IN THE SUPREME COURT OF THE STATE OF NEVADA

THE NEVADA INDEPENDENT, Appellant, vs. RICHARD WHITLEY, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE STATE OF NEVADA, EX REL. THE NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND SANOFI-AVENTIS U.S. LLC, Respondents.	No.: 81844 DC No.: A-19-799939-W

APPELLANT'S OPENING BRIEF

(Appeal from denial of Petition for Writ of Mandamus)

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NRAP 26.1 DISCLOSURE STATEMENT

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

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DATED this 23rd day of February, 2021.

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JURISDICTIONAL STATEMENT

Appellant The Nevada Independent ("The Independent"), appeals from "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." Nev. R. App. Pro. 3A(b)(1).

The District Court entered its Order Denying Petition for Writ of Mandamus, a final judgment under Nev. R. App. Pro. 3A(b)(1), on September 4, 2020. Joint Appendix IV, p. 974 – 84 ("JA IV, 974 – 84"). The Notice of Entry of Order was filed on September 9, 2020 and served electronically. *Id.* at 985 – 98. The Independent timely filed its Notice of Appeal on September 22, 2020. *Id.* at 999 – JA V, 1001.

ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court as it is a matter "raising as a principal issue a question of statewide public importance[.]" Nev. R. App. Pro. 17(a)(12).

ISSUES PRESENTED FOR REVIEW

I. The District Court erred in determining that the public records at issue are rendered confidential by the Defend Trade Secrets Act ("DTSA"), 18 U.S.C. 1836, et seq.

II. The District Court abused its discretion in failing to strike the Declaration of James Borneman.

III. The District Court erred in failing to invalidate NAC §§ 439.730 – .740.

STATEMENT OF THE CASE

On August 8, 2019, The Independent filed a Petition for a Writ of Mandamus in the District Court, seeking access to certain public records. JA I, 1 – 14. On August 27, 2019, the District Court calendared the Petition to be heard on October 22, 2019. *Id.* at 233 – 4. On October 15, 2019, The Independent filed a Supplemental Brief in Support of Petition for a Writ of Mandamus. *Id.* at 235 – 46, and on October 17, 2019, Respondents Richard Whitley ("Whitley") and the State of Nevada ex rel. the Nevada Department of Human Services ("DHHS") filed their Opposition and Motion to Dismiss, *Id.* at 247 – 56.

On October 21, 2019, Respondent Sanofi-Aventis U.S. LLC ("Sanofi") filed its Motion to Intervene and to Continue Hearing, on Shortened Time. *Id.* at 257 – 455. The Independent opposed Sanofi's Motion to Intervene on October 31, 2019, *id.* at 456 – 65, Sanofi made a Reply in Support on November 1, 2019, *id.* at 466 – 72, and the Motion was heard on November 5, 2019, *id.* at 473 – 91. Following the hearing, The Independent filed an Errata to correct an incorrect statement made during the oral argument. JA II, 492 – JA III, 520. On November 14, 2019, the District Court issued a Minute Order,

seeking further briefing from the parties. JA III, 521 – 2. On November 21, 2019, Sanofi submitted the requested Supplemental Brief, *id.* at 523 – 8, and on December 5, 2019, The Independent submitted the requested Supplemental Brief and a Reply to the Proposed Response, *id.* at 529 – 44. On December 23, 2019, the District Court entered its Order Granting Sanofi's Motion to Intervene, *id.* at 549 – 53, and Sanofi filed its Response to Petitioner's Petition for a Writ of Mandamus, *id.* at 554 – 738. On January 3, 2020, The Independent filed its Reply to Intervenor's Response. JA III, 739 – JA IV, 758.

On January 17, 2020, The Independent filed its Witness List, JA IV, 759 – 61, Sanofi filed its Disclosure of Witnesses, *id.* at 762 – 4, and Whitley and DHHS filed their Disclosure of Witnesses, *id.* at 765 – 6.

On January 23, 2020, Whitley and DHHS filed their Reply in Support of Motion to Dismiss. *Id.* at 767 – 75.

On January 30, 2020, The Independent filed a Motion to Compel Testimony of James Borneman, or in the Alternative, to Strike his Declaration. *Id.* at 776 – 815. Sanofi filed its Opposition on February 3, 2020, *id.* at 816 – 41, and the Motion was heard February 4, 2020, *id.* at 842 – 90. The Motion was denied by Minute Order, February 14, 2020. *Id.* at 921 – 2.

On February 13, Culinary Workers Union Local 226 filed a Motion for Leave to File Brief Amicus Curiae. *Id.* at 891 – 917. On February 14, 2020, The Independent filed a Notice of Non-Opposition, *id.* at 918 – 920, as did Whitley and DHHS, *id.* at 923 – 4.

On February 21, 2020, the Petition was heard. *Id.* at 925 – 68. On September 4, 2020, it was denied. *Id.* at 974 – 984. Notice of that Order was given September 9, 2020, *id.* at 985 – 998, and The Independent timely filed its Notice of Appeal on September 22, 2020, *id.* at 999 – JA V, 1001. This appeal follows.

STATEMENT OF FACTS

Americans with diabetes spend an estimated $13,700 to $16,750 per year on medical expenses, of which an estimated $7,900 to $9,600 is directly attributable to spending in relation to diabetes. JA I, 3. The cost of insulin roughly doubled from 2012 to 2016. *Id.*

About 291,000 Nevadans have diabetes, *id.*, and in 2017 about $2.7 billion was spent in Nevada in direct and indirect medical expenses owed to diabetes. *Id.*

On June 15, 2017, then-Governor Brian Sandoval signed S.B. 539 into law, following its overwhelming bipartisan support in the Legislature. JA I, 5 – 6. S.B. 539 was the product of extensive debate and amendment in the

Legislature and was passed after a predecessor bill, S.B. 265, was vetoed by Governor Sandoval. *Id.*

The extensive debate and comment in the Legislature centered around the common sentiment that Nevadans faced a crisis with respect to the skyrocketing price of insulin, that the ever-rising prices were owed to the opacity in the marketplace – what share of the blame was owed to whom is unascertainable given the ubiquity of non-disclosure agreements and gag orders in the market. *Id.* at 4 – 6. Legislators variously agreed that, "The idea would be to increase the amount of transparency that exists specifically with diabetes drugs," "Because transparency is minimal in pharmaceutical pricing, it is very difficult to get to how exactly we choose the best marker[.]" *Id.* at 6, n. 4. Clearly, "The intent of S.B. 539 is . . . to further increase transparency around the pricing of essential insulin medications[,]" *id.*, because "When we have that information, we can identify why these prices continue to go up and why there is a problem." *Id.*

Following its enactment, but before S.B. 539 took effect, trade groups representing pharmaceutical and biotechnology manufacturers filed suit in the District Court for the District of Nevada, in case number 2:17-cv-02315, seeking to enjoin the enforcement of S.B. 539. *Id.* at 7. That suit was eventually dismissed voluntarily, on June 28, 2018. *Id.*

Following, and as a result of the dismissal of 2:17-cv-02315, Respondents enacted a regulatory scheme, NAC § 439 et seq., which, in pertinent part, at NAC §§ 439.730 – .740, establishes procedures and guidelines for DHHS to undertake should they be presented with a request for public records under the Nevada Public Records Act ("NPRA"), Nev. Rev. Stat. § 239.001 et seq. JA I, 7, JA IV, 978.

DHHS set a deadline of January 15, 2019 for affected pharmaceutical manufacturers and pharmacy benefit managers ("PBMs" to submit the required information under S.B. 539. JA I, 7.

On January 17, 2019, through its reporter Megan Messerly, The Independent made a request under the NPRA for the reports submitted under S.B. 539 (enrolled in pertinent part at Nev. Rev. Stat. §§ 439B.635 and .640) by pharmaceutical manufacturers and PBMs. *Id.* at 7 – 8. On April 3, 2019, DHHS responded to Ms. Messerly, indicating that because it believed the requested information was made confidential by the DTSA, it would deny the public records request in every meaningful respect. *Id.* at 8.

On June 11, 2019, Ms. Messerly, on behalf of The Independent, made a second request under the NPRA, for further annual reports submitted pursuant to Nev. Rev. Stat. §§ 439B.635 and .640. *Id.* On June 24, 2019, DHHS issued

a similar response, affirming its belief that the requested material was made confidential by the DTSA. *Id.*

In effect, DHHS agreed to produce the information that was already in the public domain but denied the public records request in every meaningful respect. *Id.* at 10.

On August 8, 2019, The Independent filed in the District Court, seeking a Petition for a Writ of Mandamus, directing Whitley and DHHS to disgorge the requested public records, as required under the NPRA. *Id.* at 1.

SUMMARY OF THE ARGUMENT

The District Court committed numerous errors, including errors of fact and law as well as on mixed questions of fact and law, resulting in a failure to evaluate this case under the correct standard, consideration of unreliable evidence which should have been stricken, and ultimately a judgment which conflicts with controlling decisions issued by this court, and ignores the weight of persuasive opinion in the field.

Although writ petitions are typically reviewed for an abuse of discretion, "questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 6 P.3d 1147, 1149 (2003).

The DTSA does not render any given thing confidential, rather, the conduct of the party claiming to own a trade secret and the qualities that item or information has are determinative of whether a certain thing is a trade secret. *Baron v. Dep't of Human Servs.*, 169 A.3d 1268, 1276 n.6 (Pa. Cmmw. 2017). The DTSA enumerates criteria for use in evaluating whether a given thing may be correctly considered a trade secret. In contrast to laws this court has acknowledged render certain otherwise-public records confidential, such as Nev. Rev. Stat. § 202.3662, *Reno Newspapers, Inc. v. Haley*, 126 Nev. Adv. Rep. 23, 2, 234 P.3d 922, 923 (2010), it does not specify any certain thing, rather, it lists the qualities that trade secrets typically have. The DTSA, therefore, does not "declare by law," the records at issue herein "to be confidential[.]" Nev. Rev. Stat. § 239.010(1).[1] In holding that the DTSA rendered the public records sought herein confidential, the District Court erred.

The records sought herein are not trade secrets by any definition. They are specifically exempted from trade secret status under Nev. Rev. Stat. § 600A.030(5)(b). The pharmaceutical manufacturers and PBMs who

[1] *Cf. Reno Newspapers, Inc. v. Haley*, 126 Nev. Adv. Rep. 23, 2, 234 P.3d 922, 923 (2010) (Notwithstanding Nev. Rev. Stat. §202.3662's plain and unambiguous statement that applications for concealed firearms permits are confidential, portions which are not confidential ordered produced under the NPRA.)

purportedly hold these trade secrets gave the information to DHHS, without any guarantee that the information would be kept confidential, thus vitiating any confidentiality they may have once enjoyed. Further, even in the presence of a promise of confidentiality, the trade secret status would be vitiated by the pharmaceutical manufacturers and PBMs giving their trade secret information to their customer, DHHS. Further still, the assertion that any economic value is derived from the exclusive knowledge of this information is belied by 20 years of lock-step price increases the purported competitors who hold the information have engaged in. JA IV, 784, 805 – 12.

Even in the event the public records sought herein could be correct called trade secrets which otherwise would enjoy some common law confidentiality or protection, Respondents cannot meet the balancing test outlined by this Court's precedent, because of the overwhelming policy arguments in favor of transparency. *Reno Newspapers, Inc. v. Haley*, 126 Nev. Adv. Rep. 23, 6, 234 P.3d 922, 924 (2010).

The administrative codes enacted by DHHS at NAC §§ 439B.730 – .740 must be stricken, as they were not authorized by the Legislature, conflict with the obvious intent of S.B. 539, and operate as a line-item veto over the NPRA, all of which this court has specifically prohibited. *See e.g., Division of Ins. v. State Farm Mutual Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000);

Clark Co. Social Service Dep't v. Newkirk, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990); *Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988); *Clark Cty. Sch. Dist. V. Las Vegas Review-Journal*, 134 Nev. Adv. Rep. 84, 9 – 10, 429 P.3d 313, 317 – 18 (2018); *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. Adv. Rep. 19, 10, 414 P.3d 318, 322 (2018).

ARGUMENT

On January 17, 2019, through its reporter Megan Messerly, The Independent submitted a public records request to DHHS, seeking all reports submitted by pharmaceutical manufacturers pursuant to Nev. Rev. Stat. §§ 439B.635 and .640, and any other report required of pharmaceutical manufacturers by S.B. 539, and all reports submitted by PBMs pursuant to Nev. Rev. Stat. § 439B.645, and any other report required of PBMs by S.B. 539. JA I, 24 – 25.

DHHS responded April 3, 2019, indicating that it did "not intend to disclose any fields from the drug manufacturer and PBM reports not referenced in Appendix 2." *Id.* at 28, and see the referenced Appendix 2, *id.* at 31.

Subsequently, on June 11, 2019, The Independent sent a similar request for public records to DHHS, *id.* at 33 – 35, and on June 24, 2019, *id.* at 37 – 40, received a similar response.

In both cases, DHHS states, "DHHS is denying disclosure of the fields not included in Appendix 2 on the basis that the information is confidential pursuant to the federal Defend Trade Secrets Act[.]" *Id.* at 28, at 37.

DHHS therefore,

> Did not disclose the following information from the Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635):
>
> - The Cost of Producing the Drug;
> - Total Administrative Expenditures Relating to the Drug;
> - Profit Manufacturer Earned from the Drug;
>
> Percentage of Manufacturer's Total Profit for the Period During Which the Manufacturer Has marketed the Drug for Sale that Is Attributable to Drug;
>
> - Total Amount of Financial Assistance Provided through Patient Prescription Assistance Programs;
> - Cost Associated with Consumer Coupons and for Consumer Copayment Assistance Programs;
> - Manufacturer Cost Attributable to Redemption of Consumer Coupons and Use of Consumer Copayment Assistance Program; and
> - Aggregate of All Rebates Manufacturers Provided to Pharmacy Benefit Managers for Drug Sales in Nevada.

JA IV, 975.

From the Drug Manufacturer Essential Diabetes Drug Price Increase Reports required under Nev. Rev. Stat. § 439B.640, DHHS refused to disclose:

- A Description of the Factor;

- The Percentage of the Influence on any Price Increase; and
- Explanation of Role of Each Factor on the Price Increase.

JA I, 9.

From the PBM Essential Diabetes Drug Reports, required under Nev. Rev. Stat. § 439B.645, DHHS refused to produce anything other than a list of PBMs that submitted reports, denying all of the following:

- Total amount of all rebates the PBM negotiated with manufacturers during the preceding calendar year for essential diabetes drugs;
- Total amount of all rebates mentioned above that were retained by the PBM;
- Total amount of all rebates that were negotiated for purchases of such drugs for use by recipients of Medicaid;
- Total amount of all rebates that were negotiated for purchases of such drugs for use by persons covered by third parties that are government entities but are not Medicaid or Medicare;
- Total amount of all rebates that were negotiated for purchases of such drugs for use by persons covered by third parties that are not governmental entities; and
- Total amount of all rebates that were negotiated for purchases of such drugs for use by persons covered by a plan described in SB 539 §4.2(2) and (3).

Id.

On August 8, 2019, The Independent filed a Petition for a Writ of Mandamus in the Eighth Judicial District Court together with an Appendix,

seeking production of the records DHHS withheld. *Id.* at 1 – 232. The Independent argued that the DTSA does not provide a cause of action against state actors, and in any case does not preclude production of records in the public records context, *id.* at 11, at 11 n.7, and on October 15, 2019, filed a Supplemental Brief, *id.* at 235 – 46, specifically explaining that the DTSA does not make any given thing confidential by operation of law, *id.* at 238 – 240.

Ultimately, on September 4, 2020, the District Court denied the Petition, JA IV, 974- 84, stating:

> The DTSA's definition for trade secrets places these reports squarely under confidentiality protections. 18 U.S.C. 1839(3). Specifically, and as both Respondents and Sanofi highlight, these reports derive independent economic value, actual or potential, from not being generally known to, or readily ascertainable by, other people who can obtain economic value from their disclosure or use and are subject to reasonable efforts to maintain their secrecy. *Id.* 1839(3).

The District Court's ruling places itself at odds with numerous other state and federal courts which have examined this question. It is an interpretation of law, and therefore subject to *de novo* review by this Court. *See e.g.*, *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 6 P.3d 1147, 1149 (2003).

The records sought herein are not made trade secrets by the DTSA, because neither the DTSA nor any other trade secret law can make a given

thing a trade secret – it is only the conduct of the party and the properties of the thing itself which render something a trade secret.

The holders of the public records sought herein have not taken adequate steps, nor can they prove that the requested records hold any economic value, and therefore the records do not satisfy any applicable definition of what a trade secret is.

Notwithstanding that the records sought herein are not trade secrets, even were they, production would still be required under Nevada law, including the NPRA and the body of case law established by this Court, which promotes a broad interpretation of powers and rights under the NPRA, *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Rep. 84, 7, 429, P.3d 313, 317 (2018), citing *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877 – 78, and recognizes that any exceptions or confidentialities should be construed narrowly, *id.* at 11 – 12, at 318, citing *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

The records sought herein are not made confidential by the DTSA. They are not trade secrets because they have not adequately been protected, nor do they provide economic value to their holders. Even assuming, arguendo, that they could be considered trade secrets, nonetheless Nevada law would require

their disclosure, as the policy of transparency dramatically outweighs the private interest in secrecy in this case.

I. The Public Records Sought Herein are not Made Confidential Either by Statute or at Common Law.

The public records sought herein are not trade secrets. They are not made confidential by any law, including the DTSA or Nevada trade secret law. Further, the conduct of pharmaceutical manufacturers and PBMs, in providing the information to DHHS without any guarantee of confidentiality dissolved any potential claim of confidentiality. Further still, the public records sought herein provide their owners with no economic value, and therefore they do not meet any definition of a trade secret.

There can be no confidentiality under these circumstances, where the holder of the purported trade secret hands the information to another voluntarily without any guarantee that entity will – or even could – keep the information confidential: "Neither the desire for nor the expectation of non-disclosure is determinative." *Sepro Corp. v. Fla. Dep't of Envtl. Prot.*, 839 So.2d 781, 784 (Fla. Dist. App. 2003).

The information sought herein is by definition entirely public record, subject to disclosure under the NPRA, and the District Court erred in finding otherwise. In order to vindicate Appellant's rights under the NPRA, and consistent with this Court's numerous previous holdings in this area of law,

this Court should direct Respondents to produce the requested public records forthwith.

A. The DTSA Does not Explicitly and Expressly Render Anything Confidential.

The DTSA is a federal statute enrolled at 18 U.S.C § 1836, et seq., which has the purpose of offering a federal forum and cause of action for misappropriation of trade secrets, including the opportunity for an aggrieved party to get an emergency injunction. Indeed,

> Congress went out of its way to make clear that the DTSA does not preempt state trade secret laws. *Id.* Rather, the DTSA merely provides 'a complimentary Federal remedy if the jurisdictional threshold for Federal jurisdiction is satisfied.' *Id.*"

Brand Energy & Infrastructure Servs. v. Irex Contracting Grp., 2017 U.S. Dist. LEXIS 43497, 17 n.17, E.D. Pa. 16-2499, Mar. 23, 2017, citing H.R. REP. NO. 114-529, at 5.

Because the DTSA is a relatively new law, with a limited application, cases interpreting its application are not voluminous. However, the few that can be found offer insight for this case: "The DTSA does not expressly provide the [disputed records] are confidential or trade secrets . . . Notably, the DTSA does not designate the [disputed records] at issue as trade secrets." *Baron v. Dep't of Human Servs.*, 169 A.3d 1268, 1276 n.6 (Pa. Cmmw. 2017).

In *Baron*, the disputed records at issue were "rates paid to nursing homes by managed care organizations[.]" *Id.* at 1270. Although the Court denied the Petition on other grounds, it rejected the notion that the DTSA designated certain items trade secrets: "[Real Party in Interest] presumes the trade secret status applies to such rates, which is necessary for application of the DTSA. The DTSA does not exempt the rates[.]" *Id.* at 1276 n.6.

Instead, the court in *Baron* compared the DTSA to the Copyright Act, insomuch as "neither federal statute exempts records from disclosure." *Id.*, citing *Ali v. Phila. Planning Comm'n*, 125 A.3d 92 (Pa. Cmmw. 2015).

An examination of the relevant portions of the DTSA makes clear that the law does not establish the confidentiality of any certain thing, but rather offers criteria for use in evaluating claims of trade secrecy. 18 U.S.C. § 1839(3).

Indeed, trade secrets existed long before the enactment of the DTSA, or its predecessor, the Economic Espionage Act of 1996, 18 U.S.C. § 1831, et seq. In *Kewanee v. Bicron*, the Court held that state trade secret laws were "not preempted by the patent laws of the United States[.]" 416 U.S. 470, 471, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974). Now, 48 states – including Nevada, *see* Nev. Rev. Stat. § 600A et seq. – have adopted some version of the Uniform Trade Secrets Act, developing their own trade secret laws.

"[T]he DTSA was modeled on the Uniform Trade Secrets Act[.]" *Fast Enters. LLC v. Pollack*, 2018 U.S. Dist. LEXIS 161518, 7 – 9, 2018 WL 4539685, U.S. Dist. Mass. 16-cv-12149, Sept. 21, 2018, citing S. REP. NO. 114 – 220, at 3 (2016). Nevada's enactment of the Uniform Trade Secrets Act closely mirrors the DTSA language at 18 U.S.C. § 1839(3), in defining the term "trade secret:"

> Means information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, computer programming instruction or code that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Nev. Rev. Stat. § 600A.030(5)(a). The language closely follows that quoted by the *Kewanee* court from the Restatement of Torts:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers."

Kewanee, 416 U.S. at 474 – 5, quoting Restatement of Torts § 757, comment *b* (1939).

"'[W]hether information constitutes a trade secret is a question of fact.'" *Amgen Inc. v. California Correctional Health Care Services*, 47 Cal.App.5th 716, 733, 260 Cal. Rptr. 3d 873 (Cal. App. 2020), quoting *Global Protein Products, Inc. v. Le* 42 Cal.App.5th 352, 267, 255 Cal. Rptr. 3d 310 (Cal. App. 2019). In *Amgen*, the California Court of Appeal considered Amgen's claim that the material disputed in a public records action was a trade secret. California has codified the Uniform Trade Secrets Act – the basis for the DTSA. Cal. Civ. Code § 3426 et seq.

Even Ohio, whose public records body of law diverges significantly from Nevada's[2], and whose public records law allows trade secrets to be exempted from production, Ohio Rev. Code § 149.43(A)(1)(v), nonetheless requires a party claiming they hold a trade secret to prove their claim. *State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati*, 135 Ohio St. 3d 416, 421, 988 N.E.2d 546, 551 (Ohio 2013), quoting *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399 – 400, 732 N.E.2d 373 (2000) ("The entity claiming trade-

[2] For instance, Ohio law requires the *requestor* to "establish entitlement to the requested extraordinary relief by clear and convincing evidence." *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012 Ohio 4246, 976 N.E.2d 877 (Ohio 2012).

secret status in this case the corporation, 'bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute[.]").

Trade secrets are a creature of the common law, they existed long before the DTSA was dreamt of, and the DTSA does nothing to change how they are defined – and makes no effort to categorize them. As ever, trade secrets are creatures of common law, and therefore are not "explicitly made confidential by statute[.]" *Reno Newspapers, Inc. v. Haley*, 234 P.3d at 923; Nev. Rev. Stat. § 239.010(1).

Indeed, as this Court has observed, for a statutory exemption to be created, it must be established "expressly and unequivocally[.]" *Id.* at 924 – 5, citing *Cowles Pub. Co. v. Kootenai County Bd.*, 144 Idaho 259, 159 P.3d 896, 899 (Idaho 2007) and *Kroeplin v. DNR*, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286, 292 (Wis. Ct. App. 2006).

The DTSA offers criteria under which an aggrieved entity can satisfy a court they held a trade secret, for the purpose of achieving redress for the misappropriation of that trade secret. The contrast between the DTSA and the "express and unequivocal," statutory language required under Nevada law to exempt public records from disclosure is stark, and the consequence that flows

from it clear: the material sought by The Independent herein is indisputably public record subject to disclosure under Nevada law.

A. Whitley and DHHS are Immune from Suit Under the DTSA and Eleventh Amendment.

Where Federal District Courts have examined the DTSA under the specific context of a public records request under respective state law, they have ruled that the DTSA does not provide a cause of action against a state entity or employee – even under the *Ex Parte Young* doctrine, 209 U.S. 123, 126, 28 S. Ct. 441, 52 L. Ed. 714 (1908). *Fast Enters. LLC v. Pollack*, 2018 U.S. Dist. LEXIS 161518, 7 – 9, 2018 WL 4539685, U.S. Dist. Mass. 16-cv-12149, Sept. 21, 2018.

In *Fast Enterprises*, the CEO of the Massachusetts Department of Transportation, Stephanie Pollack, was sued by a software designer, Fast Enterprises, LLC, in Fast's attempt to enjoin Pollack from disclosing certain information submitted by Fast to the Massachusetts Department of Transportation during a bid solicitation process. *Id.* at 1 – 2. Fast indicated in their bid package their belief that portions of the information submitted were trade secrets. *Id.* at 2 – 3. Pollack moved to have the case dismissed on the basis that the DTSA does not grant a federal court jurisdiction over such a suit, because it "'does not prohibit or create a private right of action' in regard to

'any otherwise lawful activity conducted by a governmental entity of . . . a State.'" *Id*., at 5, quoting 18 U.S.C. 1836(c). Pollack's motion was granted, and the case dismissed: "based on the plain text of the DTSA . . . the Court must conclude that FAST seeks to enjoin the 'otherwise lawful' activity of the state of Massachusetts, and because the DTSA does not create a cause of action in such circumstances, the case is dismissed." *Id.* at 9 – 10.

Further, the *Pollack* court discussed the possibility of liability under the *Ex Parte Young* doctrine, comparing the DTSA to the Americans with Disabilities Act, or 42 U.S.C. §1983, finding that "the state of Massachusetts is the real party-in-interest, and that the DTSA does not permit a suit against Pollack where the action that [Plaintiff] is seeking to enjoin is the 'otherwise lawful' activity of the state of Massachusetts."

Similarly, in *Medsense, LLC v. Univ. Sys. of Md.*, 2019 U.S. Dist. LEXIS 166730, 2019 WL 4735430, D. Md. GLS-18-3262, Sep. 27, 2019, "[MedSense] alleged[d] that: the University System of Maryland . . . breached an exclusive licensing agreement related to certain intellectual property . . . and (b) [State Employee] defendants . . . disclosed trade secrets and confidential information." *Medsense*, 2019 U.S. Dist. LEXIS at 1. The District of Maryland determined that the Eleventh Amendment protected the State defendants from suit, and that the DTSA did not abrogate that protection. *Id.* at 17, 25 – 26.

The weight of federal authority indicates that Whitley and DHHS could not even face suit under the DTSA, let alone damages. These cases make clear the correct interpretation of the DTSA is the obvious one – that it does not interfere with government entities or employees' obligation to carry out their lawful duties.

B. The Records Sought Herein are not Trade Secrets Under any Definition or Scheme.

As discussed above, it is not the DTSA or any other statute which renders a thing a trade secret, rather, it is the conduct of the owner of a purported trade secret, the economic benefit derived the thing, and the fact that it is kept secret – at reasonable lengths – which is determinative of what is or is not a trade secret.

As explained in *Kewanee*, federal intellectual property laws allow trade secrets to remain the purview of the states. 416 U.S. at 474. Further, because the DTSA states in plain terms

> "this chapter shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by the United States Federal, State, commonwealth, possession, or territory law for the misappropriation of a trade secret, or to affect the otherwise lawful disclosure of information by any Government employee under section 552 of title 5 (commonly known as the Freedom of Information Act).

18 U.S.C. § 1838. The DTSA does not exist to displace state trade secret law (nor to prevent the disclosure of information under the federal Freedom of Information Act, nor any of the state counterparts, including the NPRA). Therefore, the law of the State of Nevada is determinative as to what is and is not a trade secret in the State of Nevada.

1. Nevada Law Excludes the Requested Records from Trade Secret Protection.

Although trade secrets are creatures of the common law, as part of S.B. 539, the Nevada Legislature exempted the public records at issue herein from trade secret status. Under Nev. Rev. Stat. § 600A.030(5)(b), the term "Trade Secret":

> Does not include any information that a manufacturer is required to report pursuant to NRS 439B.635 or 439B.640, information that a pharmaceutical sales representative is required to report pursuant to NRS 439B.660 or information that a pharmacy benefit manager is required to report pursuant to NRS 439B.645, to the extent that such information is require to be disclosed by those sections.

The language of the statute is not ambiguous – the records at issue herein by definition cannot be trade secrets in Nevada. Even if some ambiguity could be conjured up, in turning to the legislative history and related sources we find overwhelming evidence that the will of the Nevada Legislature in creating S.B. 539 was to promote transparency. JA I, 5 – 6 (collecting commentary from the

legislative history of S.B. 539 and a predecessor bill, S.B. 265); JA III, 749 (quoting the Legislative Digest, describing S.B. 539 in pertinent part as, "AN ACT relating to prescription drugs . . . providing that certain information does not constitute a trade secret." 2017 Statutes of Nevada, ch. 592, Legislative Counsel's Digest, 4295 – 96).

2. The Public Records at Issue Herein Cannot be Trade Secrets, Because They do not Provide Economic Benefit to The Holders.

In *Kewanee*, discussed herein throughout, the United States Supreme Court made a landmark decision which left trade secret law to the states. Even if the DTSA were to be understood to create an additional layer of trade secret law, in direct conflict with its plain language, which indicates it does not preempt state law, still the records at issue herein could not be understood to be trade secrets because they do not appear to provide economic value to their holders.

To prove that one holds a trade secret, one must be able to demonstrate that the information in question provides an economic benefit to the holder. However, in the case of insulin, the evidence is entirely indicative that no economic advantage is enjoyed by any particular manufacturer, let alone one that is specifically attributable to the records requested herein. For example, consider the case of Humalog, a short acting insulin produced by Lilly, and

Novolog, Novo Nordisks' competitor product, we see the prices are identical – not similar, *identical*: $255.40 per vial, in 2016. JA IV, 805 – 7.

The DTSA definition of trade secret requires that, "the information derives independent economic value, actual or potential, from not being generally known" to anyone other than the holder. In this case, it appears that, notwithstanding whatever experts, algorithms or alchemy they employ, those who manufacture insulin simply peg their price to that of their competitor. There is no economic benefit, actual or potential, derived from this information, and it is therefore not a trade secret.

C. Sanofi and Other Pharmaceutical Manufacturers and PBMs Waived any Trade Secret Protection They May Otherwise Have Enjoyed by Voluntarily Submitting the Disputed Public Records to DHHS.

Examples of trade secrets are myriad, specifically because a trade secret can be virtually anything which is kept secret, and from which one derives economic benefit by virtue of knowing that thing and keeping it away from everyone else in the world.

Among the various intellectual property protections, such as patents or copyrights, trade secrets can be thought of as having the comparative advantage of total secrecy, and the comparative weakness of being extremely fragile. By contrast to a patent for instance, the holder of a trade secret does not have the obligation of filing an application and allowing others the chance to

look at his schematic, nor is he restricted to only seeking trade secret status for certain processes or items which satisfy the patent office. However, there is a corresponding penalty, which also contrasts with patent protection: a trade secret is entitled to status only so long as it remains exactly that – secret. For this reason, trade secret status is judged partially according to whether the holder takes reasonable steps to keep the information safe.

The California Court of Appeal recognizes the fragility of trade secret protection:

> Thus, '[p]ublic disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.

Amgen Inc. v. California Correctional Health Care Services, 47 Cal.App.5th at 734 – 35, 260 Cal Rptr. 3d 873, quoting *In re Providian Credit Card Cases*, 96 Cal.App.4th 292, 304, 116 Cal. Rptr. 2d 833 (Cal. App. 2002), and quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002, 81 L. Ed. 815, 104 S. Ct. 2862 (1984).

In this case, the pharmaceutical manufacturers and PBMs subject to S.B. 539 disclosed the material disputed herein without any guarantee from DHHS that they would guard the information as confidential. In fact, under the clear

language of NAC § 439B.730 – .740, they were aware that DHHS would do no more than consider whether the material was a trade secret or not – in other words, the pharmaceutical manufacturers and PBMs were aware that there was no guarantee of confidentiality.[3] Indeed, "[A] private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential. Neither the desire for nor the expectation of non-disclosure is determinative." *Sepro*, 839 So. 2d at 784.

The pharmaceutical manufacturers and PBMs who submitted the disputed records to DHHS did so knowing that DHHS, in its role administering Medicaid in Nevada, is a major buyer of the drugs tracked under S.B. 539. DHHS therefore "directly or indirectly sit[s] on the opposite side of the negotiating table from [pharmaceutical manufacturers[.]" *Amgen*, 47 Cal.App.5th at 736 – 37, 260 Cal Rptr. 3d 873.

> "[A] large purchaser negotiating deals for Amgen's and its competitors' products presumably would greatly value insight into Amgen's 'pricing strategy, internal decisionmaking, [and] internal forecasts[.]"

[3] Of course, if such a guarantee had been offered, it would nonetheless be ineffective. "'[T]he right to examine these records is a right belonging to the public; it cannot be bargained away by a representative of the government.'" *Tenn. Valley Printing Co. v. Health Care Auth.*, 61 So. 3d 1027, 1037 (Ala. 2010.), quoting *National Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 1201, 1208 – 9 (Fla. Dist. Ct. App. 2009); Nev. Rev. Stat. § 239.001(1) ("The purpose of this chapter is to foster democratic principles by providing members of the public with prompt access to . . . public books and records[.]")

Id. at 737.

Further, as was the case in *Amgen* pharmaceutical manufacturers and PBMs were aware at all times of the consequences of S.B. 539, having had representative trade groups at legislative hearings on S.B. 539 and its predecessor S.B. 265, JA I, 150 (Page 23 of the excerpted document), 254 (Page 50 of the excerpted document).

The same trade groups – Pharmaceutical Research and Manufacturers of America and Biotechnology Innovation Organization – were Plaintiffs in the federal case whose resolution led to the adoption of NAC §§ 439.730 – .740. *See Amgen*, 47 Cal.App.5th at 738: "Amgen cannot claim to have been unaware of the possible consequences of its disclosure, including the loss of trade secret protections; trade groups opposed Senate Bill No. 17 precisely because it 'requires the disclosure of commercially sensitive pricing information' 'without confidentiality protections.'" Quoting (Assem. Com. on Appropriations, Analysis of Sen. Bill No. 17 (2017–2018 Reg. Sess.) as amended July 20, 2017, p. 4 [summarizing joint letter of Pharmaceutical Research and Manufacturers of America, Biotechnology Innovation Organization, California Life Sciences Association, and Biocom].

Indeed, at all times, each pharmaceutical manufacturer and PBM subject to S.B. 539 knew at the time they submitted the records disputed herein, that

ultimately it would be a court that decided whether the public would have access to these records – whether that was the result of a case such as this one, in which the public sues for access, or in the alternative event, in which the pharmaceutical manufacturer or PBM would seek an injunction, had Whitley and DHHS correctly determined the material disputed herein was subject to disclosure under the NPRA.

"[E]ntities doing business with government agencies and submitting records to them in connection therewith should be aware that regardless of agency promises that documents will be kept confidential, public record suits can nevertheless be successful." *Tenn. Valley Printing Co. v. Health Care Auth*, 61 So. 3d 1027, 1037, quoting Theresa M. Costonis, *What Constitutes Commercial or Financial Information, Exempt from Disclosure Under State Freedom of Information Acts*, 5 A.L.R. 6th 327, § 3 (2005) (footnotes omitted).

Given the foregoing, even assuming arguendo that the requested records could at one time correctly have been called trade secrets, that status dissolved not later than the moment each pharmaceutical manufacturer and PBM delivered the material to DHHS.

II. Because Trade Secrets are not a Statutory Exemption, even in the Event the Disputed Records are Held to be Trade Secrets, Respondents Must Satisfy the Balancing Test Outlined by This Court for NPRA Requests.

Assuming, arguendo, the Court were convinced that the records disputed herein were trade secrets, nonetheless Respondents bear the burden of proving by a preponderance of evidence that their interest in concealing these records outweighs the public's interest in accessing the records. In such a circumstance, where the cost to Nevadans is calculated in terms of lives and bankruptcies induced by medical bills, there can be no doubt that the scales tip toward disclosure.

In Nevada, public records which are not "declared by law to be confidential" may be accessed by the public and inspected or copied. Nev. Rev. Stat. § 239.010(1). In order to be "declared by law to be confidential" under Nev. Rev. Stat. § 239.010(1), the statutory exemption must be "express and unequivocal." *Reno Newspapers, Inc. v. Haley*, 234 P.3d at 924 – 5, citing *Cowles Pub. Co. v. Kootenai County Bd.*, 144 Idaho 259, 159 P.3d 896, 899 (Idaho 2007) and *Kroeplin v. DNR*, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286, 292 (Wis. Ct. App. 2006).

In the absence of a statutory exemption, "The burden is then on the governmental entity to show by a preponderance of the evidence that . . . the balance of interests weighs clearly in favor of the government not disclosing the requested records." *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. Adv. Rep. 19, 4, 414 P.3d 318, 320 (2018), citing *Public*

Employees' Ret. Sys. v. Reno Newspapers, Inc., 129 Nev. 833, 837, 313 P.3d 221, 224 (2013).

In other areas, this Court has acknowledged that many public policy questions are, "better left to the Legislature[,]" *Renown Health, Inc. v. Vanderford*, 126 Nev. Adv. Rep. 24, 7, 235 P.3d 614, 616 (2010), citing *Nevada Hwy. Patrol v. State, Dep't Mtr. Veh.*, 107 Nev. 547, 550 – 1, 815 P.2d 608, 610 – 1 (1991); *Niece v. Elmview Group Home*, 131 Wn. 2d 39, 929 P.2d 420, 428 (Wash. 1997). This is particularly true in areas in which "The Legislature has heavily regulated," because courts can safely assume that the Legislature would have codified a particular result if they'd intended it. *Renown Health, Inc. v. Vanderford*, 126 Nev. Adv. Rep. 24, 7, 235 P.3d at 616.

Where, as here, the Legislature has given as explicit an indication of its intention as could be asked for – indeed, NRS chapter 439B, where S.B. 539 is substantially codified, is titled "Restraining Costs of Health Care" – and the cost of withholding the records is measured in terms of lives lost, it is incumbent upon this Court to order disclosure of these records – whether they are trade secrets or not. The people of the State of Nevada, through the people's branch of the government, have made their preference clear: Nevadans want transparency in the insulin market, because the current state of

opacity is driving up prices, and in turn driving Nevadans to bankruptcy, or the morgue.

A similar conclusion was reached by the Washington Supreme Court, in considering whether to order disclosure of trade secrets subject to a public records request in *Lyft, Inc. v. City of Seattle*: "We must decide whether records containing trade secrets are categorically excluded from public disclosure under the Public Records Act (PRA), ch. 42.56 RCW. We hold that they are not." 190 Wn. 2d 769, 773, 418 P.3d 102, 104 (Wash. 2018).[4]

[4] In relevant part, Washington's public records law, *see, generally*, RCW 42.56 *et seq.*, is similar to Nevada's, in that it exempts records from public disclosure "'in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.'" *Lyft, Inc. v. City of Seattle*, 190 Wn. 2d at 777, 418 P.3d at 106, quoting *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251 – 52, 884 P.2d 592 (1994) (PAWS), *quoting* former RCW 42.17.340(1) 1992, *recodified as* RCW 42.56.550(1).

Further, Washington has codified the Uniform Trade Secrets Act, as has Nevada, which is the basis for the DTSA.

In *Lyft, Inc. v. City of Seattle*, the Washington Supreme Court considered whether Lyft could successfully exclude certain information it considered trade secret from the view of the public records act by virtue of the categorical statutory exemption quoted above. The Washington Supreme Court held that it could not, and that it must satisfy the balancing test – itself similar to Nevada's: "such records may be enjoined from disclosure only if disclosure would clearly not be in the public interest, and would substantially and irreparably damage a person or a vital government interest." 190 Wn.2d at 773, 418 P.3d at 104.

No sufficient evidence was placed before the District Court which could constitute a preponderance. In any event, the private interest in withholding the records disputed herein is so dramatically outweighed by the public interest in disclosure that no result other than disclosure can reasonably follow.

A. No Sufficient Evidence was Presented to the District Court to Meet the Preponderance Standard Outlined by This Court in Numerous NPRA Cases.

Even in the absence of the overwhelming policy argument, which would require disclosure of the records sought herein even in the event the records are determined to be trade secrets, a complete dearth of evidence was presented to the District Court upon which such a determination could rest.

Of the approximately seven PBMs and 98 pharmaceutical manufacturers who submitted reports pursuant to the requirements of S.B. 539, JA IV, 988 – 91, only Sanofi appeared in this matter to argue in support of withholding. Only Sanofi offered any evidence to support its contention that the public records sought herein are, in part, Sanofi trade secrets. Even in the event that this Court would find that Sanofi had carried the burden of proving that a preponderance of the evidence supported its contention that the requested materials are trade secrets, and that their interest in nondisclosure clearly outweighs the public interest in disclosure, it is impossible that could be the

case for any of the records submitted by any other pharmaceutical manufacturer, and any PBM.

Neither DHHS, nor any pharmaceutical manufacturer other than Sanofi, nor any PBM submitted any evidence to the District Court. Under these circumstances, they cannot possibly have carried their burden of proving by a preponderance of the evidence that the requested records should be protected by trade secret confidentiality.

1. The Admission of the Defective Declaration of James Borneman was an Abuse of Discretion.

Generally, evidence must be relevant, Nev. Rev. Stat. § 48.015, and witnesses must testify from personal knowledge, Nev. Rev. Stat. § 50.025(1)(a). To those ends, under E.D.C.R. 2.21, an affidavit:

> must contain only factual, evidentiary matter, conform with the requirements of N.R.C.P. 56(e), and avoid mere general conclusions or argument. Affidavits substantially defective in these respects may be stricken, wholly or in part.

Under N.R.C.P. 56(e):

> If a party fails to properly support an assertion of fact . . . the court may:
>
> 1) give an opportunity to properly support or address the fact;
>
> 2) consider the fact undisputed for the purposes of the motion;

> 3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; or
>
> 4) issue any other appropriate order[.]

Where, as here, the District Court is presented with a declaration which so severely falls short of the requirements of E.D.C.R. 2.21 and N.R.C.P. 56(e), the District Court abuses its discretion in failing to strike the declaration and admitting the declaration into evidence.

Mr. Borneman's declaration, JA III, 575 – 580, offered by Sanofi in support of its contentions that its share of the public records requested herein are appropriately considered trade secrets, is rife with sections lifted whole-cloth from various Sanofi websites, JA IV, 781, ln. 7 – 782, ln. 12, and the written testimony of other Sanofi employees. JA IV, 782, ln. 13 – 17, compare JA III, 575, par. 3 – 4 (a portion of the Declaration of Mr. Borneman), with JA IV, 802 (a portion of the Testimony of Kathleen W. Tregoning, Before the House Energy and Commerce Subcommittee on Oversight and Investigations, April 10, 2019).

Perhaps most egregiously, Mr. Borneman declares that "Sanofi US has a longstanding commitment to research in the diabetes space and there is much remaining to be done in the diabetes space to ensure better outcomes for patients[.]" JA IV, 579, par. 20. However, on December 9, 2019, about 53 days

after Mr. Borneman swore his Declaration, the Paris-based parent Sanofi issued a press release in which it discussed its stance toward future diabetes related research: "Sanofi is announcing a discontinuation of research in diabetes[.]" It beggars belief to think that Mr. Borneman, the Vice President and Head of Diabetes for Sanofi, JA III, 575, par. 1, would have no knowledge that his employer was going to drastically change purported corporate policy a mere 53 days before such a critical announcement, but, even taken at face value, the contradiction required an opportunity for The Independent to cross-examine Mr. Borneman.

In refusing to strike the Declaration of Mr. Borneman, either in whole or by striking the parts which are clearly not his own words, by refusing to strike the portions which are contradicted by his employers public statements more recent in time, the District Court entertained evidence which was clearly unreliable, and refused The Independent the opportunity to cross-examine Mr. Borneman, the only other adequate remedy in light of the circumstances.

Given the numerous significant defects in Mr. Borneman's Declaration, which called into question his veracity and reliability, and whether in truth he was the author of significant portions, it was an abuse of discretion for the District Court to fail to strike the Declaration. If this matter is returned to the

District Court, the Declaration of Borneman should be ordered stricken from the record.

III. NAC §§ 439B. 735 and .740 OFFEND S.B. 539 AND THE NPRA AND THEREFORE MUST BE STRICKEN.

In its Petition for a Writ of Mandamus, The Independent argued

> "if NAC §§ 439.730 – .740 conflict with either SB 539 – and they do, as SB 539 exempts the information [sought in the Petition] from trade secret status – or, with the NPRA – and they do, as the NPRA requires these documents be released – NAC §§ 439.730 – .740 must be invalidated.

JA I, 11, par. 66.

The District Court incorrectly ruled

> "The Independent's lawsuit can only succeed by finding a direct conflict between the unambiguous language of the statute and the agency's regulation. *Clark Co. Social Service Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990)."

JA IV, 980, par. 10.

Because this is a question of statutory construction and interpretation, this Court reviews the question *de novo* as it is a question of law. *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Rep. 84, 8 – 9, 429, P.3d 313, 317, quoting *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877, 266 P.3d 623, 626, and *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

In reality, the administrative codes enacted by DHHS at NAC §§ 439B.730 – .740 must be stricken, as they were not authorized by the Legislature, conflict with the obvious intent of S.B. 539, and operate as a line-item veto over the NPRA, all of which this court has specifically prohibited. *See e.g., Division of Ins. v. State Farm Mutual Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) ("A court will not hesitate to declare a regulation invalid when the regulation . . . conflicts with existing statutory provisions or exceeds the statutory authority of the agency[.]"); *Clark Co. Social Service Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990) ("The mere enacting of the mentioned administrative regulation obviously cannot countermand the statutory mandate."); *Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988) ("Administrative regulations cannot contradict or conflict with the statue they are intended to implement."); *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv. Rep. 84, 9 – 10, 429 P.3d 313, 317 – 18 (2018) (". . . such internal regulations do not limit the NPRA.") ("Ascribing a force to such regulations that limits the NPRA would create an opportunity for government organizations to make an end-run around the NPRA[.]"); *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. Adv. Rep. 19, 10, 414 P.3d 318, 322 (2018) ("Administrative regulations do not limit the reach of the NPRA[.]")

Cases in which this Court has upheld regulations that exempt information from the NPRA have featured legislative grants of authority which clearly and explicitly outlined the Legislature's desire for the subject information to be exempted from the NPRA:

> In drafting and adopting those regulations, under NRS 453A.370(5), the Division 'must . . . [a]s far as possible while maintaining accountability, *protect the identity and personal identifying information* of each person who receives, facilitates or delivers services."

City of Sparks v. Reno Newspapers, Inc., 133 Nev. 398, 401 – 402, 399 P.3d 352, 355 – 56 (2017) (emphasis added in *City of Sparks v. Reno Newspapers, Inc.*).

By contrast, the Legislature made no such grant of authority in S.B. 539, nor offered any such direction to exempt material from public view. There is an enabling provision in Nev. Rev. Stat. § 439B, at 439B.685, but a close review reveals that the section substantially predates S.B. 539, including specifically the grant of authority. 2011 Statutes of Nevada, ch. 221, 2007 Statutes of Nevada, ch. 3139.

There is no indication in Nev. Rev. Stat. § 439B.685 of any grant of authority or direction from the Legislature to exempt records, rather a general grant of authority is made: "The Department shall adopt such regulations as it

determines to be necessary or advisable to carry out the provisions of NRS 439B.600 to 439B.695, inclusive."

However, NAC 439.740 requires DHHS to anonymize the data collected under S.B. 539:

> In the report compiled by the Department pursuant to NRS 439B.650, the Department will include: 1. Only aggregated data that does not disclose the identity of any drug, manufacturer or pharmacy benefit manager[.]"

This language directly conflicts with the overall intent of S.B. 539 of creating transparency in an otherwise opaque market, and is the same type of conflict in regulatory law that led this Court to strike the regulations in *Clark Co. Social Service Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990), and *Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988).

In addition to inviting unelected members of the executive branch to make judicial determinations regarding confidentiality, NAC 439.735 has the effect of delaying production of public records, because it requires DHHS to offer pharmaceutical manufacturers or PBMs 30 days in which to respond to requests DHHS receives under the NPRA, or alternatively to commence a court action.

Recent amendments to the NPRA affirm the Legislatures commitment to access to public records, and specifically to the need for public records

requests to be fulfilled in a timely manner: 2019 amendments to the NPRA include a right for requestors to seek relief from the district court if their access to public records is "unreasonably delayed[,]" Nev. Rev. Stat. 239.011(1), and require governmental entities to assist requestors to access public records "as expeditiously as possible[,]" Nev. Rev. Stat. § 239.0107(1)(c)(2).

NAC §§ 439.735 and .740 have the combined effect of delaying public records requests under the NPRA, subjecting them to the whims of pharmaceutical manufacturers and PBMs, and generally frustrating the obvious Legislative intent behind S.B. 539. The codes would correctly be stricken for any of those offenses, and the result must be that NAC §§ 439.735 and .740 are stricken.

CONCLUSION

For the foregoing reasons, The Independent respectfully requests this Court reverse the ruling of the District Court and order Respondents Whitley and DHHS produce the requested public records forthwith, consistent with rulings in similar cases in Alabama, California, Florida, Pennsylvania, and

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Washington, and further, invalidate NAC §§ 439.735 and .740, because they conflict with the NPRA and S.B. 539, and exceed the legislative grant of authority under which they were enacted.

DATED this 23rd day of February, 2021.

/s/ Matthew J. Rashbrook

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ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not contain more than 9,233 words.

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

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of February, 2021.

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CERTIFICATE OF MAILING

I hereby certify and affirm that Appellant's Opening Brief was filed electronically with the Nevada Supreme Court on the 23rd day of February, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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