

IN THE SUPREME COURT OF NEVADA

LYFT, INC.,
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, in and for
the County of Clark, and THE
HONORABLE MARK R. DENTON,
District Judge,
Respondents,

and

KALENA DAVIS,
Real Party in Interest.

District Court No. A-18-777455-C
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PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

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.

Lyft, Inc. (“Lyft”) is a publicly held corporation traded on the Nasdaq Global Select Market with no parent corporation. Based on Lyft’s knowledge from publicly available U.S. Securities and Exchange Commission filings, no publicly held corporation or entity owns ten percent or more of Lyft’s outstanding common stock.

DATED this 2nd day of December, 2020.

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I.

INTRODUCTION

Following nearly two years of analysis and consideration of public commentary, comprehensive amendments to the Nevada Rules of Civil Procedure (“NRCP”), which were developed by the Nevada Supreme Court and its authorized committee, became effective on March 1, 2019. Approximately three months later, the Nevada Legislature approved A.B. 285, codified as NRS 52.380, which significantly altered the Court’s amendments to NRCP 35, the rule that governs “Physical and Mental Examinations” conducted during the course of civil discovery. Because NRS 52.380 alters the rules of civil procedure, it impermissibly violates the separation of powers doctrine. It is therefore unconstitutional and unenforceable.

In the instant case, petitioner and defendant, Lyft, Inc., sought and obtained a discovery commissioner recommendation to obtain physical and mental examinations (one by a neuropsychologist) of the real party in interest, plaintiff Kalena Davis. The Clark County discovery commissioner, however, recommended that the examination proceed with the conditions imposed by NRS 52.380, including the allowance of Davis’ attorney as an observer, and a recording, even though Davis presented no good cause for these conditions as required by NRCP 35. Because these conditions and the recommendation are contrary to NRCP 35,

and effectively preclude the neuropsychological examination, Petitioner filed an objection with the district court, which was summarily overruled without a hearing.

The district courts in Clark County are now issuing differing and inconsistent rulings on this conflict between the statute and the rule, creating uncertainty and unpredictability in the legal community. Further litigation regarding the differences between the statute and the rule will undoubtedly continue if not clarified by the Court. Writ relief is accordingly required to resolve this conflict between the statute and rule, and to clarify the constitutional question of law and provide guidance for the district courts and Nevada litigants.

II.

ROUTING STATEMENT

This petition should be retained by the Supreme Court pursuant to NRAP 17(a)(7) (“Disputes between branches of government ...”), NRAP 17(a)(11) (“Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions ...”) and NRAP 17(a)(12) (“Matters raising as a principal issue a question of statewide public importance ...”).

III.

RELIEF SOUGHT

Petitioner seeks a writ of mandamus pursuant to NRAP 21 and NRS 34.150 *et seq.* In the alternative, Petitioner seeks a writ of certiorari or review pursuant to NRS 34.010 *et seq.* or a writ of prohibition pursuant to NRS 34.320 *et seq.*¹ This petition is supported by the memorandum of points and authorities and declaration set forth below, the concurrently filed Appendix and the records of the district court.

IV.

ISSUE PRESENTED

Whether NRS 52.380, which alters several of the critical procedural aspects of physical and mental examinations conducted during civil litigation pursuant to NRCP 35, and which now effectively precludes neuropsychological and psychological examinations in Nevada, violates the separation of powers doctrine under the Nevada Constitution.

¹ The issuing court may determine which type of writ is most appropriate. *See, e.g., Club Vista Financial Servs. v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228 n. 6, 276 P.3d 246 (2012).

V.

FACTS NECESSARY TO UNDERSTAND ISSUES PRESENTED

A. The Accident

This case arises out of an automobile-motorcycle accident. Underlying defendant Adam Bridewell (“Bridewell”), while utilizing the Lyft ridesharing application and transporting two passengers, was yielding to oncoming traffic with a green light at an intersection. (Petitioner’s Appendix [“App.”] at 4).² Plaintiff and real party in interest, Kalena Davis (“Davis”), while traveling alone on a motorcycle, was allegedly splitting the lanes of travel on eastbound Russell Road. (*Id.*) Bridewell, believing the intersection was clear, attempted to complete his left turn. (*Id.*) Davis entered the intersection and crashed into the right, passenger-side door of Bridewell’s vehicle. (*Id.*) Davis was ejected from his motorcycle and suffered significant injuries. (*Id.*)

Liability for the accident is disputed. Bridewell maintains that Davis ran a red light on eastbound Russell Road. (*Id.*) Davis maintains that there were no vehicles ahead of him in his lane of traffic, and that he had a yellow light, when he

² Citations to the Appendix are designated by volume and page number (e.g., 1 App. 4).

entered the intersection. (1 App. 26:24-25).³

B. The NRCP 35 Motion Proceedings

Petitioner has retained neuropsychologist Thomas Kinsora, Ph.D., vocational rehabilitation counselor Aubrey Corwin, M.S. and physical medicine and rehabilitation specialist David Fish, M.D. as expert witnesses. (1 App. 6-7). In October 2019, Petitioner sought to schedule physical and mental examinations of Davis with all three of these expert witnesses pursuant to NRCP 35. (1 App. 3:18-19). Davis' counsel requested the opportunity to provide terms and conditions in connection with the examinations, but failed to provide specific requests.

Petitioner therefore was forced to file a motion to compel the Rule 35 examinations. (1 App. 1). Davis opposed the motion. (1 App. 25). With respect to the proposed medical examination by Dr. Fish, Davis did not object to the examination, but requested a series of conditions pursuant to NRCP 35, including that an observer "that is not the Plaintiff's attorney and is not employed by the Plaintiff or the Plaintiff's attorney," and that the examination be audio recorded. (1 App. 35). With respect to the proposed neuropsychological examination by Dr. Kinsora, Davis argued, among other things, that Dr. Kinsora's examination be audio recorded, but he did not request an observer. (1 App. 38-39). Regarding the

³ Davis has no memory of the accident, including whether his light at the intersection was green, yellow or red, or whether he was moving in between other stopped vehicles when he entered the intersection. (1 App. 5:21-28, 27:5).

proposed vocational rehabilitation examination by Ms. Corwin, Davis argued, among other things, for an audio recording and for the presence of an observer that is not the Plaintiff's attorney. (1 App. 41). Notably, Davis did not cite NRS 52.380 in his opposition (and his requests were initially consistent with NRCP 35).

In Lyft's reply, counsel provided more details of the extensive efforts made to schedule the Rule 35 examinations since October 2019, including the fact that Davis' counsel had agreed to provide a proposed stipulation with requested conditions, but that Davis' counsel failed to provide this stipulation, thereby necessitating the motion to compel. (1 App. 45-47). Lyft also reiterated why good cause existed for each of the three proposed Rule 35 examinations based on Davis' own allegations and computation of damages. (1 App. 48-52).

With respect to the conditions proposed by Davis, Lyft reminded the discovery commissioner that NRCP 35 provides for the recording of examinations, but only upon a showing of good cause. (1 App. 50:17 [citing NRCP 35(a)(3)]). Davis did not articulate, let alone demonstrate, good cause in his opposition. (1 App. 50:19-21). Regarding Davis' request for an observer during the examinations, Lyft noted NRCP 35's requirement that a party seeking an observer must "identify the observer and state his or her relationship to the party being examined." (1 App. 50:26-28 [citing NRCP 35(a)(4)]). Davis did not identify any particular proposed observer in his opposition. (1 App. 51:1-2). Finally, Lyft also highlighted NRCP

35's prohibition against observers for neuropsychological examinations, unless the court orders otherwise based on good cause. (1 App. 51:3-7 [citing NRCP 35(a)(4)(B)]). Davis proffered no such good cause in his opposition. (1 App. 51:8-12).

At the hearing on February 13, 2020, the discovery commissioner found that good cause existed for the requested medical, neuropsychological and vocational rehabilitation examinations. (1 App. 94:11-20, 98:8-13). Additionally, however, the discovery commissioner, *sua sponte*, raised the issue of A.B. 285, which is now codified as NRS 52.380. (1 App. 87:8-9). *Davis' counsel first learned of this statute at the hearing*, and, based on this newly acquired knowledge, expressed his desire to personally attend the examinations. (1 App. 99:13-20). The parties and the discovery commissioner then discussed the interplay between NRS 52.380 and NRCP 35, and the discovery commissioner stated her belief that the statute governs. (1 App. 105:6). Given the uncertainty as to whether Lyft's expert witnesses would accept the new parameters imposed by NRS 52.380, the discovery commissioner concluded that the parameters and conditions for the examinations would be discussed at the next status check hearing. (1 App. 105:21-25).

In the Discovery Commissioner's first report and recommendation, filed on March 3, 2020, the discovery commissioner concluded that Lyft's requests for the three NRCP 35 examinations by Dr. Fish, Dr. Kinsora and Ms. Corwin are

reasonable and warranted given Davis’ claims of orthopedic injuries and future treatment, traumatic brain injury and future treatment and future lost wages. (1 App. 109-110). Regarding conditions for the examinations, the discovery commissioner found that an observer could attend the medical examination with Dr. Fish pursuant to SB 285, and that the exam could be audio recorded. (1 App. 110, 114). With respect to the neuropsychological and vocational rehabilitation exams, the discovery commissioner concluded that the conditions were “to be determined by the parties.” (1 App. 111:4-5).

At the next hearing, the discovery commissioner requested supplemental briefing by the parties regarding the differences between A.B. 285 (NRS 52.380) and NRCP 35. (1 App. 135:16-19). Notably, with respect to the interplay between the statute and the rule, the discovery commissioner stated: “And this is – *this is likely an issue that’s ultimately going to have to be decided by the supreme court because there is a discrepancy or a disparity between the language of the two.*” (1 App. 136:20-22 [emphasis added]).

Petitioner filed its “Brief on Rule 35 Examinations and NRS 52.380” on March 20, 2020. (1 App. 142). Petitioner highlighted the differences between the rule and the statute, and detailed that NRCP 35 should control over NRS 52.380 based on Nevada’s separation of powers principles and jurisprudence. (1 App. 147-154). Specifically, because NRCP 35 was enacted as part of the Nevada Supreme

Court's statutory authority to enact procedural rules, the Legislature cannot enact conflicting procedural rules. (1 App. 153-54).

Davis filed "Plaintiff's Brief regarding NRCP 35 and NRS Section 52.380" on April 6, 2020. (2 App. 456). Davis argued the alterations to the Rule 35 examination conditions provided by NRS 52.380 are valid because they provide substantive rights. (2 App. 458-460).

At the next hearing on April 9, 2020, the discovery commissioner recommended that the requirements of the statute should be applied, meaning that Davis was entitled to an observer during examinations, and the examinations could be recorded, all without any showing of good cause as required by NRCP 35. (3 App. at 535). The discovery commissioner first noted that "there's obviously a contradiction between the rule and the statute, as everyone is well aware." (3 App. 539:12-14). The discovery commissioner explained: "[W]hile I understand that the Supreme Court has the authority, and it's within their purview certainly to draft rules that apply to procedure, statutes that are substantive in nature can control." (3 App. 539:16-19).

While acknowledging that "[t]here are compelling arguments on both side[s]," the discovery commissioner further concluded: "But in this case, I believe that the statute, the way it is written, creates rights and expands substantive rights under Rule 35 – or that would apply to the Rule 35 examinations." (3 App. 539:20-

540:2). The discovery commissioner further concluded: “**I understand that that may affect whether or not certain experts may perform examinations or serve as experts in a case.** But I think that that is what is allowed under the statute.” (3 App. 540:21-25 [emphasis added]).

The discovery commissioner notably also reiterated the need for appellate court intervention: “I will say that I think that this is an issue that likely needs further – **we need further direction from our appellate courts** on. But this as I indicated initially, **this may well be a case that would warrant that.**” (3 App. 544:13-17 [emphasis added]).

In the second Discovery Commissioner Report and Recommendations, filed on August 18, 2020 (the “DCRR”), the discovery commissioner noted the following conflicts between NRCP 35 (the “Rule”) and NRS 52.380 (the “Statute”):

- (a) whether a party’s attorney, or a representative of that attorney, may serve as an observer during the examination (which is barred by the Rule but permitted by the Statute);
- (b) whether a party may have an observer during a neuropsychological, psychological, or psychiatric examination without making a showing of “good cause” (which showing is also required by the Rule but not required by the Statute); and
- (c) whether the observer may record the examination without making a showing of “good cause” (which showing is required by the Rule but not required by the Statute).

(3 App. 556:12-21). The discovery commissioner concluded that “[e]ach of these conflicts is irreconcilable, such that it is not possible to construe the Rule and the Statute in harmony.” (3 App. 556:21-22).

The discovery commissioner also noted that “[a] single question is presented here: whether the Statute is procedural or substantive. If the Statute is substantive, the Statute governs where a conflict arises. If the Statute is procedural, it is unconstitutional (and therefore superseded by the Rule) to the extent that the Statute is both procedural and in conflict with the Rule.” (3 App. 557:15-18 [emphasis in original]). The discovery commissioner further explained that, “[u]nder Nevada law, the judiciary has the exclusive prerogative to make rules governing its own procedures, while the Legislature has the exclusive prerogative to enact statutes governing the substance of the law.” (3 App. 557:3-6 [citing *State v. Connery*, 99 Nev. 342, 345 (1983)] [emphasis in original]).

Accordingly, the discovery commissioner recommended that, during any NRCP 35 examination, including any neuropsychological examination, Davis would be permitted to have an observer present, including Davis’ attorney or that attorney’s representative, and that any examination could be recorded. (3 App. 558:14-559:7).

Petitioner filed an objection to the DCRR on August 31, 2020. (3 App. 561). Davis filed an opposition to the objection, and Petitioner filed a reply. (5 App.

1046; 6 App. 1381). The district court did not hear oral argument or issue any substantive ruling. Rather, in its “Order re: Discover Commissioner’s Report and Recommendations,” filed on September 18, 2020, the district court affirmed and adopted the DCRR on the check-box form. (6 App. 1391).

VI.

POINTS AND AUTHORITIES

A. **Writ relief is appropriate and necessary to resolve an unsettled and recurring conflict of law that implicates Constitutional separation of powers principles.**

Nevada appellate courts are empowered to issue writ relief when the petitioner lacks a “plain, speedy and adequate remedy at law.” *See, e.g., Beazer Homes Holding Corp. v. Eighth Jud. Dist. Ct.*, 128 Nev. 723, 730, 291 P.3d 128 (2012) (petition for writ of mandate granted and district court ordered to comply with civil procedure rule). Whether an appeal is a sufficiently adequate and speedy remedy is determined in each particular case by considering a number of factors, “including the underlying proceedings’ status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.” *Id.* (finding that petitioner lacked plain, speedy and adequate remedy at law when petition raised important issues of law and public policy and other cases involved the same disputed issues); *see also Lund v. Eighth Jud. Dist. Ct.*, 127 Nev. 358, 363, 255 P.3d 280 (2011) (writ relief warranted when a legal

error significantly affects the course of the litigation and the aggrieved party should not have to wait until final judgment to correct the error).

The promotion of judicial economy is another important factor in determining the availability of writ relief. *See Beazer*, 128 Nev. at 730 (judicial economy promoted when ruling on petition would affect many other cases pending throughout the state). In further promoting the interests of sound judicial economy and administration, writ review is accordingly warranted **when needed to clarify significant and recurring questions of law that may affect other cases**. *See Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. 396, 401, 373 P.3d 89 (2016); *Nevada Ass’n Servs. v. Eighth Jud. Dist. Ct.*, 130 Nev. 949, 954, 338 P.3d 1250 (2014); *Oxbow Constr., LLC v. Eighth Jud. Dist. Ct.*, 130 Nev. 867, 872, 335 P.3d 1234 (2014).

Though extraordinary relief is generally not available to review discovery orders, “**where an important issue of law needs clarification** and public policy is served by this court’s invocation of its original jurisdiction, . . . consideration of a petition for extraordinary relief may be justified.” *Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50 (2000) (emphasis added); *see also Club Vista*, 128 Nev. at 228 (discovery orders may be reviewed on writ petitions when challenged order is likely to cause irreparable harm).

Similarly, writ relief is also appropriate to resolve a split of authority among the lower courts on issues of statewide concern. *See, e.g., State of Nevada v. Eighth Jud. Dist. Ct.*, 116 Nev. 127, 134, 994 P.2d 692 (2000). Under these circumstances, when issues of law require clarification, the standard of review is de novo. *Beazer Homes*, 128 Nev. at 730. The constitutionality of a statute is a question of law that is reviewed de novo. *See Zamora v. Price*, 125 Nev. 388, 391, 213 P.3d 490 (2009).

Here, as detailed below, NRS 52.380, which became effective approximately six months after the latest amendments to NRCP 35 were enacted by the Nevada Supreme Court, creates several conflicts relating to the procedures for physical and mental examinations conducted during the course of litigation pursuant to the Nevada Rules of Civil Procedure. Indeed, in this case, the Clark County discovery commissioner acknowledged the need for appellate court intervention on this important and recurring issue. (1 App. 136:20-22; 3 App. 544:13-17).

Moreover, this issue will continue to recur throughout the state, as physical and mental examinations are a critical procedural component of personal injury cases. In this regard, a “circuit split” of sorts has already emerged, as different departments in Clark County have issued divergent rulings as to whether the

statute or rule provide the controlling procedure.⁴

Accordingly, writ relief is necessary to resolve the recurring conflict of law and provide guidance to Nevada district courts and litigants.

B. NRCP 35, and not NRS 52.380, governs physical and mental examinations conducted during civil discovery because the statute unconstitutionally infringes on the Nevada Supreme Court’s power to enact civil procedure rules.

As detailed below, the Legislature’s enactment of NRS 52.380 just months after the Nevada Supreme Court amended NRCP 35, was an unconstitutional violation of the separation of powers doctrine.

1. The Court amended NRCP 35 to provide for recording and observers under limited circumstances.

The Nevada Supreme Court significantly amended the Nevada Rules of Civil Procedure in 2019.⁵ The amended version of NRCP 35 (“Physical and Mental Examinations”), effective March 1, 2019, was designed to provide a comprehensive procedural framework for the conducting of physical and mental examinations in civil litigation. The rule now provides, in salient part, that “[t]he

⁴ In contrast to the instant proceedings, a different department in Clark County has concluded that the Rule prevails over the Statute. *See Troy Moats v. Troy Burgess*, Clark County District Court, Case No. A-18-769459-C (Department 14). On October 9, 2020, plaintiff in that matter filed a writ petition. *See Troy Moats v. Eighth Jud. Dist. Ct.*, Case No. 81912.

⁵ *See* No. ADKT 0522, Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, filed on December 31, 2018.

court where the action is pending 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). “The order must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it ...” NRCP 35(a)(2)(B).

As part of the 2019 amendments, the Court added provisions relating to the procedures for a party seeking recordings of examinations and observers. The amendment relating to recording provides: “On 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.” NRCP 35(a)(3) (emphasis added).⁶

Regarding observers, the amended rule provides: “The party against whom an examination is sought may request as a condition of the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. *The observer may not be the party’s attorney or anyone employed by the party or the party’s attorney.*” NRCP 35(a)(4) (emphasis added). The amended rule further clarifies that “[t]he party may not have any observer present for a

⁶ “A generalized fear that the examiner might distort or inaccurately report what occurs at the examination is not sufficient to establish good cause to audio record the examination.” NRCP 35, Advisory Committee Note – 2019 Amendment – Subsection (a).

neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.” NRCP 35(a)(4)(B).

The Court enacted these amendments after nearly two years of careful investigation and analysis through a specially formed committee. During this time, the committee received public comments, including comments and letters from health care professionals, which lead to the prohibition against observers for neuropsychological examinations. This prohibition exists for numerous reasons.

For example, according to Thomas Kinsora, Ph.D. (Petitioner’s retained neuropsychologist in this case), “[a]llowing a non-neuropsychologist, particularly an attorney, access to protected test material through third party observation, or direct access to raw test data, a) violates the neuropsychologist’s ethical guidelines and the published positions of professional organizations, b) goes against the stated position of the Nevada Board of Psychological Examiners, c) violates NAC 641.234,⁷ d) presents a risk to public safety, e) diminishes the value of test results, f) diminishes the usefulness of the neuropsychologist to the trier of fact, and g) diminishes the viability of the neuropsychologist by denying him/her the tools necessary to conduct valid assessments.” (1 App. 155-156, 248-250; 2 App. 251-

⁷ This regulation, among other things, prohibits psychologists and licensed behavior analysts from publicly reproducing or describing psychological tests or other assessment procedures in a manner which may invalidate the tests or procedures. NAC 641.234(2).

258).

The Nevada Board of Psychological Examiners offered the following in a letter to the Nevada Supreme Court provided in connection with proposed amendments to NRCP 35: “In the interest of protecting the needs of the public, it is the position of the Nevada Board of Psychological Examiners that allowing third-party observers, monitors, and/or electronic recording equipment during psychological and neuropsychological evaluations *poses a significant threat to public safety.*” (2 App. 260 [emphasis added]). The Board further advised the Court that “[o]bservation, monitoring, and recording can significantly alter the credibility and validity of results obtained during psychological and neuropsychological medical evaluations, as well as forensic evaluations completed for judicial proceedings.” (*Id.*) “Research indicates that the presence of observers, monitors and recorders during patient clinical interviews and evaluations directly impacts patient behavior and performance such that patients may avoid disclosing crucial information essential to diagnosis and clinical recommendations.” (*Id.*)

The Nevada Psychological Association issued similar guidance and warnings to the Court. (2 App. 271-272). Indeed, this Association maintains that, if observation and recording of examinations were permitted, “*no licensed psychologist in the State of Nevada would be able to conduct psychological and/or neuropsychological*” examinations because these conditions would lead to

decreased patient disclosure, compromised validity of testing, social facilitation and observer effects (i.e., patients may respond differently when they know they are being observed), compromised test security (which could adversely affect future examinations of other patients). (*Id.* [emphasis added]).

2. The Legislature enacted NRS 52.380 in response to the Court’s amendments to NRCP 35.

In response to the 2019 amendments to NRCP 35, the Nevada Legislature enacted A.B. 285, codified as NRS 52.380, which is vaguely entitled “Attendance by observer.” The provision is located in Chapter 52 of the Nevada Revised Statutes (titled “Documentary and Other Physical Evidence”). The statute, which became effective on October 1, 2019 - approximately seven months after the amendments to NRCP 35 took effect - provides, in salient part:

1. An observer may attend an examination⁸ but shall not participate in or disrupt the examination.
2. The observer attending the examination pursuant to subsection 1 may be:
 - (a) An attorney of an examinee or party producing the examinee; or

⁸ As used in this section, “‘Examination’ means a mental or physical examination ordered by a court for the purpose of discovery in a civil action.” NRS 52.380(7)(a). Though the Legislature curiously does not reference NRCP 35 in the statute, it presumably intended to include Rule 35 within the scope of this definition, as there is no other rule or law authorizing such examinations in civil discovery.

(b) A designated representative of the attorney,
if:

- (1) The attorney of the examinee or party
producing the examinee, in writing,
authorizes the designated
representative to act on behalf of the
attorney during the examination; and
- (2) The designated representative
presents the authorization to the
examiner before the commencement
of the examination.

3. The observer attending the examination pursuant
to subsection 1 may make an audio or stenographic
recording of the examination.

NRS 52.380(1)-(3). The statute further authorizes both observers and examiners to
suspend the examination under specified circumstances. *See* NRS 52.380(4)-(5).

In other words, contrary to NRCP 35, the statute permits (1) an examinee's
attorney to observe the examination; (2) an observer for neuropsychological or
psychological examinations without requiring any showing of good cause; and (3)
recording of the examination without requiring a showing of good cause. It is
unclear how the Legislature reconciled these provisions with the concerns raised
by the Nevada Board of Psychological Examiners, the Nevada Psychological
Association and practitioners such as Dr. Kinsora. (1 App. 155-156, 248-250; 2
App. 251-260, 271-272).

3. The Nevada Constitution establishes a separation of powers between the Legislative and Judicial departments.

The Nevada Constitution provides that “[t]he powers of the Government of the State of Nevada shall be divided into three separate departments, - the Legislative, - the Executive and the Judicial; and **no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others**, except in the cases herein expressly directed or permitted in this constitution.” Nevada Constitution, Art. 3, § 1 (emphasis added).

This Section provides the Constitutional basis for the “separation of powers doctrine,” which “is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government.” *Berkson v. Lepome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010); *see also Goldberg v. Eighth Jud. Dist. Ct.*, 93 Nev. 614, 615, 572 P.2d 521 (1977) (“It is fundamental to our system of government that the separate powers granted the executive, legislative and judicial departments be exercised without intrusion.”. The Court has recognized that “[t]he division of powers *is probably the most important single principle of government declaring and guaranteeing the liberties of the people.*” *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237 (1967) (emphasis added).

4. The Nevada Supreme Court is authorized to establish rules for civil litigation, and has repeatedly struck down statutes that conflict with these rules.

The Nevada Constitution further provides that “[t]he judicial power of this State is vested in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace.” Nevada Constitution, Art. 6, § 1. “‘Judicial Power’ is the capability or potential capacity to exercise a judicial function. That is, ‘Judicial Power’ is the authority to hear and determine justiciable controversies.” *Galloway*, 83 Nev. at 20. “Judicial function includes the right to exercise any lesser power that can be subsumed under, or is included as an integral part of, the broader heading of ‘Judicial Power’; that is, any power or authority that is inherent or incidental to a judicial function is properly within the realm of judicial power, as described above.” *Id.*

Pursuant to this constitutional judicial power, the Nevada Supreme Court has the authority to regulate civil litigation by adopting rules regulating civil practice and procedure:

The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the constitution of the State of Nevada.

NRS 2.120(2); *see also Berkson, supra*, 126 Nev. at 499 (“The judiciary is entrusted with rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice and to economically and fairly manage litigation.”).

Under the separation of powers doctrine, “it is clear that the judiciary, as a coequal branch of government, has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice. **Any infringement by the legislature upon such power is in degradation of our tripartite system of government and strictly prohibited.**” *Goldberg, supra*, 93 Nev. at 616-617 (citations omitted) (emphasis added). “[T]he inherent power of the judicial department to make rules is not only reasonable and necessary, but absolutely essential to the effective and efficient administration of our judicial system, and **it is our obligation to insure that such power is in no manner diminished or compromised by the legislature.**” *Goldberg*, 93 Nev. at 617 (denying writ petition by attorney seeking to attend district court’s rule-making meeting regarding selection and duties of jurors) (emphasis added); *see also State v. Merialdo*, 70 Nev. 322, 326, 268 P.2d 922 (1954) (“Nothing can be clearer than that, under our constitutional provision, our courts possess **the entire body of the intrinsic judicial power of the state.** This being so, neither the legislative nor the

executive branches of the government may assume to exercise any part of that judicial power, and **the district court cannot be directed or controlled or impeded in its functions by either of those branches.**”) (emphasis added).

The Nevada Supreme Court has repeatedly applied these separation of powers principles to conflicts between statutes and rules. *See Berkson, supra*, 126 Nev. 492; *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (1988); *State v. Connery*, 99 Nev. 342, 661 P.2d 1298 (1983); *Lindauer v. Allen*, 85 Nev. 430, 456 P.2d 851 (1969).

In *Lindauer*, the Court confronted a conflict between NRCP 41(e), which mandates dismissal if a plaintiff fails to bring an action to trial within five years, and former NRS 14.150, which changed the time for mandatory dismissal from five years to seven years. *Lindauer*, 85 Nev. at 432. Based on Article 3, Section 1 of the Nevada Constitution, the Court explained that “when a statute attempts to limit or destroy an inherent power of the courts, that statute must fail.” *Id.* at 434. “When this court adopted NRCP 41(e) it was consistent with the Nevada Constitution and the laws of the state, and when the legislature later enacted NRS 14.150, it not only indulged in an unconstitutional act but attempted to diminish the effect of NRS 2.120 in an area where it was powerless to act.” *Id.* at 435. Accordingly, the rule prevailed over the former statute. *Id.*

In *Connery*, the Court confronted a conflict between NRAP 4(b), which provides, for criminal cases, that appeals must be filed within 30 days after the entry of the judgment or order being appealed, and a statute which required appeals to be taken within 30 days after “rendition” of the judgment or order. *Connery*, 99 Nev. at 344. Because the State filed its appeal later than 30 days after the district court’s oral “rendition” of its ruling, but within 30 days of the entry of the order as permitted by NRAP 4(b), the conflict between the statute and the rule was implicated. The Court again determined that the rule prevailed over the statute, reasoning that “[t]he judiciary has the inherent power to govern its own procedures, and this power includes the right to promulgate rules of appellate procedure as provided by law.” *Connery*, 99 Nev. at 345 (citing NRS 2.120 and *Goldberg, supra*, 93 Nev. 614).

“Although such rules may not conflict with the state constitution or ‘abridge, enlarge or modify any substantive right,’ NRS 2.120, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature.” *Id.* at 345. Accordingly, **“the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers.”** *Id.* at 345 (citing *Lindauer, supra*, 85 Nev. 430) (emphasis added). **“[S]uch a statute is of no effect.”** *Id.* (Emphasis added). In other words, the rules

of procedure enacted by the Court supersede procedural statutes relating to judicial functions, “so long as the rule does not conflict with the state constitution or alter a substantive right.” *Id.*

In *Whitlock*, the Court confronted an apparent conflict between NRS 16.030(6), which permits the parties to directly conduct *voir dire* at trial, and NRCP 47(a), which arguably provides district courts with discretion to deny parties the ability to directly examine potential jurors. The Court held that the statute was not a “legislative encroachment on judicial prerogatives” because, though it implicated trial procedure, the statute, importantly, “**does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule.**” *Whitlock*, 104 Nev. at 26 (emphasis added).

Most recently, in *Berkson, supra*, this Court held that a statute permitting a plaintiff whose judgment is reversed on appeal with the right to file new action within one year (NRS 11.340) unconstitutionally interferes with the judiciary’s authority to manage the litigation process. *Berkson*, 126 Nev. at 501. The Court accordingly struck the statute as unconstitutional on separation of powers grounds. *Id.* “In addition to the constitutionally mandated bases for keeping separate those inherent powers of the judiciary, leaving control of court rules and the administration of justice to the judiciary, and thereby placing the responsibility for the system’s continued effectiveness with those most familiar with the latest issues

and the experience and flexibility to more quickly bring into effect workable solutions and amendments, makes good sense.” *Id.* at 500.

5. NRS 52.380 violates the separation of powers doctrine because it is procedural, not substantive.

The net effect of the authorities discussed above is that rules of civil procedure promulgated by the Nevada Supreme Court prevail over conflicting statutes enacted by the Legislature, so long as the rule does not conflict with the Constitution, or abridge, enlarge or modify any substantive right. *See Connery, supra*, 99 Nev. at 345. Accordingly, “the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers.” *Id.* This prohibition is especially pronounced when a statute “interfere[s] with procedure to a point of disruption,” or constitutes an “attempted abrogation of an existing court rule.” *See Whitlock, supra*, 104 Nev. at 26.

The conflict here has already been resolved by federal courts in the context of construing FRCP 35, which is the federal equivalent to NRCPP 35.⁹ Specifically, **the United States Supreme Court has recognized and held that FRCP 35 is a**

⁹ FRCP 35 contains the same general authorizing language as NRCPP 35, as it provides: “The court where the action is pending 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.” FRCP 35(a)(1). FRCP 35 also contains the same good cause requirement as NRCPP 35. FRCP 35 contains no provisions for recording or observing.

rule of procedure. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11, 61 S. Ct. 422 (1941). In *Sibbach*, the injured plaintiff refused defendant’s request for a medical examination pursuant to FRCP 35, arguing that the rule implicates substantive rights, and was therefore not within the Supreme Court’s rulemaking authority. The Court explained that “[t]he test must be whether a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” *Id.* at 14. Based on this standard, the Court concluded that FRCP 35 was procedural, and therefore enforceable pursuant to the Court’s rulemaking authority. *Id.*

Fast forward nearly 80 years later, in a thorough and detailed opinion issued just a few months ago, the Nevada federal court concluded that NRS 52.380 is procedural, not substantive. See *Freteluco v. Smith’s Food & Drug Ctrs.*, 2020 U.S. Dist. LEXIS 113217 at *7-*12 (D. Nev. June 29, 2020). In adjudicating precisely the same conflict between NRS 52.380 and FRCP 35 that is at issue here, the court concluded that “whether an observer is present in the neuropsychological examination of Plaintiff *is not substantive, but is procedural*. That is, NRS 52.380 *sets forth procedures* applicable to observers who may attend independent medical examinations.” *Id.* at *10-*11 (emphasis added).

The court reasoned, consistent with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny, that the provisions of NRS 52.380 “are not ‘outcome’ or case determinative, but instead reflect a ‘procedural preference.’” *Id.* at *11 (citing *Flack v. Nutribullet, LLC*, 333 F.R.D. 508, 517 (C.D. Cal. 2019), *Smolko v. Unimark Lowboy Trans.*, 327 F.R.D. 59, 63 (M.D. Pa. 2018) and *Stefan v. Trinity Trucking*, 275 F.R.D. 248, 250 (N.D. Ohio 2011)).

The court in *Freteluco* continued: “By specifying that the court may determine ‘the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it,’ Fed. R. Civ. P. 35(a)(2)(B), Rule 35 *consigns the procedures to be used in conducting these examinations to the sound discretion of the court*, an approach that is consistent with the general guidance of the rules which provide that issues relating to the scope of discovery rest in the sound discretion of the [c]ourt.” *Id.* at *11-*12 (quoting *Smolko*, 327 F.R.D. at 61) (emphasis added).

With respect to the statute, the court in *Freteluco* explained that “NRS 52.380 *sets forth process* allowed under Nevada Rules of Evidence applicable to an examination under Nev. R. Civ. P. 35, *and is not a substantive law* the application of which overrides existing federal law found in Fed. R. Civ. P. 35(a)(2) that grants this Court the authority to enter an order specifying the ‘time, place, manner, conditions, and scope of the examination’” *Id.* at *12 (emphasis

added).

The court in *Freteluco* went on to conclude that the plaintiff failed to establish good cause to overcome the majority rule excluding third parties from Rule 35 examinations. *Id.* at *12-*14. In so concluding, like the Nevada Board of Psychological Examiners and the Nevada Psychological Association counseled in its comments to this Court, the federal court articulated many of the concerns associated with observers: “The introduction of a third party changes the nature of the proceeding, much in the way that television coverage of events qualitatively changes what occurs in front of the camera.” *Id.* at *13.

“Courts are often reluctant to permit a third party or recording device out of concern that the intrusion would (1) potentially invalidate the examination results; (2) fail to provide a level playing field[] as plaintiff was not required to tape record his examinations with his own health care providers; and (3) inject a greater degree of the adversary process into an evaluation that is to be neutral.” *Id.* at *13 (quoting *Flack*, 333 F.R.D. at 518). “[T]he presence of a third party introduces a degree of artificiality to the examination that would be inconsistent with the applicable professional standard.” *Id.* at *14.

Still another federal court has recognized that FRCP 35 is “**unquestionably** a rule of procedure.” *Durmishi v. Nat’l Cas. Co.*, 720 F. Supp. 2d 862, 876 (E.D. Mich. 2010). FRCP 35’s “purpose is to regulate access to proof through different modes of discovery during the course of litigation. **It does not prescribe rights or remedies. Instead, it merely sets forth a process for obtaining information that might bear on a matter in controversy.**” *Id.* (emphasis added).

VII.

CONCLUSION

As detailed above, NRS 52.380 is an unconstitutional rule of procedure. It violates the separation of powers doctrine, and is therefore of no effect. NRCP 35 occupies the field and governs physical and mental examinations in Nevada. The Court should therefore grant this petition and issue a writ of mandamus compelling the district court to (1) sustain Petitioner’s objections to the discovery commissioner’s report and recommendation, dated August 18, 2020 (3 App. 555); and (2) order that the Rule 35 examinations permitted by the discovery commissioner proceed without any recording, and without any observers, as Davis never presented any good cause for either the recording or the presence of any observers.

The Court should also take the opportunity to clarify that NRS 52.380 is procedural, and that it constitutes an unconstitutional violation of the separation of powers doctrine. The statute therefore has no force and effect with respect to medical and physical examinations in civil litigation, which are controlled entirely by NRCP 35.

DATED this 2nd day of December, 2020.

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SUPPORTING DECLARATION

I, Jeffrey D. Olster, declare and state as follows:

1. I am an attorney duly licensed to practice before all courts of the State of Nevada. I make this declaration pursuant to NRAP 21(a)(5), NRS 34.170, NRS 34.030 and NRS 34.330. My office represents petitioner Lyft, Inc. in this matter. As such, I have personal knowledge of the following.

2. As detailed above, Petitioner maintains that writ review is warranted on the legal grounds that NRS 52.380 conflicts with NRCP 35.

3. The documents contained in the concurrently filed Appendix are true and correct copies of the salient district court record to the best of my knowledge, information and belief.

I declare under penalty of perjury under the laws of the State of the Nevada that the foregoing is true and correct.

Dated this 2nd day of December, 2020.

/s/ Jeffrey D. Olster

Jeffrey D. Olster

ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

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 in Times New Roman, font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **6,969** words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(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 2nd day of December, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 2nd day of December, 2020, I did cause a true copy of the foregoing **PETITION FOR WRIT OF MANDAMUS** to be served via the Court's electronic filing and service system ("E-Flex") to all parties on the current service list:

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