Case No. 81844

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE NEVADA INDEPENDENT,

Appellant,

v.

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.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASE NO. A-19-799939-W

RESPONDENTS' ANSWERING BRIEF

AARON D. FORD
Nevada Attorney General
HEIDI PARRY STERN
Solicitor General (Bar No. 8873)
STEVE SHEVORSKI (Bar No. 8256)
Chief Litigation Counsel
AKKE LEVIN (Bar No. 9102)
Senior Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for Respondents
Richard Whitley and the Nevada
Department of Health and Human Services

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I. STATEMENT OF JURISDICTION

Respondents Richard Whitley and the State of Nevada ex rel. the Nevada Department of Health and Human Services (collectively, the "Department") agree with the Statement of Jurisdiction of appellant The Nevada Independent (the "Independent").

II. ROUTING STATEMENT

This Court should retain the case because it raises a question of first impression under the Nevada Public Records Act and the Defend Trade Secrets Act of 2016 ("DTSA") that is of statewide public importance. NEV. R. APP. P. 17(11)-(12). The principal issue is whether the Department must grant a public record request for cost, pricing, and profit reports that essential diabetes drug manufacturers must provide to the Department under NRS 439B.635 *et seq*., if disclosure of such information would constitute misappropriation of a trade secret under the DTSA. This issue was raised in the parties' briefs, argued during the hearing on the Independent's Petition for Writ of Mandamus, and resolved by the district court in its order denying the Petition. *See* I JA 7-8, 238-239, 248-250; III JA 556, 565-567; IV JA 767-773, 928, 932-935,

952-953, 972, 974-982.[1] This issue is of statewide importance because the DTSA and the diabetes drug cost reporting statutes of NRS 439B.635 *et seq*. are relatively new and the Court has not yet interpreted them before. A decision by this Court would promote uniformity on the interpretation of these statutes.

III. STATEMENT OF THE ISSUES

1. Records are not open to the public if the law declares them confidential. The Defend Trade Secrets Act ("DTSA") protects against unauthorized disclosure of confidential financial information related to products sold in interstate commerce. Did the district court abuse its discretion by denying the Independent mandamus relief on its public records requests if they required the Department to disclose diabetes drug manufacturers' cost and profit reports that "squarely" meet the DTSA's confidentiality protections?

2. The Department can adopt such regulations that it deems necessary or advisable to implement NRS 439B.630 *et seq*. The Department adopted NAC 439.735, which provides for a procedure it

[1] The Roman numerals preceding citations to the Joint Appendix ("JA") refer to the JA volume where the pages can be found.

must follow when receiving a public records request for information that diabetes drug manufacturers believe would constitute misappropriation of a trade secret under the DTSA if disclosed to the public. Did the district court correctly hold that NAC 439.735 is a valid regulation?

IV. STATEMENT OF THE CASE

A. Nature of the Case

This case involves two public record requests from the Independent to the Department. The Independent asked for all annual reports on drug costs and price increases that essential diabetes drug manufacturers and pharmacy benefit managers are required to provide to the Department under NRS 439B.635, NRS 439B.640, and NRS 439B.645. The Department partially denied the public record requests because some of the requested information was subject to requests for confidentiality under the Defend Trade Secrets Act of 2016 ("DTSA"). The Independent filed a Petition for Writ of Mandamus to compel disclosure of the records. I JA 1.

B. Disposition below

On September 8, 2020, the district court entered its order denying the Independent's Writ Petition ("Order"). IV JA 974-982.

First, the district court held that the regulations adopted by the Department in NAC 439.730-439.740 are valid. IV JA 980 (¶ 10). The district court recognized the Department's broad discretion to implement regulations to "foster efficient enforcement of codified legislation" and the regulations ensured that the Nevada Public Records Act "complied with the DTSA protections." IV JA 980 (¶ 11). The district court observed that NAC 439.735 does not automatically shield records from disclosure but requires the Department to analyze whether the records claimed confidential by essential diabetes drug makers deserve confidentiality under the DTSA. IV JA 980 (¶ 11). The district court further noted that if the Department had "failed to carve out these procedural protections, the courts would become inundated with cases in which the compelled disclosing parties claim they did not have the opportunity to protect their trade secrets from mass disclosures." IV JA 890-91.

Next, the district court concluded that the DTSA's trade secret definition put the reports requested by the Independent "squarely" under the DTSA's "confidentiality protections" because "[1] 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 [2] are subject to reasonable efforts to maintain their secrecy." IV JA 891 (¶ 13, citing 18 U.S.C. § 1839(3)). Examples of efforts to maintain the records' secrecy included:

> [1] Respondents placing significant limitations on who receives said information, [2] Respondents and high-level employees privatizing the information that is shared, and [3] the affected entity submitting prompt requests to Respondents to exclude said reports from disclosure based on their status as confidential data or information that derives economic value from not being generally known, and thus protected, trade secrets under the DTSA.

IV JA 891 (¶ 13).

V. STATEMENT OF FACTS

A. Congress adopts the Defend Trade Secret Act to create a private civil action for trade secret misappropriation

In May 2016, Congress enacted the Defend Trade Secret Act ("DTSA"). *See* Pub. L. No. 114-153, 130 Stat 376, 114th Cong. (2nd Sess. May 11, 2016). The DTSA creates a federal, "private civil action" for misappropriation of trade secrets "if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1).

The DTSA defines a "trade secret" as "all forms and types of financial, business, scientific, technical, economic, or engineering information . . . if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value . . . from not being generally known . . . ." 18 U.S.C. § 1839(3).

Under the DTSA, "misappropriation" may occur through: (1) the "acquisition of a trade secret of another . . . by improper means"; (2) the "disclosure" of a trade secret without the owner's consent; and (3) the "use" of a trade secret without the owner's consent. 18 U.S.C. § 1839 (5)(A), 18 U.S.C. § 1839 (5)(B).

Remedies under the DTSA include injunctive relief and damages. 18 U.S.C. § 1836(b)(3)(A)(i), 18 U.S.C. § 1836(b)(3)(B)(i)(I).

B. Nevada expands diabetes drug reporting requirements and restricts manufacturers' trade secret protections

In 2017—a year after the DTSA went into effect—the Nevada Legislature adopted Senate Bill ("SB") 539, which created and expanded certain reporting requirements about essential diabetes and asthma drugs under NRS 439B.630-439B.670 (collectively, the "Reporting Statutes"). *See* S.B. 539, 2017 Leg. 79th Sess. (2017).

In relevant part, the Reporting Statutes require the Department to each year compile a list of essential diabetes drugs and the wholesale acquisition costs of such drugs. NRS 439B.630. All drug manufacturers on that list must prepare and submit to the Department an annual report with enumerated drug cost categories, as well as the profit earned from the drug. NRS 439B.635. If the wholesale acquisition cost of the essential diabetes drugs underwent a "significant price increase," the manufacturers must also report the reasons for it. NRS 439B.640. Pharmacy benefit managers ("PBMs") must annually report information concerning rebates they negotiated with essential diabetes drug manufacturers. NRS 439B.645. Pharmaceutical sales representatives must annually report information about drug samples or other compensation they provided. NRS 439B.660(4).

Each year, the Department must analyze the information it receives under the Reporting Statutes and compile a report on the price of the essential diabetes drugs, "the reasons for any increases in those prices and the effect of those prices on overall spending on prescription drugs in this State." NRS 439B.650.

The Independent does not contend, below or on appeal, that the Department failed to comply with its obligations under NRS 439B.630 or NRS 439B.650.

SB 539 also amended the "trade secret" definition of Nevada's Uniform Trade Secret Act. *See* 2017 NEV. STAT., ch. 592, § 9 at 4307. "Trade secret" was initially defined as any "information," which derives "independent economic value . . . from not being generally known" and which is "the subject of [reasonable] efforts . . . to maintain its secrecy." *Id.*; NRS 600A.030(5)(a). But SB 539 excluded from that definition "information" that essential diabetes drug manufacturers, PBMs, and pharmaceutical sales representatives are "required to report" under the Reporting Statutes, "to the extent that such information is required to be disclosed by those sections." NRS 600A.030(5)(b).

C. Pharma and Bio sue the Department's director for anticipated violations of the Defend Trade Secret Act

A month before SB 539 became effective, the Department's director, respondent Richard Whitley, and the governor were sued in federal court by Pharmaceutical Research and Manufacturers of America ("Pharma") and Biotechnology Innovation Organization ("Bio"), which claimed to

represent leading pharmaceutical and biotechnology companies "across the United States and in more than 30 other nations." III JA 585-586.

Pharma and Bio alleged, *inter alia*, that SB 539 conflicts with and violates the DTSA. III JA 584 (¶¶ 5-7). They claimed that SB 539 eliminates their members' trade secret protection for information they must disclose under the Reporting Statutes and allows the Department to use the information for other purposes, such as negotiating rebates with manufacturers. III JA 601 (¶¶ 51-52).

The Nevada Legislature could intervene and thereafter, the case was dismissed without prejudice. III JA 694-595.

D. The Department adopts regulations to harmonize the new state and federal laws

In 2018, the Department adopted regulations to implement SB 539 and to address confidentiality issues under the Reporting Statutes in light of the DTSA. *See* NAC 439.730-439.740.

Under NAC 439.735, essential diabetes drug manufacturers and PBMs can request to keep certain information they must report confidential if they "reasonably believe[] that public disclosure of [such] information . . . would constitute misappropriation of a trade secret for which a court may award relief [under the DTSA]." NAC 439.735(1).

Requests for confidentiality ("RFCs") must describe "the information" with specificity and include "an explanation of the reasons why public disclosure of the information would constitute misappropriation of a trade secret" under the DTSA. NAC 439.735(2).

The explanation of reasons set out in the RFC is not confidential and must be disclosed upon a public records request. NAC 439.735(2).

If the Department receives a public records request for information it received under the Reporting Statutes that is subject to an RFC, it must do "an initial review" to evaluate the confidentiality claim. NAC 439.735(3). If the Department reasonably believes that public disclosure of the information would constitute misappropriation of a trade secret under the DTSA, it must deny the public records request. NAC 439.735(4). If not, it must wait 30 days before disclosing the information to allow a drug manufacturer or PBM to bring an action under the DTSA. NAC 439.735(5). If no action is brought, the Department will disclose the information. NAC 439.735(6)(a).

E. The Independent makes public records requests to the Department for diabetes drug makers' reports

On January 19, 2019, the Independent made a public records request to the Department that asked, in relevant part, for: (1) a list of

each diabetes drug manufacturer or PBM that "submitted a required annual report on the costs associated with essential diabetes drugs . . ."; and (2) the annual reports these manufacturers and PBMs were required to disclose under the Reporting Statutes. I JA 24-26.

On April 3, 2019, the Department responded that the Independent sought information for which the manufacturers and PBMs had submitted RFCs under NAC 439.735(1). I JA 28. Respondent Sanofi, for example, submitted an RFC on January 15, 2019. III JA 732. Sanofi explained, *inter alia*, that competitors not subject to disclosure requirements could use its drug cost structure, marketing and advertising costs, rebate strategies, and profit information to obtain an unfair advantage. III JA 733.

The Department advised the Independent which information it would produce and denied the remainder of the requested information as confidential based on its "review of the DTSA, and on the information provided by drug manufacturers and PBMs in the completed RFCs" submitted under NAC 439.735(2). I JA 28.

On June 11, 2019, the Independent sent the Department a second public records request, asking for essentially the same information. I JA

33. The Department responded two weeks later and again partially denied the request, citing the same reasons. I JA 37.

The Independent never made a public records request for the explanation of reasons that supported the RFCs submitted under NAC 439.735(2). Nor did the Independent challenge the Department's confidentiality determination. Instead, the Independent filed a Petition for Writ of Mandamus in district court to compel disclosure of the requested annual reports. I JA 1.

VI. SUMMARY OF ARGUMENT

This Court should affirm the Order denying the Independent's Writ Petition, because the district court did not abuse its discretion when finding that the cost, pricing, and profit reports that essential diabetes drug manufacturers must provide to the Department "squarely" come within the federal trade secret protections of the Defend Trade Secrets Act ("DTSA") and are exempt from disclosure under NRS 239.100(1).

The DTSA was enacted a year before Nevada adopted the Reporting Statutes and limited the diabetes drug manufacturers' trade secret protection. The DTSA provides a federal cause of action for the

unauthorized disclosure of trade secrets under circumstances where the owner expected that its trade secrets would remain confidential.

There is no question that essential diabetes drugs are sold in interstate commerce and that the confidential cost, pricing, profit, and rebate information that manufacturers and PBMs must report falls within the DTSA's broad trade secret definition. The Independent never challenged the Department's confidentiality determination under the DTSA, nor did it ask for—let alone challenge—the statement of reasons that diabetes drug manufacturers submitted to support their requests for confidentiality, which are public records.

The Independent and the Culinary[2] want this Court and the Department to ignore the DTSA. They urge this Court to hold that the Department is free to eliminate essential diabetes drug makers' trade secrets because Nevada adopted statutes purportedly saying so. But the DTSA coexists with Nevada law and must be given effect. And there is nothing in the Reporting Statutes or NRS 600A.030(5)(b) that eliminates the DTSA's protections or compels disclosure of the diabetes drug cost reports to the public.

[2] Culinary Workers Union Local 226, which filed an *Amicus* Brief.

Even assuming there was any doubt that the DTSA declares the reports confidential, the balance of the equities weighs against disclosure.

The goal of promoting transparency in essential diabetes drug costs does not depend on public disclosure of the manufacturers' confidential information: The Department must still analyze the information it receives, compile a report on the drug pricing, and publish it each year. NRS 439B.650. It has done so.

The Independent tells the Department not to worry about lawsuits, but the ink on SB 539 was barely dry when pharmaceutical organizations sued the Department's director—respondent Richard Whitley—for injunctive relief based on anticipated violations of the DTSA if their members' trade secrets were disclosed to the public.

And disclosure of a trade secret in Nevada is fatal to its existence everywhere. As the *Amicus* Brief illustrates, most states have not yet adopted legislation like SB 539. Until each state or Congress adopts a law eliminating diabetes drug manufacturers' trade secrets, who is Nevada to eliminate such rights when the DTSA says otherwise?

The district court also correctly held that the regulations adopted by the Department are valid. They do not conflict with SB 539 or foil its "transparency" purpose, as the Independent and the Culinary argue. None of the regulations changes the obligations of the diabetes drug manufacturers or the Department under the Reporting Statutes. Information that essential diabetes drug makers submit subject to a request for confidentiality is not automatically protected but must be scrutinized by the Department. If the Department disagrees that the information is confidential, the burden is on the drug makers to go to court to prevent disclosure. Thus, the regulations balance the policies of the NPRA, the DTSA, and the Reporting Statutes.

In sum, the Independent failed to meet its burden to show that it had a clear right to the records it requested. The district court did not abuse its discretion by denying the Writ Petition. Its Order should be affirmed.

VII. ARGUMENT

A. The district court did not abuse its discretion in denying the Independent's Writ Petition because the diabetes drug cost reports are trade secrets under the DTSA

Under the Nevada Public Records Act ("NPRA"), "all public books and public records of governmental entities" are open to the public "unless otherwise declared by law to be confidential . . . ." NRS 239.010(1).

The NPRA does not define "confidential," but "confidential" means and has always meant "'private' or 'secret.'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363, 204 L. Ed. 2d 742 (2019) (interpreting the Freedom of Information Act and quoting WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 174 (1963)).

While the government entity withholding a record has the burden to prove that a record is confidential, NRS 239.0113, it can meet this burden in one of two ways: (1) by showing that a statute declares the record confidential; or (2) by showing that its interest in withholding the record from disclosure "clearly outweighs the public's interest in access" to the record. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011). The Department met its burden by showing both.

1. The diabetes drug cost reports "squarely" meet the DTSA's broad trade secret definition

"[T]he definition of what may be considered a 'trade secret' [under the DTSA] is broad." *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657 (9th Cir. 2020). The DTSA defines a trade secret as:

> *[A]ll* forms and types of *financial*, *business*, scientific, technical, *economic*, or engineering *information*, *including* patterns, plans, *compilations*, program devices, formulas, designs, prototypes, *methods*, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if . . .
>
> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value . . . from not being generally known to . . . another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1839(3)(A)-(B) (emphasis added).

The Independent's Opening Brief by and large ignores this definition and asks the Court to do likewise. The Independent argues that trade secrets existed "long before the DTSA" under common law. Opening Brief ("OB") at 19. This is true, but so what? The point is that the DTSA creates a statutory trade secret definition and with it a federal

right to bring an action for misappropriation of a trade secret related to products sold in interstate commerce. 18 U.S.C. § 1836(b)(1).

a. The reports contain financial business information related to diabetes drugs sold in interstate commerce.

The Independent does not dispute that the annual reports essential diabetes drug makers must provide to the Department under the Reporting Statutes that set out the costs of their drugs, their profits, and the reasons for significant price increases are "compilations" of "financial, business [and] economic . . . information . . . ." 18 U.S.C. § 1839(3). Nor does the Independent deny that the reports about rebates which PBMs must disclose under NRS 439B.645 are "compilations" of "financial, business [and] economic . . . information." 18 U.S.C. § 1839(3). It is also undisputed that the financial information disclosed to the Department relates to a "product"—*i.e.*, an essential diabetes drug—that is "used in . . . interstate . . . commerce." 18 U.S.C. § 1836.

It is irrelevant if 18 U.S.C. § 1839(3) does not "explicitly and expressly" designate such reports as trade secrets, as the Independent argues. OB at 15 (citing and quoting *Baron v. Commw. Dep't of Human Servs.*, 169 A.3d 1268, 1276 n.6 (Pa. Commw. Ct. 2017), *aff'd*, 194 A.3d

563 (Pa. 2018) ("*Baron*"). Under this rationale, no record would qualify as a trade secret, which would render the DTSA's trade secret definition and its protections illusory. Section 1839 should not be read to yield such "absurd result[]. . . ." *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008).

As the Independent admits elsewhere, "it is . . . the properties of the thing itself which render something a trade secret." OB at 13. The "properties of the thing itself" here are that the reports with diabetes drug cost, price, and profit information are financial, business information, which is precisely what 18 U.S.C. § 1839(3) captures.

Undeterred, the Independent points to a footnote in *Baron* where the Pennsylvania court observed that the DTSA does not designate rates paid to nursing homes as trade secrets. *Baron*, 169 A.3d at 1276 n.6. But that comment did not inform the case's holding, and such narrow reading is at odds with the case law within the Ninth Circuit holding that the DTSA's definition of trade secret is broad. *InteliClear, LLC*, 978 F.3d at 657; *see also API Americas Inc. v. Miller*, 380 F. Supp. 3d 1141, 1148 (D. Kan. 2019) (holding that "the DTSA defines 'trade secret' broadly . . . .").

What's more, the plain terms of the NPRA do not require that a record be "expressly" declared confidential to be excepted from public disclosure, so long as the record is "otherwise declared by law to be confidential . . . ." NRS 239.010(1).

And while the Independent submits that in *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 234 P.3d 922 (2010), this Court held that trade secrets are "creatures of common law" that are not "explicitly made confidential by statute," OB at 19, *Haley* has no such holding. *Haley* did not even involve a trade secret. And it was decided six years before the DTSA "explicitly" codified a trade secret definition in 18 U.S.C. § 1839(3). Thus, none of the Independent's arguments can avoid that the reports it seeks meet the first part of the DTSA's trade secret definition.

b. The confidentiality and independent economic value of the information were proven and unchallenged

To meet the DTSA's trade secret definition, owners must also show they took "reasonable measures to keep such information secret" and that the information derives independent value from not generally known. 18 U.S.C. § 1839(3)(A)-(B).

The Independent's argument that there was a "complete dearth of evidence" before the district court to support its finding that the respondents met these requirements because "only Sanofi appeared" and offered any evidence, OB at 33, is not well taken.

The Department denied the Independent's public record requests based on its review of the DTSA and the information provided by the diabetes drug manufacturers and PBMs in the completed requests for confidentiality ("RFCs") they had submitted. I JA 28; I JA 37. Sanofi was just one of the diabetes drug manufacturers that submitted RFCs with their annual reports. I JA 28; III JA 732.

The Independent never challenged the Department's confidentiality determination before filing suit. Nor did it make a public record request for the explanations of reasons set out in the RFCs the Department received, which are not confidential and must be disclosed. NAC 439.735(2). Only now—on appeal—the Independent attempts to challenge the merits of the RFCs and does so with arguments that are by and large unsupported. *E.g.*, OB at 24:23-26:08.

The district court was not required to conduct an independent review of the RFCs and could defer to the confidentiality determination

by the Department. *See Cty. of Clark v. Doumani*, 114 Nev. 46, 53 n.2, 952 P.2d 13, 17 n.2 (1998)(seeing "no reason" to "make a distinction" in the abuse of discretion standard of review "based on whether the district court has taken additional evidence" from that considered by the Board), *superseded by statute on other grounds*.

Even so, the district court had before it as an example Sanofi's RFC, which explained both how Sanofi kept the information secret and why the information derives independent value from not being generally unknown. III JA 732-734. The district court also had the declaration of James Borneman, Sanofi's "Vice President and Head [of] Diabetes and Primary Care Sales . . . ." III JA 575. Mr. Borneman explained that the drug pricing and profit information Sanofi must disclose to the Department is only shared "internally on a need-to-know basis, and is subject to non-disclosure provisions in Sanofi US's employment and other business agreements." III JA 577 (¶¶ 12-13). The information has independent economic value, he stated, because Sanofi's customers could "learn how we develop our pricing, which in turn could be used against us in negotiations with insurers and other intermediaries in the healthcare system . . ." III JA 578 (¶16). Sanofi's competitors—especially

those who do not (yet) make essential diabetes drugs—would "learn how we allocate our resources and set our prices" which are based on "the same or similar factors when setting prices for other products." III JA 578 (¶17).

Thus, the district court did not abuse its discretion when finding that the reports met all requirements of 18 U.S.C. § 1839(3) and "squarely" fit under the DTSA's confidentiality protections. IV JA 981 (¶ 13).

2. Nevada's trade secret statute does not compel disclosure of the reports or trump the DTSA

After repeatedly arguing that trade secrets are creatures of common law and that the DTSA's trade secret definition does not render any "thing" confidential, *e.g.*, OB at 12, 16, 19, the Independent goes on to argue that *Nevada's* trade secret definition is "determinative" and trumps the DTSA. OB at 23. But it does not.

a. NRS 600A.030(5)(b) does not compel disclosure

When the Legislature enacted the Reporting Statutes in 2017, it amended NRS 600A.030 to exclude from the 'trade secret' definition "any information that a manufacturer . . . or . . . [PBM] is required to report"

under the Reporting Statutes "to the extent that such information is required to be disclosed by those [Statutes]." NRS 600A.030(5)(b). Thus, essential diabetes drug manufacturers and PBMs cannot withhold their reports from the Department on the basis that they are trade secrets.

But it does not necessarily follow that NRS 600A.030(5)(b) makes these reports public records, as the Independent maintains. OB at 23.

First, the reports may nevertheless remain confidential vis-à-vis the public—especially where, as here, the reports are submitted subject to an RFC and fall within the DTSA's broad trade secret definition. A case on which the Independent relies for a different point—*Fast Enters., LLC v. Pollack*, No. 16-cv-12149-ADB, 2018 WL 4539685 (D. Mass. Sept. 21, 2018)—illustrates this.

In *Fast Enters.*, a software company argued that its bid proposal to the Massachusetts Department of Transportation contained trade secrets protected by the DTSA and should not be disclosed in response to a public records request. *Fast Enters., LLC*, 2018 WL 4539685, at *1-2. The court rejected that argument because "Massachusetts state law would [not] have exempted the records from disclosure ***prior*** to the enactment of the DTSA. . . ." *Id.* at *2 (emphasis added). Trade secrets

provided to the government "as a condition of receiving a governmental contract or other benefit" were already subject to disclosure under Massachusetts law. *Id*. at *2 n.6 (quoting MASS. GEN. LAWS 4, § 7 (26)(g)).

Here, by contrast, Nevada never had a statute like MASS. GEN. LAWS 4, § 7 (26)(g) that made trade secrets disclosed to the government subject to disclosure before the DTSA was enacted in 2016. The diabetes drug cost reports fit Nevada's 'trade secret' definition before NRS 600A.030(5) was amended in 2017 because they contain "information" that "[d]erives independent economic value . . . from not being generally known" and subject to reasonable "efforts . . . to maintain its secrecy." NRS 600A.030(5)(a).

Second, the Independent's broad reading of NRS 600A.030(5)(b) also does not jive with the Reporting Statutes, which do not require the Department to turn around and publish the reports it receives from the drug makers on its website in the first place. Rather, the Department must compile the information it receives, analyze it, and prepare its *own* reports. NRS 439B.650. Thus, NRS 439B.650 further supports that NRS 600A.030(5)(b) was not meant to eliminate the drug manufacturers' trade

secrets altogether but to prevent them from withholding the reports from the Department on the basis that the reports included trade secrets.

Third, the Culinary has it backwards when arguing that "Nevada's discretion over its own trade-secret and public-records policy" should trump a "federal standard." States across the country have enacted, in one form or another, a version of the Uniform Trade Secret Act ("UTSA") to *protect* trade secrets. But if NRS 600A.030(5)(b) is construed the way the Independent and the Culinary propose, trade secret owners would lose their protection not just in Nevada but across the country.

The Independent's argument that the Department is free to disclose the drug reports because doing so is "lawful activity conducted by a governmental entity," 18 U.S.C. § 1833(a)(1), therefore only begs the question. It is not at all clear that NRS 600A.030(b)(5) makes such disclosure "lawful."

b. The DTSA's anti-preemption clause is narrow

When the language of a statute is clear, courts cannot go beyond the statute to determine what the legislature meant. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). Here, the anti-preemption clause of the DTSA is clear: It provides, in relevant part, that the DTSA

"shall not be construed to preempt or displace any other *remedies* . . . provided by . . . State . . . law for the misappropriation of a trade secret . . . ." 18 U.S.C. § 1838 (emphasis added). In other words, the remedies under the DTSA are not exclusive; state law remedies remain intact.

The Independent wants the Court to ignore the plain language of 18 U.S.C. § 1838. It relies on and quotes *Brand Energy & Infrastructure Servs., Inc. v. Irex Contracting Grp.*, No. CV 16-2499, 2017 WL 1105648, at *7 n.17 (E.D. Pa. Mar. 24, 2017) ("*Brand Energy*") for the proposition that the DTSA does not displace "state trade secret *laws*." OB at 15 (emphasis added). But *Brand Energy* quoted the legislative history of 18 U.S.C. § 1838—not the anti-preemption clause of the DTSA itself. *Brand Energy,* 2017 WL 1105648, at *7 n.17.

The Culinary likewise features the legislative history in the body of its brief and buries the text of 18 U.S.C. § 1838 in a footnote. *Amicus* Brief ("AB") at 13:3-20 and n.17. Nothing in 18 U.S.C. § 1838 says that state trade secret laws trump the DTSA altogether.

But no matter: Even the DTSA's legislative history does not support the Independent's argument that 18 U.S.C. § 1838 leaves all matters of trade secret law to "the purview of the states," OB at 22, nor

could it: "While 48 states have adopted variations of the [Uniform Trade Secret Act], the state laws vary in a number of ways and contain built-in limitations that make them not wholly effective in a *national* and *global* economy." 2016 H.R. Rep. No. 114-529, at 4 (2016) (emphasis added).

The Independent's reliance on *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 94 S. Ct. 1879 (1974) ("*Kewanee*") is equally misplaced. That 1974 case, involving a federal patent statute and an Ohio trade secret law, could hardly determine the extent to which the 2016 DTSA preempts Nevada's trade secret law. Nor did *Kewanee* broadly hold that trade secrets remain the purview of the states, as the Independent suggests. OB at 22:18. In fact, *Kewanee* held that when a state law "touches upon the area of federal statutes enacted pursuant to constitutional authority," such as the DTSA, states may not disregard the federal statute's policy or deny its benefits. *Kewanee*, 416 U.S. at 479-80, 94 S. Ct. at 1885. The reason why the Ohio trade secret law held up is because it had different objectives from the federal patent law and did not conflict with it. *Kewanee*, 416 U.S. at 491, 94 S. Ct. at 1891.

The case on which the Culinary relies for its anti-preemption argument—*CDK Glob. LLC v. Brnovich*, 461 F. Supp. 3d 906 (D. Ariz.

2020)—is also not on point. True, that court held that the DTSA "does not preempt state laws that provide other means of lawful access." *Id.* at 918. But *Brnovich* did not involve a public records request or a trade secret claim. There, the plaintiffs challenged a law that would permit the exchange, integration, and sharing of protected dealer data between a limited group of *private* parties—*i.e.*, dealer management systems licensers, dealerships, and certain third parties who had met security standards and other conditions. *Id.* at 912-13. The law did not allow for disclosure of the protected information to the public. *See id.* And the court did not foreclose a claim under the DTSA "if dealers or authorized third parties were *exploiting access* to protected dealer data as a means to steal Plaintiffs' trade secrets (*a claim Plaintiffs have not asserted here*) . . . ." *Brnovich*, 461 F. Supp. 3d at 918-19 (emphasis added).

c. The DTSA's anti-preemption clause protects against disclosure of trade secrets

The latter part of the DTSA's anti-preemption provision allows the "lawful disclosure of information by any Government employee under section 552 of title 5 (commonly known as the Freedom of Information Act ["FOIA"])." 18 U.S.C. § 1838. FOIA is "the federal analog of the NPRA." *Gibbons*, 127 Nev. at 881, 266 P.3d at 628.

But section 552 specifically excludes from FOIA's reach "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (emphasis added). Financial information is "confidential" and exempt from disclosure under FOIA when the information "is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy," *Food Mktg. Inst.*, 139 S. Ct. at 2366—as it was here.

Thus, nothing in the DTSA supports the argument that Nevada law overrides the DTSA's protections. While the DTSA may not preempt state laws such as the Reporting Statutes and NRS 600A.030(5)(b), which give the *Department* lawful access to diabetes drug cost and pricing information, the DTSA protects against disclosure of trade secrets without the owners' consent in response to a public records request.

The district court therefore correctly denied mandamus relief on the Independent's public records request based on the DTSA.

3. The balance of the interests weighs against disclosure of the diabetes drug cost, price, and profit reports

Even assuming the DTSA does not "otherwise declare" the reports confidential, NRS 239.100(1)—it does—"the balance of interests clearly

outweighs the public's interest in access" to the reports. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628.

As a preliminary matter, the NPRA is aimed, by its terms, at providing access to "public books and public records of a governmental entity . . . ." NRS 239.010(1). Contrary to the Culinary' s contention, this Court has not "regularly applied [the NPRA] to records that were not generated by the government . . . ." AB at 9. For example, this Court did not hold in *Gibbons* that emails to or from the governor's state-issued e-mail account are public records; the Court remanded the case with instructions for the State to support its confidentiality claim by giving the newspaper "a log" describing the e-mails "and a specific explanation for nondisclosure." *Gibbons*, 127 Nev. at 885-86, 266 P.3d at 631.

The telephone records in *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 343 P.3d 608 (2015) were subject to disclosure under NRS 239.001(4) because they related to a public service—telephone service to the Clark County Detention Center—even if that service was provided by a private entity. *Blackjack Bonding*, 131 Nev. at 86, 343 P.3d at 612-13.

The Culinary also twists the holding of *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 401, 399 P.3d 352, 355 (2017). This

Court held only that "business licenses are public records." *Id.* The identity and identifying information of marijuana business license holders supplied to the government is *not*. *Id*. at 405, 399 P.3d at 358.

Thus, this Court's cases do not support that the NPRA's policy is equally strong when it comes to confidential business information created by private business entities that the government obtains because of a compelled disclosure, as is the case here.[3]

a. SB 539's transparency goal does not depend on the disclosure of the diabetes drug cost reports to the public

The Independent and the Culinary repeatedly argue that SB 539's transparency goal is frustrated if the public does not get the reports that diabetes drug manufacturers must provide to the Department. But the public already has access to the reports that the Department must compile and publish on the internet based on the information it receives

[3] The Culinary argues that some courts apply different standards under FOIA depending on whether the information was voluntarily submitted to the government or mandated. AB at 10-11 (citing cases). But the Ninth Circuit "has not yet decided whether to adopt this voluntary-required dichotomy." *Freeman v. Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1187 (D. Or. 2007) (citation omitted).

from the essential diabetes drug manufacturers. NRS 439B.630; NRS 439B.650.

b. Disclosure of the reports would subject the Department to lawsuits for injunctive relief

The Independent's argument that that the Department should not worry about litigation because the DTSA creates no private right of action for "any otherwise lawful activity conducted by . . . a state," 18 U.S.C. § 1833, assumes too much. Misappropriation of a trade secret under the DTSA occurs not only when someone acquires the trade secret "by improper means," as the Culinary submits, AB at 12, but also when a person uses or discloses the trade secret without the owner's consent, knowing that the trade secret was "acquired under circumstances giving rise to a duty" to keep it confidential, as it was here. 18 U.S.C. § 1839(5)(A)-(B)(ii)(II); *Attia v. Google LLC*, 983 F.3d 420, 424 (9th Cir. 2020) (discussing the three forms of "misappropriation" under the DTSA).

The Independent's argument that the Department is immune from suit under the Eleventh Amendment ignores that neither this Court nor the Ninth Circuit Court of Appeals has decided the issue. *But see*, *e.g.*, *Evans v. Presidio Tr.*, No. 19-CV-08025-HSG, 2020 WL 6802422, at *3 (N.D. Cal. Nov. 19, 2020) ("the Court has not found a provision in the

DTSA that contains any unequivocal waiver of the federal government's sovereign immunity"); *MedSense, LLC v. Univ. Sys. of Md.*, 420 F. Supp. 3d 382, 392 (D. Md. 2019) ("[A] review of the DTSA does not indicate that it was Congress' intent to abrogate a state's Eleventh Amendment immunity . . . .").

Moreover, the Eleventh Amendment does not foreclose lawsuits for prospective injunctive relief to end continuing violations of federal law. *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999); *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441 (1908). Indeed, just months after SB 539 was adopted, Pharma and Bio sued the Department's director in federal court for injunctive relief. *See* III JA 582-625.

It is therefore not only possible but likely that diabetes drug manufacturers and PBMs will bring suit in federal court against the Department and its officials to enjoin them from disclosing the reportable information to the public, as the district court found. IV JA 980-81 (¶11).

c. Disclosure of the reports extinguishes the manufacturers' trade secrets—not just in Nevada but elsewhere

As the case on which the Independent extensively relies makes clear, "public disclosure . . . is fatal to the existence of a trade secret." *Amgen Inc. v. Health Care Servs.*, 47 Cal. App. 5th 716, 734, 260 Cal. Rptr. 3d 873, 887 (2020) (internal quotation marks and citations omitted). If the Department discloses the information it received subject to RFCs, the secrecy of the protected information would be forever lost—not just in Nevada but elsewhere—because the Independent is "under no obligation to protect the confidentiality of the information. . . ." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002, 104 S. Ct. 2862, 2872 (1984). Thus, providing Nevada's citizens with access to the diabetes drug reports has consequences outside its borders.

While the Culinary argues that "States across the country have adopted legislation requiring transparency in drug manufacturer's pricing decisions," AB at 7:9-10, it provides no support for this contention. The mere introduction of legislative bills is irrelevant. Only Nevada and California have passed such laws, and California's law merely requires

drug manufacturers to give *notice* of a significant price increase to public and private entities. CAL. HEALTH & SAFETY CODE § 127677.

Until and unless all fifty states enact litigation like Nevada's Reporting Statutes or Congress passes such a law, the information essential diabetes drug manufacturers are required to disclose in Nevada remains confidential under the DTSA and under other states' laws.

Put another way, decisions as to whether essential diabetes drug manufacturers should give up the confidentiality of their cost, pricing, and profit information should be made at a national level and cannot be decided by Nevada (much less the Department) alone.

B. The district court correctly held that the Regulations adopted by the Department are valid

"When determining the validity of an administrative regulation, courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) (citations omitted). Regulations are upheld unless they exceed the agency's statutory authority, conflict with the statute or its legislative purpose, or are "arbitrary and capricious." *Id.* The three regulations

adopted by the Department under NAC 439.730-439.740 (collectively, "Regulations") have none of these features.

1. The Department has plenary power to adopt regulations under the Reporting Statutes.

The Department may adopt "such regulations as it determines to be necessary or advisable to carry out the provisions of NRS 439B.600 to 439B.695, inclusive." NRS 439B.685. Although NRS 439B.685 lists a number of matters that the regulations "must" address, the Culinary is wrong to assert that the Department may "only" adopt regulations on the "form and manner" in which drug makers and PBMs provide their reports. AB at 21:5 (citing former NRS 439B.930). By its plain terms, the Department's regulatory power under the Reporting Statutes is "without limitation. . . ." NRS 439B.685.

2. The Regulations do not conflict with SB 539

Nothing in the Regulations changes the requirements of the Reporting Statutes. The essential diabetes drug manufacturers and PBMs must "comply[] with," and give the Department all reports required by, the Reporting Statutes. NAC 439.735(1). All that NAC 439.735(1) does is allow them to submit an RFC with their reports.

The Regulations also do not change the Department's reporting obligations. Contrary to the Independent's argument on page 40 of its brief, NRS 439B.650 does not require the Department to disclose the identities of the drug manufacturers in its analytical report. So, NAC 439.740(1)—which allows the Department to publish only the aggregated data on the prices and reasons for price increases—is not in conflict with the Reporting Statutes.

The Regulations likewise do not conflict with NRS 600A.030(b)(5), which exempts from the 'trade secret' definition reports that essential diabetes drug manufacturers and PBMs must provide to the Department under the Reporting Statutes. Nothing in NRS 600A.030(b)(5) requires the Department to turn around and disclose the reports to the public.

3. NAC 439.735 harmonizes the policies of SB 539, the DTSA, and the NPRA.

"Whenever possible, this court will interpret a rule or statute in harmony with other rules or statutes." *State Farm Mut. Auto. Ins. Co.*, 116 Nev. at 295, 995 P.2d at 486 (citing cases). The Department was required to do likewise when adopting regulations under the Reporting Statutes. The Department could neither disregard the DTSA nor the NPRA. The Department achieved that goal with NAC 439.735.

Under NAC 439.735, essential diabetes drug makers and PBMs must fully "comply[] with" the Reporting Statutes but can request confidentiality with respect to information if they reasonably believe that public disclosure of it "would constitute misappropriation of a trade secret . . . pursuant to the [DTSA]. . . ." NAC 439.735(1). But protection is not automatic, nor is it total: RFCs must be specific and supported by an explanation of reasons why public disclosure of the information would constitute misappropriation of a trade secret under the DTSA. NAC 439.735(2). This explanation of reasons is available upon a public records request, *id.*, which—it bears repeating—the Independent has yet to make.

Moreover, NAC 439.735 puts the burden on the drug manufacturers and PBMs to go to court and prevent disclosure of their information under the NPRA if the Department disagrees with their confidentiality claims. NAC 439.735(5)-(6). In other words, NAC 439.735 strikes a careful balance between the private parties' interest in "nondisclosure" and "the public's interest in access." *PERS v. Reno Newspapers, Inc.*, 129 Nev. 833, 837, 313 P.3d 221, 224 (2013) (internal quotation marks and citation omitted).

NAC 439.735 is nothing like the "internal regulations" on which the school district relied to prevent disclosure in *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 429 P.3d 313 (2018), or the "administrative regulations pertaining to local records management programs" Lyon County relied on in *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. 142, 147 n.1, 414 P.3d 318, 322 n.1 (2018) ("*Comstock*"). When this Court said in *Comstock* that the "administrative regulations do not limit the reach of the NPRA," it was not talking about all regulations, as the Independent suggests, OB at 38. This Court was talking about NAC Chapter 239 pertaining to public records. *Comstock*, 134 Nev. at 147, 414 P.3d at 322 (discussing NAC 239.041 and NAC 239.125(1)).

Perhaps recognizing this, the Independent now complains—for the first time on appeal—about the delay occasioned by the procedure of NAC 439.735. OB at 40. But the Independent only suffers delay if the drug makers or PBMs sue, and delays in obtaining public records are not uncommon. Only delays that are "unreasonabl[e]" allow requestors to seek relief from the court under NRS 239.011. And if the Independent is

not entitled to the records because they are confidential under the DTSA, its delay argument is a moot point.

For all these reasons, the district court was right to uphold the Regulations.

VIII. CONCLUSION

The district court was within its discretion to deny the Independent mandamus relief on its public records request to the Department. The Independent asked for confidential diabetes drug cost and profit reports compiled by private drug manufacturers that fell plainly under the DTSA's broad trade secret definition. The district court also correctly held that the regulations adopted by the Department are valid, because they are consistent with Nevada's Reporting Statutes and harmonize them with the DTSA and the NPRA. For these reasons, the Order below should be affirmed in its entirety.

Dated this 26th day of April, 2021.

AARON D. FORD
Attorney General

By: /s/ *Akke Levin*
Akke Levin (Bar No. 9102)
Senior Deputy Attorney General
Attorneys for Respondents

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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:

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Dated this 26th day of April, 2021.

AARON D. FORD
Attorney General

By: /s/ *Akke Levin*
Akke Levin (Bar No. 9102)
Senior Deputy Attorney General
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 26th day of April, 2021, and e-served the same on all parties listed on the Court's Master Service List.

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
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