IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY MOATS,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK AND THE HONORABLE JUDGE ADRIANA ESCOBAR,

Respondents,

TROY BURGESS,

Real Party in Interest.

Docket No. 81912

AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION
(In Support of Petitioner)

Tom W. Stewart, Esq.
Nevada Bar No. 14280
THE POWELL LAW FIRM
8918 Spanish Ridge Avenue, Ste. 100
Las Vegas, Nevada 89148
Telephone: (702) 728-5500
tstewart@tplf.com

Micah S. Echols
Nevada Bar No. 8437
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Ste. 100
Las Vegas, Nevada 89107
Telephone: (702) 655-2346
mechols@claggettlaw.com

Attorneys for Amicus Curiae Nevada Justice Association

NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.l(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

The Nevada Justice Association ("NJA"), an amicus curiae, is a non-profit organization of independent lawyers throughout Nevada. NJA is represented by Tom W. Stewart, Esq., of The Powell Law Firm, and Micah Echols of the Claggett & Sykes Law Firm in this matter. NJA, and its counsel, did not appear in the district court in this matter.

Dated this 29th day of November 2020.

THE POWELL LAW FIRM

/s/ Tom W. Stewart
Tom W. Stewart, Esq.
Nevada Bar No. 14280

and

Micah S. Echols, Esq.
Nevada Bar No. 8437
CLAGGETT & SYKES LAW FIRM

Attorneys for Amicus Curiae
Nevada Justice Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

AMICUS INTEREST AND AUTHORITY TO FILE

NJA is a non-profit organization of independent lawyers throughout Nevada who represent injured parties and share the common goal of improving the civil justice system. NJA works to advance the science of jurisprudence, promote the administration of justice for the public good, uphold the honor and dignity of the legal profession, and ensure that Nevadans have access to the legal system.

NJA files this brief with an accompanying motion pursuant to NRAP 29(a) and (c). Through its brief, NJA seeks to provide the Court with further context behind the statute and rule of civil procedure at issue in this original proceeding. Amicus intervention is appropriate where "the amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n,* 125 F.3d 1062, 1063 (7th Cir. 1997). Thus, amici curiae are regularly allowed to appear when they seek to inform the deciding court on matters of historical context and legislative history. *See, e.g., Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.,* 547 U.S. 651, 661 (2006) (considering amicus curiae arguments regarding the legislative history of a statute). Accordingly, NJA requests leave to appear as amicus curiae.

BACKGROUND AND CONTEXT

Although this writ petition requires only straight forward statutory interpretation—which is analyzed below—some background and context regarding NRCP 35 exams and the separation-of-powers questions implicated by the petition may be helpful to the Court's ultimate resolution of this original proceeding.

I. COMPULSORY NRCP 35 EXAMS ARE NOT INDEPENDENT BUT, RATHER, INHERENTLY ADVERSARIAL.

NRCP 35 provides that a court "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." NRCP 35(a)(1). Although NRCP 35 exams are commonly referred to as "independent medical exams," that phrase is a misnomer; indeed "[t]hese examinations are generally performed by a defense-selected, defense-paid doctor, not a court-ordered independent expert." *Davanzo v. Carnival Cruise Lines*, 2014 WL 1385729, at *1-2 (S.D. Fla. Apr. 9, 2014) (analyzing federal analog). As such, "it is somewhat artificial and unrealistic to describe such an exam as an [independent medical exam]. Instead, it is more accurate to view the examination as a compulsory examination" that is "more akin to a litigant attending a deposition than a medical patient seeing his doctor." *Id.* As a result, many courts recognize that the examination is not independent but, rather, is "inextricably intertwined with the adversarial process." *Goggins v. State Farm*

Mut. Auto. Ins. Co., 2011 WL 1660609, at *3 (M.D. Fla. May 3, 2011); *see also Zabkowicz v. West Bend Co.*, 585 F. Supp. 635, 636 (E.D. Wis. 1984) ("[T]he defendants' expert is being engaged to advance the interests of the defendants; clearly, the doctor cannot be considered a neutral in the case.").

II. THE LEGISLATURE ENACTED SUBSTANTIVE SAFEGUARDS TO PROTECT VULNERABLE LITIGANTS DURING NRCP 35 EXAMS.

The inherently adversarial nature of the an NRCP 35 exam provides the backdrop for necessity and eventual enactment of certain statutory safeguards for litigants during the exam—namely, the right to record the exam and the right to have an observer of one's choosing—including his or her attorney—present at the exam. Those substantive safeguards were first recommended to be included in the 2019 revisions to Nevada's Rules of Civil Procedure. *See* Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of Graham Galloway, representing NJA) (testifying that the subcommittee tasked with providing recommendations on the updated NRCP 35 "voted 7-to-1 to make substantial changes, the changes that are [now] set forth or embodied in [NRS 52.380].").

However, despite the recommendations, the final adoption of NRCP 35 modified those safeguards in two crucial ways. First, the rule only allows audio-recording at the court's discretion "for good cause shown," rather than as a matter

of right.[1] Second, the rule prohibits a "party's attorney or anyone employed by the party or the party's attorney" from serving as an observer of the examination, and prohibits any observers at a "neuropsychological, psychological, or psychiatric examination, [unless] the court orders otherwise for good cause shown."[2]

Because of the omission of those crucial safeguards from NRCP 35, the 2019 Legislature, with NJA as proponents, sought to enshrine those substantive rights in statute. *See, e.g.*, Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of Graham Galloway, representing NJA) ("The origins of this bill flow from a committee formed by the Supreme Court of Nevada two years ago to review, revise, and update our Nevada Rules of Civil

---

[1] NRCP 35(a)(3) provides, in relevant part, that "[o]n request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded."

[2] NRCP 35(a)(4) provides that a party may have an observer present, subject to the following limitations:

> The observer may not be the party's attorney, or anyone employed by the party or the party's attorney.
>
> (A) The party may have one observer present for the examination, unless:
>
> (i) the examination is a neuropsychological, psychological, or psychiatric examination; or
>
> (ii) the court orders otherwise for good cause shown.
>
> (B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.

Procedure—the rules that govern all civil cases."). The result was NRS 52.380.[3] The statute mandates that, as a matter of right, a party may have an observer, including a party's attorney, present at his or her examination. *See* NRS 52.380(1)-(2). Further, the statute provides that the observer may, as a matter of right, "make an audio or stenographic recording of the examination." NRS 52.380(3). In addition to those substantive safeguards, the statute includes several procedural rights, including the right for an observer or the examiner to suspend the examination and the ability to file a protective order. *See* NRS 52.380(4)-(6).

---

[3] NRS 52.380 provides, in relevant part, that:

> 1. An observer may attend an examination but shall not participate in or disrupt the examination.
> 2. The observer attending the examination . . . may be:
>
> (a) An attorney of an examinee or party producing the examinee; or
>
> (b) A designated representative of the attorney . . .
>
> 3. The observer attending the examination . . . may make an audio or stenographic recording of the examination.
> 4. The observer attending the examination . . . may suspend the examination if an examiner:
>
> (a) Becomes abusive towards an examinee; or
>
> (b) Exceeds the scope of the examination, including, without limitation, engaging in unauthorized diagnostics, tests or procedures.
>
> 5. An examiner may suspend the examination if the observer attending the examination . . . disrupts or attempts to participate in the examination.
> 6. If the examination is suspended . . . the party ordered to produce the examinee may move for a protective order . . .

III. THE CONFLICT BETWEEN NRCP 35 AND NRS 52.380 IMPLICATES THE SEPARATION-OF-POWERS DOCTRINE.

The conflict between NRCP 35 (promulgated by the Supreme Court) and NRS 52.380 (enacted by the Legislature) implicates the separation-of-powers doctrine, which "prevent[s] one branch of government from encroaching on the powers of another branch." *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009) (citing *Clinton v. Jones*, 520 U.S. 681, 699 (1997)).

Indeed, while the judicial branch has the exclusive province to make rules governing legal procedure, the legislative branch has the exclusive prerogative to enact statutes governing the substance of the law. *See State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983); NRS 2.120. Although legislation that violates the separation of powers is unconstitutional, *see Hardy*, 125 Nev. at 299, 212 P.3d at 1108, all statutes are presumed to be constitutional and "every possible presumption will be made in favor of the constitutionality of a statute." *List v. Whisler*, 99 Nev. 133, 137-38, 660 P.2d 104, 106 (1983).

ARGUMENT

The crux of this writ proceeding is a simple question: does NRS 52.380 create substantive rights—to record and to have an observer, including an attorney, present at a party's own NRCP 35 exam—that supersede the conflicting strictures of NRCP 35 prohibiting such practices? The answer is yes,

so the Court should grant the petition.

Indeed, the separation of powers doctrine mandates that the presumptively-constitutional, substantive statute preempts the conflicting portions of NRCP 35, requiring this Court to exercise its discretion to reverse the district court's improper order requiring petitioner Troy Moats to appear at his own exam without the ability to record or have an observer present.

I. NRS 52.380 CREATES A SUBSTANTIVE RIGHT TO RECORD AND HAVE OBSERVED ONE'S OWN INDEPENDENT MEDICAL EXAM.

A substantive rule or statute is one that "creates duties, rights and obligations," while a procedural rule or statute merely "specifies how those duties, rights, and obligations should be enforced." *Azar v. Allina Health Services*, 587 U.S. ——, ——, 139 S. Ct. 1804, 1811 (2019); *see also* 1 James W. Moore, *Moore's Federal Practice* § 1.05[2][b], at 1-29 (3d ed. 2016) ("Substantive rights are rights established by law. The term 'substantive' does not mean rights that are 'important' or 'substantial,' but rather those that have been conferred by the Constitution, by statute, or by the common law."). A substantive statute supersedes a conflicting procedural statute or court rule. *Connery*, 99 Nev. at 345, 661 P.2d at 1300.

The statute's plain language and legislative history confirm that NRS 52.380 creates a right to record and have observers, including an attorney, present at one's own NRCP 35 exam. Thus, NRS 52.380's substantive provisions

preempt NRCP 35's conflicting provisions.

A. The plain text of NRS 52.380 creates substantive rights.

This Court reviews questions of statutory construction de novo. *APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 136 Nev., Adv. Op. 64, 473 P.3d 1021, 1027 (2020). When "construing a statute, [this Court's] analysis begins with its text." *Shue v. State*, 133 Nev. 798, 805, 407 P.3d 332, 338 (2017). "When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

The plain language of NRS 52.380, contains rights that can be protected or enforced by law as well as the means with which those rights should be enforced. Indeed, the statute both creates the substantive right to right to have an observer present at one's own independent medical exam, including a psychological, neuropsychological, or psychiatric exam, *see* NRS 52.380(1)-(2), to have an observer record one's own exam, *see* NRS 52.380(3), and provides the procedural rules to enforce those rights. *See* NRS 52.380(4) (allowing observer to suspend the exam); NRS 52.380(5) (allowing examiner to suspend the exam); NRS 52.380(6) (allowing the examinee to move for a protective order if the exam is suspended).

Thus, the Court need not go beyond the statute's plain text to determine that those plainly substantive portions of the statute—NRS 52.380(1)-(3)—create the

right to record and have observed one's own psychological, neuropsychological, or psychiatric independent medical exam that supersede the conflicting portions of NRCP 35. Accordingly, because the district court concluded the opposite, this Court should exercise its discretion to intervene and vacate the district court's order.

B. The legislative history of NRS 52.380 confirms that it creates substantive rights.

Although the Court need not go beyond the plain text of NRS 52.380 to resolve this original proceeding, the statute's legislative history further confirms that the right to record and to have observers present are, and were intended to be, substantive rights that supersede NRCP 35.

Indeed, "[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). The legislative intent of a statute can be determined by examining the statements of a bill's major proponents. *See, e.g.*, *Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 881, 362 P.3d 83, 87 (2015) ("The most informative statement as to the Legislature's intent in defining [a statutory term] came from a lead proponent of [the bill].").

Here, the legislative history explicitly provides that NRS 52.380 was enacted

to provide a substantive right to record and to have observers in one's own exam. Indeed, the Nevada Legislature considered arguments involving the substantive nature of NRS 52.380, and proponents of the bill outlined the necessity of providing substantive rights to parties undergoing independent medical exams that did not exist prior to the statute's enactment:

> Under the current state of our rules, that claimant— the victim—has no right to have an observer present. They do not have a right to record what happens . . . That is the current state of the law . . . the way it currently stands in these forced examinations, the claimant has no rights as part of that examination.

See Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of Alison Brasier, representing NJA). Proponents of the bill further clarified that the enactment of NRS 52.380 was to provide substantive—not procedural—rights to litigants:

> The reason we are before you today is because [A.B. 285] protects substantive rights. This is not a procedural rule, which you would usually find within our [Nevada Rules of Civil Procedure]. Our Nevada Rules of Civil Procedure involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney.

See Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of George T. Bochanis, representing NJA).

Additionally, proponents of the bill noted that having an observer present at an examination and or having the ability to record the exam are substantive rights litigants have in Alaska, Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, Oklahoma, Washington, West Virginia, and Utah, as well as in the Fifth Circuit and indeed in Nevada in the workers-compensation context.[4] *See* Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (Exhibit C).

[4] As outlined in Exhibit C to the Assembly Judiciary Committee, Arizona, California, Illinois, Michigan, Pennsylvania, Oklahoma, Washington, and Utah authorize either the presence of an observer or audio recording of the exam by statute or court rule. *See* Ariz. R. Civ. P. 35(c); Cal. Code Civ. P. § 2032(q)(2); 735 Ill. Comp. Stat. § 5/2 - 1003(d) (2008); Mich. R. Civ. P. R. 2, 311 (1985); Pa. R. Civ. P. 4010 (2002); 12 Okla. Stat. § 3235(D); Wa. Super. Ct. R. Civ. Cr. 35 (2001); Utah R. Civ. Proc. R. 35 (1993). Additionally, Alaska, Connecticut, Delaware, Florida, Indiana, Kentucky, Massachusetts, New Jersey, New York, West Virginia, and the Fifth Circuit have all recognized one or both of the substantive rights in their caselaw. *See Lagfeldt–Haaland v. Saupe Enterprise, Inc.*, 768 P.2d 1144, 1147 (Alaska 1989); *Polcaro v. Daniels*, 2007 WL 1299159 (Conn. Sup. Ct. 2007); *Rocken v. Huang*, 558 A.2d 1108, llll (Del. Sup. Ct. 1988); *Lunceford v. Florida Central Railroad Co., Inc.*, 728 So.2d 1239, 1241 (Fla. App. 5. Dist. 1999); *Jacob v. Chaplain*, 639 N.E. 2d 1010, 1013 (Ind. 1994); *Metropolitan Property & Cas. Ins. Co. v. Overstreet*, 103 S.W. 3d 31, 38-40 (Ky. 2003); *Hepburn v. Barr & Barr*, 2006 WL 1711849 (Mass. Sup. Ct. 2006); *B.D. v. Carley*, 704 A.2d 979, 981 (N.J. 1998); *Flow v. Cty. of Oneida*, 34 A.D. 3d 1236 (N.Y. 2006); *State ex rel. Hess v. Henry*, 393 S.E. 2d 666 (W. Va. 1990); *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990).

Finally, the legislative history reveals that, although members of the committee tasked with recommending revisions to NRCP 35 for the 2019 overhaul of Nevada's Rules of Civil Procedure voted 7-to-1 to provide the substantive rights now embodied in NRS 52.380, the changes were not adopted in the 2019 update to the rules. *See* Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of George T. Bochanis, representing NJA). The failure to include the substantive protections within NRCP 35 necessitated the proposal, and eventual enactment, of what is now NRS 52.380.

This legislative history confirms what the statute's plain text demonstrates: that NRS 52.380 was explicitly enacted to create substantive right for litigants when they are most vulnerable during discovery—during one's own examination by "a defense-selected, defense-paid doctor" in a process "inextricably intertwined" with the inherently adversarial litigation process. The Legislature considered the effect an observer could have during an NRCP 35 examination, and ultimately allowed a litigant to have an observer, including his or her attorney, present during any type of NRCP 35 exam and to have their observer record the exam. Granting this right was well within the Legislature's power, meaning the substantive provisions of NRS 52.380 preempt the competing provisions of NRCP 35, requiring reversal of the district court's erroneous order.

C. NRS 52.380 is presumptively constitutional.

Although legislation that violates the separation of powers is unconstitutional, *see Comm'n on Ethics v. Hardy*, 125 Nev. 285, 299, 212 P.3d 1098, 1108 (2009), all statutes are presumed to be constitutional and "every possible presumption will be made in favor of the constitutionality of a statute." *List v. Whisler,* 99 Nev. 133, 137-38 (1983). In other words, "unless it be demonstrated that there is clearly no rational and legitimate reason for the [enactment of the statute], [this Court] must uphold the law." *Mengelkamp v. List*, 88 Nev. 542, 545, 501 P.2d 1032, 1034 (1972); *see also* Michael L. Stokes, *Judicial Restraint and the Presumption of Constitutionality*, 35 U. Tol. L. Rev. 347, 372-73 (2003) ("While the fundamental principle of judicial review dictates that the judiciary must have the last word in constitutional matters, the other branches consider the matter first, and their conclusions deserve deference.").

Here, ample evidence of the rational and legitimate reasons for NRS 52.380's enactment further supports the statute's presumptive constitutionality. The Legislature heard testimony detailing the need for substantive safeguards for litigants undergoing NRCP 35 exams and the specific safeguards that were necessary to protect the litigants during those exams. The safeguards discussed in that testimony are now embodied as the substantive provisions of NRS 52.380. And,

while this Court certainly has the last word in the constitutionality of the statute, the Legislature had the first word, and their conclusions regarding NRS 52.380 deserve deference. As a result, this Court should conclude that NRS 52.380's substantive provisions regarding the right to record and the right to have an observer at an NRCP 35 exam are constitutional.

CONCLUSION

The plain text and legislative history of NRS 52.380 demonstrate that its substantive provisions preempt the competing, procedural strictures of NRCP 35. The district court concluded the opposite in ordering petitioner Troy Moats to attend his NRCP 35 without an observer or the ability to audio record the exam. As a result, this Court should exercise its discretion grant the petition and reverse that order.

Dated this 29th day of November 2020.

THE POWELL LAW FIRM

/s/ Tom W. Stewart
Tom W. Stewart, Esq.
Nevada Bar No. 14280

and

Micah S. Echols, Esq.
Nevada Bar No. 8437
CLAGGETT & SYKES LAW FIRM

Attorneys for Amicus Curiae
Nevada Justice Association

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this amicus curiae 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 amicus curiae brief with the page- or type-volume limitations of NRAP 29 and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

proportionally spaced, has a typeface of 14 points or more and contains 3,291 words.

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

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of November 2020.

THE POWELL LAW FIRM

/s/ Tom W. Stewart

Tom W. Stewart, Esq.
Nevada Bar No. 14280

and

Micah S. Echols, Esq.
Nevada Bar No. 8437
CLAGGETT & SYKES LAW FIRM

Attorneys for Amicus Curiae
Nevada Justice Association

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION (In Support of Petitioner)* was filed electronically with the Supreme Court of Nevada on the 29th day of November 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Marjorie L. Hauf
Matthew G. Pfau
Caitlin J. Lorelli
Thomas E. Winner

I further certify that the foregoing document were mailed via email to the following:

Honorable Adriana Escobar, District Court Judge
Eighth Judicial District Court, Department 14
200 Lewis Avenue
Las Vegas, Nevada 89155
dept14lc@clarkcountycourts.us

/s/ Anna Gresl
Anna Gresl, an employee of
Claggett & Sykes Law Firm