as though they were fully set forth here.

104. Lara has suffered several redressable injuries because of the unconstitutional and unauthorized seizure, adoption, and detention of his property. Some of those injuries are in the past and some continue to this day.

105. For more than six months, Lara has been deprived of the total use and enjoyment of his lawfully earned life savings.

106. He was unreasonably detained on the side of the road for more than 90 minutes. At the time, Lara was traveling to visit with his two daughters for the weekend and he was only entitled to one weekend per month with them.

107. Officers seized 100 percent of his money, leaving Lara with only a few dollars in his wallet and a debit card. (Lara has no credit cards.)

108. Because he keeps very little money in the bank, Lara contacted his brother and persuaded him to wire \$1,000. Picking up this money took Lara out of his way, took additional time away from his weekend with his daughters, and required Plaintiff to burden a family member with the inconvenience and expense of wiring money unexpectedly.

109. In the more than six months since seizure, Lara has continued to shop for a home appropriate for him and his two daughters in either Lubbock or California. His search has been

1 impeded by the fact that his life savings is in legal limbo. Additionally, he has had to take valuable
2 time away from his homebuying search to address the seizure of his money.

3 110. Lara has been at times anxious, ashamed, and depressed over the seizure of his
4 money. He has lost sleep and struggled to process what had happened to him. He did not believe
5 that anything like this could happen in America. He had no idea that his money could be taken from
6 him based on such flimsy a justification and held, without charge or hearing, for the better part of
7 a year. Nor did he believe that an innocent person could go through such an ordeal and, when the
8 deadline to return his property arrived, still not get his money back.

9 111. Lara had to find and retain lawyers to assist him in getting his money back. He had
10 to work with those lawyers to prepare a federal motion and this complaint. To enforce his legal
11 rights in this way, Lara had to take time away from his children, his home search, and his job search.

12 112. No one from NHP has contacted Lara in the six months since his money was seized
13 or the last 36 days since the federal government lost the right to pursue any form of forfeiture.
14 Despite DEA's obligation now to return his money "promptly," NHP has done nothing to ensure
15 that happens.

16 113. Although NHP officers seized Lara's money while carrying out their duties under
17 Nevada law, Lara has been forced to communicate with DEA and contend with the bureaucracy of
18 the federal government.

19 114. By turning Lara's property over to federal authorities, NHP deprived Lara of the
20 comparatively robust protections of Nevada civil forfeiture law, including the government being
21 required to obtain a criminal conviction prior to forfeiture (something that is a legal impossibility
22 because Lara was not even charged with a crime), as well as a higher burden of proof under Nevada
23 law (clear and convincing evidence) than under federal law (preponderance of evidence).

24 115. Based on the four claims for relief that follow, this Court can and should remedy
25 each of the injuries above (and any others Lara may later show).

26 ///

27
28

FIRST CLAIM FOR RELIEF

**NHP has No Statutory Authority to Participate in Federal Equitable Sharing
(Declaratory & Injunctive Relief)**

116. Plaintiff incorporates the factual allegations in ¶¶ 1–115 above as though they were fully set forth here.

117. NHP’s participation in federal adoption and equitable sharing is ultra vires because it is not authorized by state law.

118. The power to seize and forfeit property in Nevada arises from Title 14, Chapter 179 of the Nevada Revised Statutes.

119. Specifically, “property is subject to seizure and forfeiture” when it is believed to be “proceeds attributable to the commission or attempted commission of any felony” related to drugs or several other state offenses. NRS 179.1164(1).

120. Chapter 179 lays out a detailed process for how law enforcement must handle seized property.

121. No provision adopted by Nevada's Legislature under Chapter 179 or any other provision in Nevada’s Revised Statutes authorizes law enforcement to simply turn seized property over to federal law enforcement for adoption and equitable sharing.

122. On information and belief, no other provision of Nevada law specifically authorizes state law enforcement to turn seized property over to federal law enforcement for adoption and equitable sharing.

123. As a result, each time Nevada law enforcement acts as NHP did here—seize a person’s property for the purpose of federal adoption—it acts ultra vires and unlawfully.

124. As a direct and proximate result of NHP’s ultra vires acts, Lara’s property was unlawfully seized and he has been injured by the following constitutional violations.

///

SECOND CLAIM FOR RELIEF

**Nevada's Due Process Clause Prohibits Seizures Motivated by Financial Self-Interest
(Declaratory & Injunctive Relief)**

125. Plaintiff incorporates the factual allegations in ¶¶ 1–124 above as though they were fully set forth here.

126. Even if NHP were statutorily authorized to participate in federal adoption and equitable sharing—which it is not—the Due Process protections of Nevada's Constitution prohibit participation.

127. Nevada's Constitution guarantees that “[n]o person shall be deprived of . . . property, without due process of law.” Nev. Const. art. I, § 8, cl. 2

128. On information and belief, NHP's policy and practice is to retain, for its own use, all proceeds generated by seizing property under state law and turning it over for federal adoption and equitable sharing.

129. This policy and practice creates a personal and institutional interest, financial and otherwise, into the decision to seize property that brings irrelevant and impermissible factors into the investigative process and thereby creates actual bias, the potential for bias, and/or the appearance of bias.

130. The NHP officers who investigate cases and seize property for adoption also benefit from equitable sharing proceeds, which are used to pay police salaries and to pay for equipment and facilities used by NHP.

131. As a direct and proximate result of NHP's policy and practice of seizing property for adoption and retaining equitable sharing proceeds, Plaintiff has suffered injury to his constitutional rights, including but not limited to the unjust taking of his property.

132. Even if NHP has no wider policy and practice, the seizure in this case was motivated by constitutionally impermissible self-interest on the part of NHP.

133. As a direct and proximate result of NHP's policy and practice of seizing property for the purpose of federal adoption and equitable sharing (or the decision to seize Lara's property for that purpose), Lara has been denied due process in violation of Nevada's Constitution by having

1 his property seized, without probable cause, by persons with a direct financial incentive in the
2 forfeiture of his money.

3 **THIRD CLAIM FOR RELIEF**

4 **The Seizure of Lara’s Money Lacked Probable Cause**
5 **(Monetary & Declaratory Relief)**

6 134. Plaintiff incorporates the factual allegations in ¶¶ 1–133 above as though they were
7 fully set forth here.

8 135. The Nevada Constitution guarantees that: “[t]he right of the people to be secure in
9 their . . . effects against unreasonable seizures and searches shall not be violated; and no warrant
10 shall issue but on probable cause . . .” Nev. Const. art. I, § 18.

11 136. Nevada law enforcement officers unreasonably seized Lara’s money, without a
12 warrant or probable cause to believe there was a real connection between the money and criminal
13 activity.

14 137. Carrying cash is not a crime.

15 138. Distrusting banks is not a crime.

16 139. None of what officers repeatedly called Lara’s “odd” behavior—for example,
17 driving below the speed limit and carrying a large amount of cash—amounts to a crime.

18 140. At the time of seizure, Nevada law enforcement officers had no evidence connecting
19 Lara’s money to criminal behavior other than a manufactured dog alert.

20 141. Lara questions the reliability of the dog alert, given how the procedure was carried
21 out by Sergeant Rigdon and Trooper Brown.

22 142. In any event, the financial incentive to seize Lara’s money factored in even before
23 the sergeant-in-charge performed any investigation. Well before the dog alert, Sergeant Rigdon
24 discussed with DEA Agent Shane Murray how adoption would be “no issue” because “it’s too easy
25 to do an adoption.” Sergeant Rigdon told Murray: “I’ll text you the money count after we get it.”
26 Agent Murray responded that he would “look for the adoption.”

27 143. Nevada’s forfeiture procedures are generally more protective of property rights than
28 federal procedures. If NHP had seized Lara’s property and turned it over to state prosecutors, they

1 would have had the burden to obtain a criminal conviction, *see* NRS 179.1173(2), and only after
2 obtaining a criminal conviction, prosecutors would have been made to show by clear and
3 convincing evidence that the money was connected to the criminal conviction, *see* NRS
4 179.1173(4). By contrast, federal law only requires a preponderance of the evidence. *See* 18 U.S.C.
5 § 983(c).

6 144. On information and belief there are no limits of any kind on the money NHP can
7 take in through federal adoption and equitable sharing or what NHP can spend that money on. the
8 proceeds for. *Compare* NRS 179.1187(2)(a) *with* NRS 179.1187(3).

9 145. Had this forfeiture been conducted under state procedures, Nevada law requires that
10 at the close of each fiscal year, 70 percent of any forfeiture account balance greater than \$100,000
11 must be turned over to public schools.

12 146. The seizure in this case would not have taken place but for the prospect of federal
13 adoption and equitable sharing of the proceeds.

14 147. Under these circumstances, NHP has every incentive to turn roadside seizures
15 (especially marginal ones such as this) over to DEA. The federal procedures are comparatively
16 advantageous to law enforcement. DEA would do 100 percent of the investigative work. DOJ would
17 do 100 percent of the legal work. And NHP would get 80 percent of the proceeds.

18 148. The decision to seize Lara's money was designed to take advantage of the
19 comparatively government-friendly procedures available under federal law.

20 149. As a direct and proximate cause of NHP's unreasonable seizure lacking probable
21 cause, Lara has been deprived of his money for the last six months and suffered the other injuries
22 outlined above.

23 **FOURTH CLAIM FOR RELIEF**

24 **Due Process Requires a Prompt, Post-Seizure Hearing Before a Neutral Magistrate** 25 **(Monetary, Declaratory, & Injunctive Relief)**

26 150. Plaintiff incorporates the factual allegations in ¶¶ 1–149 above as though they were
27 fully set forth here.
28

152. The Nevada Constitution guarantees “[n]o person shall be deprived of . . . property, without due process of law.” Nev. Const. art. I, § 8, cl. 2. It also provides that “[a]ll men are by Nature free and equal and have certain inalienable rights among which are . . . Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness.” *Id.* art. I, § 1.

154. Sections 1 and 8 require that property owners have access to an interim hearing before a neutral magistrate when, as here, the government deprives a person of their life savings.

156. As a direct and proximate cause of the lack of a prompt, post-seizure hearing, Plaintiff's constitutional rights were violated and his money was detained for longer than it would have been if he had a means of contesting probable cause.

WHEREFORE, Plaintiff Stephen Lara prays for judgment as follows:

- 20

d. That the due process guarantee of Article I, § 8, cl. 2 requires the state to provide a means of contesting probable cause to seize property, before a neutral magistrate, within 30 days of a seizure; and

e. That Plaintiff was denied due process of law under Article I, § 8, cl. 2 of the Nevada Constitution because he was not given a means of contesting probable cause to seize his property, before a neutral magistrate, for over six months;

2. For a temporary restraining order and preliminary and permanent injunctive relief prohibiting Defendants from participating in federal equitable sharing and requiring an interim hearing to determine probable cause within 30 days of the date of seizure;

3. For an award of compensatory damages (to be measured in discovery) for the economic injuries Plaintiff has suffered due to Defendants' above-described violations of the Nevada Constitution;

4. For an award of \$1 in nominal damages based on Defendants' above-described violations of the Nevada Constitution;

5. For an award of reasonable attorneys' fees and costs as provided by law; and

6. Such further relief as this Court deems just and proper.

DATED this 31st day of August 2021

PISANELLI BICE PLLC

By: /s/ Jordan T. Smith
Jordan T. Smith, Esq., NV Bar No. 12097
John A. Fortin, Esq., NV Bar No. 15221
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Wesley Hottot, Esq., (*pro hac vice forthcoming*)
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, Washington 98101

Benjamin A. Field, Esq., (*pro hac vice forthcoming*)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203

Attorneys for Plaintiff

EXHIBIT 2

2195
AARON D. FORD
Attorney General
NATHAN L. HASTINGS (Bar No. 11593)
Senior Deputy Attorney General
(775) 684-4606
nhastings@ag.nv.gov
KATHLEEN BRADY (Bar No. 11525)
Deputy Attorney General
(775) 684-4605
kbrady@ag.nv.gov
State of Nevada
Office of the Attorney General
555 Wright Way
Carson City, NV 89711
(775) 684-4601 (fax)
Attorneys for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STEPHEN LARA,

Plaintiff,

vs.

STATE OF NEVADA ex rel. Department of
Public Safety, Highway Patrol Division;
COLONEL ANNE CARPENTER, in her
official capacity as Chief of the Nevada
Highway Patrol; and SERGEANT GLENN
RIGDON, in his official capacity as an officer
of the Nevada Highway Patrol, and JOHN
DOES I-X,

Defendants.

Case No. CV21-01595

Dept. No. 4

**NEVADA HIGHWAY PATROL DEFENDANTS' MOTION TO STAY PROCEEDINGS
PENDING THE NEVADA SUPREME COURT'S ANSWERS TO ACCEPTED CERTIFIED
QUESTIONS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
NEVADA**

Defendants Nevada Department of Public Safety Highway Patrol Division, Col. Anne
Carpenter, and Sgt. Glenn Rigdon (collectively, NHP), by and through counsel, Aaron D. Ford, Nevada
Attorney General, and Nathan Hastings, Senior Deputy Attorney General, and Kathleen Brady, Deputy

1 Attorney General, now move this Court to stay proceedings in this matter, including any deadline for
2 NHP's response to Stephen Lara's Complaint (Lara), pending necessary answers from the Nevada
3 Supreme Court to questions certified by the United States District Court. This motion is based on the
4 following memorandum of points and authorities, all papers and pleadings on file, and any other
5 evidence the Court deems appropriate to consider.

6 **Memorandum of Points and Authorities**

7 **A. Lara's Nevada Constitutional Claims.**

8 In this action, Lara has identified his requested relief in four claims for declaratory, injunctive
9 and/or monetary relief. (Complaint at 16 – 21). Lara characterizes all four of these claims as being
10 premised solely on alleged violations of the Nevada Constitution, Article 1, §§ 8 and 18; specifically,
11 asserting violations of Nevada Constitutional due process and probable cause-related rights. (*See id.* at
12 16, ¶ 124; at 17, ¶¶ 127-28, 131-33; at 18-19, ¶¶ 135-36, 149; at 20, ¶¶ 152-56).

13 **B. Factual Background.¹**

14 On February 19, 2021, at approximately 11:03 am, Nevada Highway Patrol (NHP) Trooper
15 Chris Brown was parked in the center median on IR80 near Derby Dam in Washoe County, Nevada.
16 He observed a silver Toyota Camry sedan travelling westbound, slow down to below the speed limit
17 after passing his vehicle. Trooper Brown began to follow the vehicle and noticed the vehicle following
18 a commercial vehicle too closely, then driving around the commercial vehicle and pulling back in front
19 of the commercial vehicle too closely, only leaving up to one second of following distance at highway
20 speed.

21 Trooper Brown then initiated a traffic stop. Trooper Brown began a discussion with Lara to
22 educate him about the dangers of following too closely. Trooper Brown noticed that the car had a lived-

23
24 ¹ In his Complaint, Lara includes a 'General Factual Allegations' section. (Complaint at 4 – 14, ¶¶ 19 –
25 102). He states that prior to filing his Complaint, he obtained dash and bodycam recordings of the
underlying incident, and that his factual allegations are based on having obtained true and correct
transcriptions of those recordings. (*Id.* at 5, ¶ 24).

26 NHP has also reviewed the recordings and considers it is appropriate to fill in certain missing facts
27 from Lara's Complaint at this stage. This additional description is based on the dashcam and bodycam
28 recordings. As described in this motion, the pending Nevada Supreme Court certified questions
preclude an answer or other responsive pleading at this stage; and NHP submits this brief factual
summary to present a fair description of the facts.

1 in look, and Lara indicated that he was travelling from Lubbock, Texas to Portola, California to see his
2 daughters for the weekend. Trooper Brown asked Lara to speak with him while he went over the
3 paperwork. Trooper Brown conducted a records check and began a written warning. Lara indicated to
4 Trooper Brown that he was currently unemployed and getting ready to move his daughters to Texas.
5 Trooper Brown noticed that Lara was nervous and overly polite, noted the short turn around trip in a
6 third-party rental vehicle to a source drug area, and became suspicious of criminal activity. Trooper
7 Brown asked Mr. Lara if he had any firearms, drugs, or large amounts of currency in the vehicle, and
8 Lara stated that there was a large amount of currency in the vehicle but that there were no drugs or
9 firearms and that he does not use drugs.

10 After a short discussion, Trooper Brown asked Lara for consent to search the vehicle, and Lara
11 consented. After Lara signed a consent form, the search occurred. Prior to searching the interior of the
12 vehicle, Trooper Tumanuvao, who had arrived on scene to assist Trooper Brown, deployed his drug
13 detection canine around the exterior of the vehicle and advised of a positive alert as to the odor of drugs
14 coming from the vehicle.²

15 Inside a backpack in the trunk of the vehicle, Trooper Brown located a large plastic baggie
16 containing a large amount of newer \$100 bills in a plastic baggie along with bank receipts. Trooper
17 Brown questioned Lara as to the amount, and Lara indicated that there was approximately \$100,000 in
18 the baggie. Trooper Brown then called the DEA seeking that they come to the scene. Trooper Brown
19 then questioned Lara as to why he had such a large amount of cash in the vehicle and about the receipts.
20 After the DEA agent called back, indicating that he would not be able to come to the site, Trooper
21 Brown discussed the situation with his chain of command, indicating that the vehicle was being rented
22 for 2 days for a trip from Lubbock Texas to Portola California and back, that Lara was nervous, and
23 that they had located a large amount of money in the vehicle.

24 ² Lara's Complaint makes no mention of this earlier and important canine deployment and controlled
25 substance alert on the vehicle. Instead, in its section titled 'Dog Alert,' the Complaint only mentions a
26 later dog deployment on a bag of money that had been placed "on the ground on the side road" some
27 distance from Lara's vehicle. (Complaint at 7, ¶ 41). Lara describes this alert as coming after the arrival
28 of Sgt. Rigdon, "Roughly 30 minutes" following Trooper Brown's inspection of money and receipts.
(*Id.* at ¶ 38). But the early positive canine alert to the vehicle for controlled substances, omitted from
the Complaint, as well as the later alert on the money, is an important factor supporting probable cause
for the seizure of money in this matter.

1 Trooper Brown then told Lara he was not under arrest and that he did not have to answer any
2 questions, but Lara consented to further questions regarding the currency. Trooper Brown then went
3 through the Currency Questionnaire form with Lara. In filling out the form, Lara stated that the money
4 was his life savings from working and from his military retirement, that he did not trust banks, and he
5 kept it on his person to secure and spend the money. Trooper Brown asked when Lara had last paid
6 taxes, and Lara indicated that it was approximately two years ago. Lara further provided that he had
7 direct deposit into Bank of America and USAA and had credit and debit cards, but that he did not keep
8 a balance in his bank accounts and had receipts to show where the money came from. Upon reviewing
9 receipts, it was determined that Lara had transactions with Wells Fargo Bank, Bank of America,
10 Plumas Bank, Bank of the West, US Bank, First Financial Bank, and Lubbock National Bank. When
11 asked about the dog alert on the vehicle, Lara indicated that he wasn't sure why that happened and
12 provided that the car was a rental. When asked about the rental, Lara indicated that the rim of his wheel
13 cracked and he had to rent a car. When Officers determined that his father had rented the vehicle for
14 him, Lara provided that his father had rented it for him as a nice gesture.

15 Trooper Tumanuvao also engaged Lara in conversation, and Lara indicated that he had last gone
16 to Portola in December. However, Trooper Tumanuvao located a toll bill during the search that
17 indicated that Lara had been in Portola earlier in February.

18 After conducting the interview, a canine sniff was conducted of the currency, and the dog
19 alerted to the odor of drugs. It was then determined that the currency would be seized and provided to
20 the Reno Drug Enforcement Agency (DEA). Lara was provided with the DEA's contact information.

21 Sergeant Rigdon then asked Lara questions concerning the amount of the currency, but Lara
22 could not identify how much was in the bag. Lara indicated that he had saved the money for 20 years.
23 However, Sergeant Rigdon pointed out that the currency did not contain any older bills, it was all new
24 currency. Sergeant Rigdon weighed the money and determined that there was approximately \$86,000 in
25 cash in the baggie. The currency was later counted and it was determined there was \$86,900 in U.S.
26 Currency The money was seized and provided to the US Marshalls Service for the purpose of potential
27 civil asset forfeiture.

28 ///

1 **C. Background – Potentially Dispositive Certified Questions Accepted by the Nevada**
2 **Supreme Court.**

3 On July 21, 2021, in connection with a separate federal court action,³ and under NRAP 5, the
4 Nevada Supreme Court accepted the following certified questions from the United States District Court
5 for the District of Nevada:

- 6 1. Is there a private right of action under the Nevada Constitution, Article 1, § 8?
7 2. Is there a private right of action under the Nevada Constitution, Article 1, § 18?
8 3. If there is a private right of action, what immunities, if any, can a state actor
9 defendant raise as a defense?
10 4. If there is a private right of action, what remedies are available to a plaintiff for these
11 claims?

12 (Exhibit 1, Order Accepting Certified Questions, *Mack v. Williams*, Nevada Supreme Court Case No.
13 81513). In its Order, the Nevada Supreme Court stated that its acceptance of these questions for
14 determination is based on the fact that “no clearly controlling Nevada precedent exists with regard to
15 these legal questions” (*Id.* at 1).

16 As described above, Lara brings his claims in this case pursuant to the Nevada Constitution,
17 Article 1, §§ 8 and 18. But, as the Nevada Supreme Court has recently confirmed, Nevada law is
18 currently unclear as to whether a private right of action exists to allow such claims to even be brought.
19 (*Id.*) Therefore, the Nevada Supreme Court’s answers to these pending certified questions are a
20 necessary prerequisite for this case to proceed on Lara’s claims as pleaded.

21 **D. Need for Stay of Proceedings**

22 Generally, it is proper to stay litigation temporarily if the litigation could be impacted by other
23 pending matters. (*See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248 (2004)). Much of the authority
24 regarding seeking stay appears to arise in the context of stay pending an anticipated dispositive decision
25 on appeal or writ petition to the Nevada Supreme Court. (*See Hansen v. Eighth Judicial Dist. Court*,
26 116 Nev. 650, 6 P.3d 982 (2000) (referencing NRAP 8(a)). While the factors described in NRAP 8(c)
27 concern appellate proceedings and there is no existing case on point, this case law is clearly analogous

28

³ Case No.: 2:18-cv-00799-APG-VCF

1 to the Nevada Supreme Court's certification of the questions identified above and is dispositive as to
2 whether Lara's claims can proceed, and whether NHP has certain available defenses to suit. (*See* Secs.
3 E and F of this motion below). Indeed, the instant motion for stay is akin to the 'Initial Motion in the
4 District Court' referenced in NRAP 8(a)(1).

5 Moreover, as described further in this motion, interests of judicial economy and fairness to
6 NHP's ability to meaningfully present affirmative defenses, strongly urge that proceedings in this case
7 be stayed pending the Supreme Court's answers to the certified questions. As explained in Sections E
8 and F of this motion below, NHP will be greatly prejudiced if it is required to respond at this stage and
9 potentially be subjected to suit and discovery in this matter without the Supreme Court's answers to the
10 certified questions of whether Lara's claims are justiciable and/or whether NHP can plead immunity
11 defenses.

12 In contrast to the prejudice to NHP if the case is not stayed, Lara will not be prejudiced by a
13 stay. Indeed, Lara points out that he has filed a separate action in federal court to compel the return of
14 the money that was seized in this case. (*See Lara v. U.S. Drug Enf't Admin.*, Case No. 3:21-ms-00002,
15 Complaint at 11, ¶ 79). It is clear that the instant action is not about the return of his money. A stay in
16 this case will have no impact on Lara's interest in the seized money. Lara primarily seeks prospective
17 declaratory and injunctive relief about what NHP may or not be allowed to do in relation to future
18 unrelated seizures and/or forfeitures. Even if he enjoyed a likelihood of success in obtaining that relief,
19 it seems highly unlikely that Lara will be prejudiced by any delay in obtaining it resultant from a stay in
20 this case. Even if there is any prejudice to Lara in delaying such relief, it is minor in comparison with
21 the prejudice to NHP in proceeding in this case without the benefit of the necessary but absent legal
22 authority concerning justiciability and defenses set to be determined by the Nevada Supreme Court
23 through its answers to the certified questions.

24 **E. The Justiciability of Lara's Claims Depends on the Outcome of the Pending**
25 **Certification Questions before the Nevada Supreme Court.**

26 Even if alleging violation of federal constitutional rights, a litigant may not directly pursue a
27 cause of action under the United States Constitution. (*See Azul-Pacifico v. City of Los Angeles*, 973
28 F.2d 704, 705 (9th Cir. 1992)). A right of action to bring, and jurisdiction to hear claims for such

1 alleged violations only exists pursuant to federal statute, 42 U.S.C. § 1983. (*See, e.g., id.*). There is no
2 parallel Nevada statute providing a private right of action for alleged violations of Nevada state
3 constitutional rights.

4 As described above, Lara’s claims in this case are for monetary, declaratory and injunctive
5 relief stemming from alleged violations of the Nevada Constitution. In accepting the United States
6 District Court’s certified questions, the Nevada Supreme Court acknowledges that the question of
7 whether such claims may be brought has not been decided.

8 Implicit in and underlying the Nevada Supreme Court’s acceptance of the certified questions is
9 the absolute legal reality that a right of action must be provided for in the law. Several broad principles
10 apply to Lara’s claims in light of the pending certified questions: “No constitutional restriction has been
11 placed upon the legislature’s right to limit a cause of action or a right of action.” (*Derouen v. City of*
12 *Reno*, 87 Nev. 606, 608, 491 P.2d 989, 990 (1971)). “Declaratory relief is available only if: (1) a
13 justiciable controversy exists between persons with adverse interests; (2) the party seeking declaratory
14 relief has a legally protectable interest in the controversy; and (3) the issue is ripe for judicial
15 determination.” (*County of Clark, ex rel. Univ. Medical Center v. Upchurch*, 961 P.2d 754, 114 Nev.
16 749 (1998) (citations omitted, emphasis added). “The Uniform Declaratory Judgments Act does not
17 establish a new cause of action or grant jurisdiction to the court when it would not otherwise
18 exist; instead, the Act merely authorizes new form of relief, which in some cases will provide fuller and
19 more adequate remedy than that which existed under common law.” (N.R.S. 30.010 et seq.; *Builders*
20 *Ass’n of N. Nev. v. City of Reno*, 776 P.2d 1234, 105 Nev. 368, 369 (1989) (citations omitted, emphasis
21 added.) Nevada courts have held that a declaratory relief action is appropriate when a party merely
22 seeks a ruling on the meaning of a statute but is inappropriate when an agency's discretionary decisions
23 are required. (*See Prudential Ins. Co. v. Ins. Comm’r*, 82 Nev. 1, 4-5, 409 P.2d 248, 250 (1966)).

24 The Nevada Supreme Court must decide the certified questions so the parties to this matter can
25 determine what legal positions they may appropriately put forward in applying the Supreme Court’s
26 forthcoming answers and existing authorities and principles, including those cited here, to the claims
27 asserted by Lara.

28 ///

1 **a. There are no established elements to Lara’s purported Nevada constitutional**
2 **claims.**

3 Without the Nevada Supreme Court’s answers to the certified questions, even if that Court
4 ultimately determines that a private right of action exists for Lara’s Nevada constitutional claims, the
5 parties do not know what the claims’ elements are or might be. Pursuant to 42 U.S.C. § 1983, to prevail
6 on a federal constitutional claim, a plaintiff must prove that the defendant was (1) acting under color of
7 law and (2) that the defendant’s conduct deprived the plaintiff of a federal statutory or constitutional
8 right. 42 U.S.C. § 1983. Those elements come from the statute. Without an equivalent state statute,
9 there are no established elements for a private right of action under the Nevada Constitution.

10 Section F below describes how NHP is unable to argue whether Lara’s claims are justiciable or
11 plead their defenses in this case without answers to the certified questions. But as just explained,
12 without those answers, and without knowing the elements for Lara’s proffered claims, neither can they
13 or the Court determine whether Lara has sufficiently pleaded the claims consistent with governing
14 elements. The parties cannot litigate the sufficiency of a Complaint without clear authority as to the
15 elements of pleaded claims.

16 **F. NHP Cannot Respond to Lara’s Complaint pursuant to NRCP 12 without the Nevada**
17 **Supreme Court’s Answers to the Certified Questions.**

18 **a. NRCP 12 provision for defenses by motion in this case.**

19 NRCP 12(b) provides for the assertion of defenses in a responsive pleading or motion. Defenses
20 that may be asserted by motion include lack of subject-matter jurisdiction and failure to state a claim
21 upon which relief can be granted. (NRCP 12(b)(1), (5)).

22 Because Nevada law, this Court, and the parties lack guiding authority for citation and analysis
23 to establish the viability of Lara’s claims, NHP is unable to proceed or respond consistent with the
24 rights provided them under NRCP 12. Until the Nevada Supreme Court answers the certified questions
25 referenced herein, proceedings in this matter are untenable: the Nevada Supreme Court has
26 acknowledged that it must determine whether plaintiffs in Nevada may bring and whether the district
27 courts of the state have jurisdiction to hear private state constitutional claims.

28 ///

1 Consider the following hypothetical: if this matter is not stayed, and if NHP is required to
2 answer or otherwise respond at this time – if it asserts as a defense that Lara’s claims are not justiciable
3 and argue that there is no private right of action for damages or injunctive/declaratory relief on Nevada
4 constitutional claims, this Court will presumably either be unable to rule on that defense (consistent
5 with the Supreme Court’s finding that there is no clear authority on that question at this time), or the
6 Court would likely determine at that time that a stay is necessary to await the Supreme Court’s answers
7 to the certified questions. Either of those outcomes is offensive to judicial economy as NHP requests
8 the stay now, and waste of time and resources for the court and the parties can be avoided proactively.

9 **b. Immunities**

10 One of the specific pending certified questions before the Nevada Supreme Court is what
11 immunities may exist if there is a private right of action to bring Nevada Constitutional claims. (*See*
12 *question 3, at Sec. C, infra, also Exhibit 1*). The importance of this question cannot be overstated. For
13 example, in connection with 42 U.S.C. § 1983 claims for alleged federal constitutional rights
14 violations, certain defendants may claim immunity from suit pursuant to the doctrine of qualified
15 immunity.⁴

16 “One of the purposes of immunity, absolute or qualified, is to spare a defendant not only
17 unwarranted liability, but unwarranted demands customarily imposed upon those defending a long
18 drawn-out lawsuit.” (*Siebert v. Gilley*, 500 U.S. 226, 232 (1991) (emphasis added)). Qualified immunity
19 is recognized by the Supreme Court as a right, not merely to avoid standing trial, but also, “to avoid the
20 burdens of such pretrial matters as discovery.” *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (citations
21 omitted). “Once a defendant pleads a defense of qualified immunity, . . . , the judge appropriately may

22 ⁴ Qualified Immunity attaches when an official’s conduct does not violate a clearly established statutory
23 or constitutional rights of which a reasonable person would have known.” *White v. Pauly*, 580 U.S.
24 ___, ___, 137 S.Ct. 548, 51 (2017) (per curiam) (alterations and internal quotation marks omitted).
25 “Because the focus is on whether the officer had fair notice that her conduct was unlawful,
26 reasonableness is judged against the backdrop of the law at the time of the conduct.” *Brosseau v.*
27 *Haugen*, 543 U.S. 194, 198 (2004) (per curiam). “‘Qualified immunity gives government officials
28 breathing room to make reasonable but mistaken judgments,’ and ‘protects all but the plainly
incompetent or those who knowingly violate the law.’” *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (quoting
Ashcroft v. al-Kidd, 563 U.S. 731, 735, 131 S.Ct. 2074, 2085 (2011))). “The privilege is ‘an immunity
from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a
case is erroneously permitted to go to trial.’” *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

1 [perform governing immunity analysis].... Until this threshold immunity question is resolved, ***discovery***
2 ***should not be allowed.***” (Siegert, 500 U.S. at 231 (emphasis added, citations omitted); *see also*
3 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

4 Nevada statute provides for certain additional immunity defenses. (See NRS 41.032-41.038
5 (statutory provision of immunity from suit for causes of action that are predicated upon the exercise or
6 performance of, or the failure thereof, a discretionary function or duty on the part of the State of
7 Nevada, its agencies, or its political subdivisions, its officers, employees, or immune contractors). As
8 just described above regarding NRCP 12 response implications of the certified questions, NHP’s ability
9 to properly apply and plead these and potentially other immunity defenses is precluded at this time.
10 Until the Nevada Supreme Court answers Certified Question 3 regarding immunities, NHP cannot
11 meaningfully prepare a responsive pleading. Pursuant to the authorities herein cited, these proceedings
12 must be stayed because it is likely that allowing discovery at early stages of this case will be improper.
13 Should NHP plead a qualified immunity defense, discovery should not be permitted to proceed. Until
14 the certified questions are answered, the parties and the court cannot know whether such a defense will
15 be available in this case.

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1 **G. Conclusion**

2 Consistent with the foregoing, NHP respectfully requests that the Court acknowledge the impact
3 on this action of the questions described herein which have been certified to and accepted by the
4 Nevada Supreme Court. Judicial economy and fairness to NHP's ability to defend their interests in this
5 case require that proceedings be stayed pending the Nevada Supreme Court's answers to these
6 questions.

7 Dated this 14th day of October, 2021.

8 AARON D. FORD
9 Attorney General

10 By: /s/ Nathan L. Hastings
 Nathan L. Hastings (Bar. No. 11593)
 Senior Deputy Attorney General

11
12 By: /s/ Kathleen Brady
13 Kathleen Brady (Bar. No. 11525)
 Deputy Attorney General

14 *Attorneys for Defendants*
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DATED this 14th day of October, 2021.

By: /s/ Nathan L. Hastings
Nathan L. Hastings (Bar. No. 11593)
Senior Deputy Attorney General

By: /s/ Kathleen Brady
Kathleen Brady (Bar. No. 11525)
Deputy Attorney General

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on October 14, 2021, I filed the foregoing document via this Court's electronic filing system. Parties that are registered with this Court's EFS will be served electronically. For those parties not registered, service was made by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Carson City, Nevada to the following:

Jordan T. Smith, Esq.
John A. Fortin, Esq.
Pisanelli Bice PLLC
400 South 7th St., Ste. 300
Las Vegas, NV 89101
Attorneys for Plaintiff

Wesley Hottot, Esq. (*pro hac vice forthcoming*)
Institute for Justice
600 University St., Ste. 1730
Seattle, WA 98101
Attorneys for Plaintiff

Benjamin A. Field, Esq. (*pro hac vice forthcoming*)
Institute for Justice
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
Attorneys for Plaintiff

/s/ M. Neumann
M. Neumann, an employee of
the office of the Nevada Attorney General

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2

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EXHIBIT 3

3347

IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STEPHEN LARA,

Plaintiff,

v.

STATE OF NEVADA, ex rel. Department of
Public Safety, Highway Patrol Division;
COLONEL ANNE CARPENTER, in her
official capacity of Chief of the Nevada
Highway Patrol; and SERGEANT GLENN
RIGDON, in his official capacity as an officer
of the Nevada Highway Patrol; and JOHN
DOES I-X,

Defendants.

Case No. CV21-01595

Department No.: 4

ORDER GRANTING VERIFIED APPLICATION FOR ASSOCIATION OF COUNSEL
WESLEY P. HOTTOT, ESQ. AND BENJAMIN A. FIELD, ESQ.,
PURSUANT TO SCR 42

On October 5, 2021, Plaintiff STEPHEN LARA (hereinafter "LARA"), by and through his attorney, Jordan T. Smith, Esq. and John A. Fortin, Esq. of Pisanelli Bice PLLC, filed a *Verified Application for Association of Counsel P. Hottot, Esq. and Benjamin A. Field, Esq., Pursuant to SCR 42* under Nevada Supreme Court Rule 42, together with a Verified Application for Association of Counsel for Wesley Hottot, Esq., Certificate of Good Standing for the State of Washington and Texas, and the State Bar of Nevada Statement, and a Verified Application for Association of Counsel for Benjamin A. Field, Certificate of Good Standing for the State of New York and the District of Columbia, and the State Bar of Nevada Statement. Thereafter, the matter was submitted for the Court's consideration.

1 Initially, the Court notes DCR 13(3) provides a basis for granting the instant Motion
2 because no oppositions were filed. See DCR 13(3) (“[f]ailure of the opposing party to serve and
3 file his written opposition may be construed as an admission that the motion is meritorious and a
4 consent to granting the same”). Additionally, the Court finds that Wesley P. Hottot, Esq. and
5 Benjamin A. Field, Esq. have met the requirements of Nevada Supreme Court Rule 42 to permit
6 them to practice in Nevada for the above entitled matter, and that it is appropriate to grant the
7 Verified Application for Association of Counsel Wesley P. Hottot, Esq. and Benjamin A. Field,
8 Esq., Pursuant to SCR 42.

9 Based on the foregoing, and good cause appearing,

10 IT IS HEREBY ORDERED that the Verified Application for Association of Counsel
11 Wesley P. Hottot, Esq. and Benjamin A. Field, Esq., Pursuant to SCR 42 is GRANTED.

12 IT IS HEREBY FURTHER ORDERED that Wesley P. Hottot, Esq. and Benjamin A.
13 Field, Esq. are hereby admitted to practice in the above-entitled Court for the purposes of the
14 above-entitled matter only.

15 DATED this 25 day of October, 2021.

16 
17 _____
18 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

CASE NO. CV21-01595

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 25 day of October, 2021, I filed the **ORDER GRANTING VERIFIED APPLICATION FOR ASSOCIATION OF COUNSEL WESLEY P. HOTTOT, ESQ. AND BENJAMIN A. FIELD, ESQ., PURSUANT TO SCR 42** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

xx **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

NATHAN HASTINGS, ESQ. for STATE OF NEVADA, DEPT. OF PUBLIC SAFETY,
HIGHWAY PATROL DIV. et al

JORDAN SMITH, ESQ. for STEPHEN LARA

JOHN FORTIN, ESQ. for STEPHEN LARA

KATHLEEN BRADY, ESQ. for STATE OF NEVADA, DEPT. OF PUBLIC SAFETY,
HIGHWAY PATROL DIV. et al

 Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada:

Wesley P. Hottot, Esq.
Institute for Justice
600 University St., Ste. 1730
Seattle, WA 98101

Benjamin A. Field, Esq.
Institute for Justice
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – [NONE]

 Federal Express or other overnight delivery service [NONE]

DATED this 25 day of October, 2021.

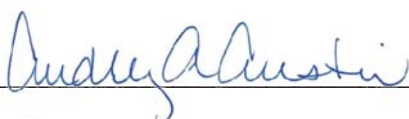


EXHIBIT 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81513

SONJIA MACK,
Appellant,

v.

**BRIAN WILLIAMS; JAMES DZURENDA;
ARTHUR EMLING, JR.; and MYRA LAURIAN,**
Respondents.

On Response to Order Accepting Certified Question from
the U.S. District Court for the District of Nevada
Case No. 2:18-cv-00799-APG-VCF
Honorable Judge Andrew P. Gordon, U.S. District Court Judge

**BRIEF OF *AMICI* STEPHEN LARA AND
INSTITUTE FOR JUSTICE**

Wesley Hottot
Pro hac vice pending
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, Washington 98101
whottot@ij.org

Benjamin A. Field
Pro hac vice pending
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
bfield@ij.org

Jordan T. Smith
Counsel of Record
Bar No. 12097

John A. Fortin
Bar No. 15221
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
jts@pisanellibice.com
jaf@pisanellibice.com

Attorneys for Amici

NRAP 26.1 DISCLOSURE

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

Stephen Lara is an individual. The Institute for Justice is a non-profit public interest law firm. The law firm whose partners or associates have or are expected to appear for Amici is PISANELLI BICE PLLC.

DATED this 1st day of November 2021.

/s/ Jordan T. Smith

Jordan T. Smith, Esq., Bar No. 12097
Counsel of Record
John A. Fortin, Esq., Bar No. 15221
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Wesley Hottot
Pro hac vice pending
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, Washington 98101

Benjamin A. Field
Pro hac vice pending
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203

*Attorneys for Amici Stephen Lara &
Institute for Justice*

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Stephen Lara is currently suing the Nevada Highway Patrol based on the unlawful seizure of his life savings. *See Lara v. State*, No. CV21- 01595 (Second Judicial Dist., Washoe Cty., filed Aug. 31, 2021). His lawsuit alleges that NHP violated his rights under Article I, Sections 8 and 18 of the Nevada Constitution and seeks declaratory and injunctive relief, monetary damages, and nominal damages. The defendants in *Lara* recently moved to stay proceedings pending the outcome of this case. Because Lara's case could be impacted by this Court's decision—particularly his claim for damages—he wishes to be heard on the certified questions.

Lara is represented *pro bono* by the Institute for Justice (IJ) and its associated attorneys in Nevada. IJ is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society. Government accountability is a cornerstone of any free society. Therefore, a key part of IJ's mission is litigating cases involving private enforcement of constitutional rights at the state, local, and national level.¹ Several of IJ's recent cases have

¹ *See, e.g., Timbs v. Indiana*, 139 S. Ct. 682 (2019) (holding that the Excessive Fines Clause applies to state and local forfeitures); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (striking down economic regulations based on the substantive-due-process protections of the Texas Constitution and rejecting a series of justiciability and immunity arguments from the government).

addressed qualified immunity.² And it regularly files amicus briefs on issues germane to the certified questions.³

Amici have separately moved the Court for leave to file this brief and do so out of time under Rules 29(a) and (f) of the Rules of Appellate Procedure.

² See, e.g., *Brownback v. King*, 141 S. Ct. 740 (2021); *Serrano v. Customs & Border Patrol*, 975 F.3d 488 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2511 (2021); *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 111 (2020); *Lech v. Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020).

³ See, e.g., *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); *Hernandez v. Mesa*, 140 S. Ct. 735 (2020); *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

INTRODUCTION

This is a case about first principles. The framers and ratifiers of the Nevada Constitution emphasized the primacy of individual rights and made them enforceable against the government. The Nevada Legislature has repeatedly expanded the capacity of ordinary people to sue the government. And, for more than 150 years, this Court has recognized that the state is susceptible to constitutional challenges in the courts of general jurisdiction. With these bedrock principles in focus, only a lawyer could argue that private citizens are powerless to enforce the Nevada Constitution or that state officials are categorically immune from its commands.

Below, amici explain how the text of the Nevada Constitution, state statutes, and case law all align to make answering the certified questions straightforward. Yes, there is a private right of action under Article 1, Sections 8 and 18. In such a case, state officials have only those immunities adopted by the Legislature or recognized at common law. And courts may order declaratory and injunctive relief, compensatory damages, or nominal damages based on the text of the Constitution, state law, and common law.

A right without a remedy is no right at all. Amici aim to show the Court that this first principle of governmental accountability applies with full force in Nevada.

ARGUMENT

I. Ordinary People Can Sue To Enforce Their Rights Under The Nevada Constitution.

A core purpose of state constitutions is to protect people's rights against the government. The Nevada Constitution is no exception. Like virtually every other state, Nevada's founding charter reflects the primacy of individual rights by listing them first, *see* Nev. Const. art. 1, describing them at length, *see id.* §§ 1–24, and emphasizing their importance in unmistakable terms, *see id.* § 1 ("All men are by Nature free and equal and have certain inalienable rights" including "defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness."); *id.* § 2 ("[a]ll political power is inherent in the people" and "[g]overnment is instituted for the protection, security and benefit of the people"); *id.* § 20 ("This enumeration of rights shall not be construed to impair or deny others retained by the people."). The framers and ratifiers of the Nevada Constitution would not have bothered to include so much detail about individual rights if they meant for them to be unenforceable.

Amicus Stephen Lara illustrates why the Nevada Constitution matters. In February 2021, Lara—a recently retired Marine sergeant—was traveling to Portola, California to visit his teenage daughters and shop for a home nearby. He was heading westbound on I-80 outside Reno, driving below the

speed limit, when an NHP trooper pulled him over for an "unsafe lane change." Other troopers began arriving. Over the course of his 90-minute detention, Lara truthfully answered all the officers' questions. He admitted that he had a large amount of cash, told them what the money was for, and even showed them receipts documenting where it came from.

None of that mattered. An NHP sergeant ordered the seizure of all of Lara's money—\$86,900—for the stated purpose of turning the money over to the U.S. Drug Enforcement Administration for federal adoption.⁴ There was nothing illegal in Lara's car. He was not arrested. He has not been charged with any crime. Yet, to get his money back, Lara had to sue the United States in federal court. *See Lara v. U.S. Drug Enf't Admin.*, No. 3:21- cv-00394-MMD-wgc (D. Nev. filed Aug. 31, 2021). After his story made national headlines, DEA pledged to return his money. *See Matt Zapotosky, A former Marine was pulled over following a truck too closely.*

⁴ Adoptions rely on the U.S. Department of Justice's Equitable Sharing Program, under which state and local law enforcement seize property under state law and federal agencies pursue civil forfeiture under federal law. The federal agency pays 80% of the proceeds back to the seizing agency and keeps 20% for itself. In Nevada, law enforcement agencies use adoption to avoid this state's comparatively robust protections for property owners in forfeiture proceedings and limits placed on how much forfeiture money per year an agency can keep. *See* NRS 179.1173(4) (requiring clear and convincing evidence connecting property to a forfeitable crime); NRS 179.1187(2)(d) (requiring agencies with more than \$100,000 in forfeiture funds to pay 70% of the excess to the State Education Fund).

Police took nearly \$87,00 of his cash. Washington Post, Sept. 1, 2021, <https://wapo.st/3Eo2Oi5>. Two weeks ago, DEA finally returned the money and, this week, Lara will dismiss his federal action without prejudice.

Now Lara must turn to Nevada's courts to seek damages and prevent the same thing from happening in the future. As demonstrated below, unlike federal courts, Nevada's courts are courts of general jurisdiction. Articles 4 and 6 of the Nevada Constitution make the courts guardians of Article 1. The Nevada Declaration of Rights presumes a government structure in which citizens can petition the judiciary to enforce their rights against the executive and legislative branches. The Nevada Legislature has gone several steps beyond this basic constitutional command, specifically authorizing suits for money damages against state officials who violate a person's constitutional rights, as well as suits for declaratory and injunctive relief.

Together, the text of the Nevada Constitution and state statutes answer the first two certified questions—whether there is a private right of action under Article 1, Sections 8 and 18—with a resounding "yes."

a. The Constitution Permits Suits Against The State.

Without a mechanism for enforcement, no constitution is worth the paper it is written on.

The framers and ratifiers of the Nevada Constitution understood this, and so they provided for judicial enforcement of constitutional rights. Under Article 6, Section 1, "[t]he judicial power of this State is vested in a court system" This "judicial power" includes "suit[s] against [the] state," under Article 4, Section 22 ("Provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution."). The forum for such a suit is "[t]he District Courts in the several Judicial Districts of this State" which "have original jurisdiction in *all cases* excluded by law from the original jurisdiction of justices' courts." Nev. Const. art. 6 § 6 (emphasis added). Constitutional analysis begins with constitutional text. And the Nevada Constitution makes the state subject to suit and gives the Legislature the power to establish procedural devices to accomplish that constitutional design.

The constitutional text should also be understood against its common law backdrop. High courts across the country have recognized that their states' governing charters, like Nevada's, permit equitable enforcement of constitutional rights against state and local governments. *See, e.g., Ladd v. Real Estate Comm'n.*, 230 A.3d 1096, 1108 (Pa. 2020) (holding that "the General Assembly's police powers are also limited and subject to judicial review"); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76–

77 (Tex. 2015) (rejecting the argument that sovereign immunity bars claims for alleged constitutional violations); *cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (collecting cases). These cases (and many others) make clear that the constitution is the state's highest law and that everyone—not just government officials—has the right to challenge state action based on its guarantees.

In more than 150 years of statehood, Nevada's courts have repeatedly recognized this so-called private right of action. *See, e.g., S. Pac. Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187, 189–90 (1964) (holding that state due process claims could be brought against the Public Service Commission); *Saunders v. State*, 70 Nev. 480, 481–82, 273 P.2d 970, 970–71 (1954) (recognizing claim for damages as compensation under the Nevada Constitution's Takings Clause); *Marymont v. Nev. State Banking Bd.*, 33 Nev. 333, 111 P. 295, 303 (1910) (holding a banking act unconstitutional under Article 1, §§ 1, 8, & 20); *State v. Preble*, 18 Nev. 251, 2 P. 754, 754 (1884) (holding an official's acts did not accord with the constitutional right granted by Article 1, § 16 [repealed in 1924] and issuing a writ of mandamus allowing a foreigner to purchase land). In recent years, too, this Court has repeatedly assumed that a private right of action exists, including for money damages. *See, e.g., City of Fernley v. State, Dep't of Tax*, 132 Nev. 32, 366

P.3d 699 (2016) (assuming a constitutional damages claim is appropriate when deciding which statute of limitations applies); *Ransdell v. Clark Cty.*, 124 Nev. 847, 192 P.3d 756 (2008) (resolving constitutional damages claim on the merits without suggesting any problem with bringing the claim directly under the Nevada Constitution). None of these cases would make sense if courts did not have the power to adjudicate disputes over a person's constitutional rights. *See City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 362, 302 P.3d 1118, 1128 (2013) ("This court has long recognized that the judiciary as a coequal branch of government has the inherent power to protect itself and to administer its affairs. Inherent judicial power stems from two sources: the separation of powers doctrine and the power inherent in a court by virtue of its sheer existence." (internal quotation marks and citations omitted)).

To summarize, under Article 6, the courts are charged with exercising the "judicial power" against the executive and legislative powers. The text of the constitution gives courts the sole responsibility of adjudicating disputes between ordinary people and the state government. If any doubt remained, Article 4 authorizes "suit[s] against the State as to all liabilities" provided some mechanism is "made by general law." Since statehood, this Court has understood this constitutional structure as providing a private right of action

against the government, including an action for damages. And, as demonstrated by the next section, the Nevada Legislature has adopted several mechanisms "by general law" to allow, if not encourage, such "suit[s] against the State."

b. The Legislature Has Authorized Suits Against The State.

In addition to the private right of action built into the Constitution, the Nevada Legislature has authorized suits against the state.

Like every other state, Nevada has adopted the Uniform Declaratory Judgements Act. *See* NRS Chapter 30. The UDJA provides a cause of action for:

[A]ny person . . . whose rights, status or other legal relations are affected by a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.

NRS 30.040(1).

This broad grant of capacity to sue specifically includes constitutional claims. *See* NRS 30.130 (providing "if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard"). Amicus Stephen Lara is currently relying on this provision to seek prospective declaratory and

injunctive relief in his suit against NHP. *See* Compl. ¶¶ 16–17, *Lara v. State*, No. CV21-01595 (Second Judicial Dist., Washoe Cty., filed Aug. 31, 2021).

The injunction statute, NRS Chapter 33, likewise gives courts broad discretion to order an injunction when (1) a person's rights depend on "restraining the commission . . . of the act complained of," (2) there would be "great or irreparable injury to the plaintiff," and (3) "the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights." NRS 33.010. Despite adopting many subsections designed to cabin and further define courts' injunctive powers, *see* NRS Chapter 33, the Legislature has not in any way limited the power of courts to issue injunctions against the state or its political subdivisions.

Even if the UDJA and injunction statutes did not exist, however, Nevadans would have a common-law equitable cause of action to enforce their constitutional rights. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."); *see also City of Sparks*, 129 Nev. at 363, 302 P.3d at 1128 ("Thus, the courts, whose judicial functions involve hearing and resolving legal controversies, possess the authority to take any actions that are inherent or

incidental to that function."). Even under federal law, where qualified immunity frequently bars claims for compensatory damages, it is blackletter law that plaintiffs can always seek an equitable remedy to enjoin unconstitutional executive action. *See Free Enter. Fund*, 561 U.S. at 491 n.2.

Beyond claims for injunctive and declaratory relief, the Legislature has specifically authorized private causes of action against the state by waiving its sovereign immunity. *See* NRS 41.031 (providing that the state "consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations"). It has even expressly provided for jury-determined damages for successful mandamus actions against government officials, *see* NRS 34.270, which this Court has applied in cases where the mandamus action was based on a constitutional violation, *see Gulbranson v. City of Sparks*, 89 Nev. 93, 95, 506 P.2d 1264, 1265 (1973).

There are, of course, limitations on the state's waiver of immunity. For example, no award may exceed \$150,000, NRS 41.035(1), and officials can defeat a lawsuit by demonstrating their actions were authorized by law or effectively out of their control, NRS 41.032(1). But these limitations only underline the general rule that ordinary people can sue the state government for violating their state constitutional rights.

II. The State, Its Subdivisions, And Its Agents Are Not Immune From Suits To Enforce The Nevada Constitution.

The Legislature has plainly and emphatically decided that there is no immunity from suit for claims against the government arising from the Constitution. Accordingly, this Court need not consider whether it would be constitutional for the state to immunize itself from suit because the Legislature has waived any immunity that it could assert. The state has expressly "waive[d] its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations." NRS 41.031(1). That waiver extends to "all political subdivisions of the State." *Id.* And by defining circumstances under which "an officer or employee of the State" may not be sued, the statute recognizes that as a general matter officers and employees may indeed be sued. *See* NRS 41.032.⁵

Following the statutory text, this Court has broadly construed Nevada's waiver of immunity. *See Martinez v. Maruszczak*, 123 Nev. 433, 441, 168 P.3d 720, 725 (2007) ("Nevada's qualified waiver of sovereign immunity is

⁵ The Legislature's enactment of a broad waiver of immunity largely codified the direction of the state's common law, in which the "trend was toward the judicial abolition of [the doctrine of sovereign immunity]." *State v. Silva*, 86 Nev. 911, 914, 478 P.2d 591, 593 (1970).

to be broadly construed."). For example, this Court recently held that Nevada's waiver of immunity included consent to damages liability under the federal Fair Labor Standards Act. *See Echeverria v. State*, 137 Nev. Adv. Op. 49, 495 P.3d 471, 476 (2021). Rejecting the government's efforts to read the waiver of sovereign immunity narrowly, this Court held that Nevada's waiver applies beyond just for tort actions. *See id.* ("To hold that the State is immune from any claim that does not sound in tort would be a dramatic and atextual curtailment of Nevada's waiver of sovereign immunity."). Instead, Nevada law recognizes that "the State should generally take responsibility when it commits wrongs." *Id.* If that principle reaches wage-and-hour rules, it surely extends to enforcing Article 1's Declaration of Rights.

It follows that Nevada's waiver of immunity is broad and subject only to specifically defined exceptions. *See* NRS 41.031(1) (waiving immunity "except as otherwise provided" in particularly enumerated statutory sections). Those exceptions are exceptionally precisely defined. *See, e.g.*, NRS 41.0331 (immunity for constructing fence at abandoned mine); NRS 41.0332 (no action against school districts for negligent acts of volunteer crossing guards); NRS 41.033 (no action may be brought for failing to inspect a building). This finely reticulated statutory framework suggests that additional exceptions to the broad waiver of immunity should not be

casually implied. *See Echeverria*, 495 P.3d at 476 ("If the Legislature meant to pass a law that waived immunity from one category of liabilities only, it could have easily done so expressly.").

Given such clear statements of law and policy, it is hard to see how state courts could import the doctrine of qualified immunity into Nevada law. Qualified immunity is a gloss on a *federal* statute, 42 U.S.C. § 1983, based on a unique set of judge-made policies. *See Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (explaining that the federal doctrine of qualified immunity derives from "principles not at all embodied in the common law"). By contrast, there is no basis in Nevada law for importing an atextual gloss on a federal statute. On the contrary, the Nevada Legislature has rejected official immunity in unambiguous terms.

Assuming a statutory basis for qualified immunity exists in Nevada (and there is none), still, this Court should decline to adopt the doctrine. An atextual gloss of the kind applied to Section 1983 by federal courts is fundamentally unworkable at the state level. Qualified immunity for state officials would run counter to the principles of the Declaration of Rights, the structure of Articles 4 and 6, and policies articulated by the Nevada Legislature. And even if all these legal hurdles could somehow be overcome,

adopting a state form of qualified immunity would still be unwise.⁶ The federal doctrine has caused grievous injustices as laid out exceptionally well in the Roderick and Solange MacArthur Justice Center's amicus brief.⁷

In a similar vein, this Court should not stretch the immunities that do exist in Nevada law to reach claims that the government or its agents have violated the Nevada Constitution. In particular, the discretionary-function exception drawn from NRS 41.032(2) should not be interpreted to apply to suits for constitutional violations. This exception only applies where the "judgment is of the kind that the discretionary-function exception was designed to shield," and what it is meant to shield is "prevent[ing] judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy." *Martinez*, 123 Nev. at 445–46, 168 P.3d at 728–29. A decision to violate the Nevada Constitution is decidedly not the kind of legitimate policy choice that the discretionary-function

⁶ Indeed, this Court's own precedent supports not adopting qualified immunity for state law claims. *See Paulos v. FCH1, LLC*, 136 Nev. 18, 22-25, 456 P.3d 589, 593-95 (2020) (grappling with issue preclusion arguments to state law claims under NRS 41.031 following a dismissal in federal court based on qualified immunity and never discussing extending qualified immunity to bar the appellants' state law claims).

⁷ Amici agree with MacArthur that "experience in the federal courts has shown [that] qualified immunity is unworkable and unjust." Br. of Amicus RSMJC at 1. They urge the Court to reject qualified immunity for all the reasons MacArthur has ably explained.

exception is meant to protect. *Accord Loumiet v. United States*, 828 F.3d 935, 939, 943 (D.C. Cir. 2016) (applying the same test under federal law and adopting the view of most circuit courts "that the discretionary-function exception does not shield government officials from . . . liability when they exceed the scope of their constitutional authority"). Simply put, Nevada officials have no discretion to violate the Constitution. *See City of Fernley*, 132 Nev. at 42, 366 P.3d at 706 ("[T]he principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution.").

III. Available Remedies Include Declaratory And Injunctive Relief, Monetary Damages, And Nominal Damages.

Finally, the Court should recognize that courts have a broad range of remedies available when an ordinary person challenges the constitutionality of state action.

Some remedies are created by statute. *See* Part I-B *above*. These include the power to enter a declaratory judgment, *see* NRS 30.040(1), order an injunction, *see* NRS 33.010, or award damages, *see* NRS 41.031.

Regardless of legislative decisions, however, constitutional rights have always been understood to carry with them, at minimum, equitable remedies to enjoin unconstitutional actions. *See Free Enter. Fund*, 561 U.S. at 491 n.2. This makes sense. A right without a remedy is no right at all. That is why, for

as long as the United States has been a republic, and Nevada a state, ordinary people have had the right to petition courts for redress when the government violates constitutional rights. Any view that leaves constitutional rights unenforceable in court would neuter their protections, making them meaningless. This Court should not relegate the Nevada Constitution to the dustbin of history in this way. Just the opposite: This Court should preserve and affirm the right of the people to seek judicial redress when government officials break their oaths to uphold the state's governing charter.

CONCLUSION

Amici urge this Court to answer the certified questions as follows:

1. Is there a private right of action under Nevada Constitution Article 1, § 8? Yes.
2. Is there a private right of action under Nevada Constitution Article 1, § 18? Yes.
3. If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense? All defenses available at common law that have not been otherwise abrogated. At minimum, the Court should squarely reject the federal doctrine of qualified immunity.
4. If there is a private right of action, what remedies are available to a plaintiff for these claims? All remedies dictated by the text of Articles 3 and

6 of the Nevada Constitution and those adopted by the Nevada Legislature,
including equitable relief and money damages.

DATED this 1st day of November 2021.

/s/ Jordan T. Smith

Jordan T. Smith

Counsel of Record

Bar No. 12097

John A. Fortin

Bar No. 15221

PISANELLI BICE PLLC

400 South 7th Street, Suite 300

Las Vegas, Nevada 89101

Wesley Hottot

Pro hac vice pending

INSTITUTE FOR JUSTICE

600 University Street, Suite 1730

Seattle, Washington 98101

Benjamin A. Field

Pro hac vice pending

INSTITUTE FOR JUSTICE

901 North Glebe Road, Suite 900

Arlington, Virginia 22203

Attorneys for Amici Stephen Lara &

Institute for Justice

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2020 in 14-point font, Georgia style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because it contains 4,148 words excluding those parts exempted by rule.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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, including NRAP 28(e), which requires every assertion 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 if this Brief does not conform to the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of November 2021.

/s/ Jordan T. Smith
Jordan T. Smith
Bar No. 12097

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 29th day of September 2021, I served a true and correct copy of the foregoing Brief of *Amici Curiae* Stephen Lara and Institute for Justice as filed, byway of the Supreme Court's electronic filing system to the following:

Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General
Nevada Attorney General's Office
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101

DATED this 1st day of November 2021.

/s/ Jordan T. Smith
Jordan T. Smith
Bar No. 12097