

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYFT, INC.,
Defendant,

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.

SUPREME COURT CASE NO. 82148

District Court Case No.

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**REAL PARTY IN INTEREST KALENA DAVIS'S
AMENDED ANSWER TO PETITION FOR WRIT OF MANDAMUS
PER ORDER OF NEVADA SUPREME COURT, APRIL 12, 2021**

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NRAP 26.1 Disclosure Statement

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

The following have an interest in the outcome of this case or are related to entities interested in the case:

- Kalena Davis;
- Lyft, Inc.;
- Adam Bridewell;
- The Hertz Corporation.

There are no other known interested parties.

Clear Counsel Law Group has represented Plaintiff / Real Party in Interest Kalena Davis in this matter since its inception.

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STATEMENT OF THE ISSUES¹

1. Whether provisions of NRS 52.380 (the “Statute”) conflict with provisions of NRC P 35 (the “Rule”);
2. Whether — if any such conflict exists — each provision of the Statute conflicting with the Rule contains substantive rights (thus superseding the Rule) or is procedural (thus superseded by the Rule); and
3. Whether — if any such conflict exists — comity permits this Court to adopt that portion of the Statute, or to read it as directory, thereby preserving that portion of the Statute.

STATEMENT OF FACTS

On October 20, 2017, Defendant Bridewell and Plaintiff Davis were traveling in opposite directions towards the same intersection. Bridewell made a left turn at the intersection while Davis was oncoming traffic. Davis’s motorcycle collided with Bridewell’s vehicle. Liability is disputed.

¹ Because the Petition misstates the “Issues Presented,” this Answering Brief includes a statement of those issues.

The Petition simply (and incorrectly) *presumes* that the Statute and the Rule conflict. Moreover, contrary to Defendant’s assertions, the Statute does not “alter[] [any] of the procedural aspects of physical and mental examinations . . . pursuant to NRC P 35[]” nor — “effectively” or otherwise — “preclude[] neuropsychological and psychological examinations in Nevada.” *Petition*, 3.

SUMMARY OF THE ARGUMENT

NRS 52.380 does not violate the separation of powers doctrine because NRS 52.380 and NRCP 35 can co-exist harmoniously. They appoint separate observers with distinct purposes, powers, and restrictions.

Rule 35 defines a procedure for gathering and preservation of evidence. NRS 52.380 defines substantive protections for a party ordered to be examined by the agent of the injuring party. NRS 52.380 prevents victims of traumatic harms from being revictimized by that adverse agent.

Rule 35(a)(3) and (4) promote preservation of evidence by creating a recording of the examination and providing a court-appointed witness — not the victim’s representative or employee — to witness the examination and testify about it. Preservation of evidence is the thrust of Rule 35; hence, it is among the “discovery rules,” *i.e.*, Nevada Rules of Civil Procedure 26 through 37.

By contrast, NRS 52.380 focuses on protection of the victim being examined by the agent of the injuring party. Under NRS 52.380, the examinee may bring an observer, who can be the representative of the victim and is empowered to protect the victim during the examination.

The Rule and Statute differ in purpose and function, and therefore provide for separate observers. The Rule’s observer is a witness, explicitly prohibited from protecting the interests of the victim during the examination. The Statute’s observer

is an advocate, with explicit authority to record the examination (and even suspend it) to protect the victim.

Because these functions cannot be fulfilled by the same person, there is no conflict between the Rule and the Statute.

If the Rule and the Statute do conflict in some way, NRS 52.380 does not violate separation of powers because the Statute creates substantive rights for the victim, including the right to representation during the examination and the right to record it. The Statute also extends these substantive rights to victims undergoing mental examinations — the types that may be the most intrusive. These substantive rights represent public policy decisions by the Legislature. The Legislature intended these rights to be substantive, and they are objectively so.

If this Court finds no substantive content to the protections of NRS 52.380 and also finds that some aspect of the Rule and Statute cannot be harmonized, this Court should adopt NRS 52.380 — either as sound policy or in comity to the Legislature — to resolve the conflict.

If this Court declines to so resolve any conflict, this Court should deem NRS 52.380 directory, and thus advisory, to the District Courts, regarding the will of the People. Such a portion of the Statute would be considered by the District Court under the “good cause” analysis of NRCP 35(a)(3) and (4), shifting the burden from the examinee to the examining party to rebut the showing of “good cause.”

STANDARD OF REVIEW

This Court reviews statutory construction *de novo*.² The primary consideration is legislative intent.³ When a statute is unambiguous, this Court gives its words their plain meaning rather than resorting to the rules of construction.⁴ If, however, a statute is susceptible of more than one reasonable interpretation, the Court avoids any meaning that would nullify its operation, looking to policy and reason.⁵ Further, this Court construes statutes as a whole, so that all provisions are, to the extent practicable, reconciled and harmonized.⁶

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² *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010) (citing *State, Dep't of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 476, 874 P.2d 1247, 1249 (1994)).

³ *Id.* at 109 (citing *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993)).

⁴ *Id.* at 109 (citing *Seput v. Lacayo*, 122 Nev. 499, 502, 134 P.3d 733, 735 (2006)).

⁵ *Id.* at 109-10 (citing *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 714 (2007)).

⁶ *Id.* (citing *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005)).

ARGUMENT

I. NRS 52.380 Does Not Violate The Separation Of Powers Doctrine Because Rule 35 And NRS 52.380 Can Be Read Harmoniously.⁷

Separation of powers is violated if the Legislature enacts a procedural statute conflicting with a pre-existing court rule.⁸ However, as explained below, NRS 52.380 does not violate separation of powers because NRS 52.380 and NRCP 35 can be read harmoniously and serve different functions.⁹

Rule 35 is focused on collection of evidence through medical examinations and preservation of evidence through recordings and observers.¹⁰ NRS 52.380 is focused on protection of the interests and person of the victim by an advocate who is not — and cannot be — appointed under Rule 35.

Although both the Rule and Statute use the term “observer,” a plain-text reading shows that the Rule’s “observer” and the Statute’s “observer” cannot be the same person. Moreover, the Rule does not prohibit the existence of the Statute’s

⁷ Plaintiff now believes that his original analysis in the District Court (as well as that of Defendant and the Court) was incorrect. *See Levingston v. Washoe Cty.*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996) (“[I]ssues of a constitutional nature may be addressed when raised for the first time on appeal”).

⁸ *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983).

⁹ *Goldberg v. Eighth Judicial Dist. Court In & For Clark Cty.*, 93 Nev. 614, 617, 572 P.2d 521, 523 (1977) (judiciary and legislature may have overlapping functions, provided that each branch cites basic source of power).

¹⁰ NRCP 35.

observer/advocate. The Statute does not prohibit the existence of the Rule’s observer/witness.

A. Rule 35 Is A Procedural Rule, Focused On Collection And Preservation Of Evidence.

A Rule 35 examination is performed by agreement of the parties¹¹ or order of the court.¹² When the court orders the exam, it must set forth the “time, place, manner, conditions, and scope of the examination[.]”¹³ In 2019, Rule 35 was amended to include Subsections (a)(3) and (a)(4), dealing with court-ordered recordings and court-appointed observers.¹⁴ These Subsections reference “conditions” set by the court — thus referencing the “conditions” requirement of Rule 35(a)(2) — and set boundaries and limitations for the court’s “conditions.”¹⁵

Under Rule 35(a)(3), the court may order a recording of the exam. The Rule recognizes the *evidentiary* nature of such recording by requiring the recording party to pay for it and provide a copy to the other parties upon written request.¹⁶ Thus, the non-requesting party can ensure that the recording will be paid for and made

¹¹ NRCP 35(b)(6) (examination by agreement of parties).

¹² NRCP 35(a)(2)(A).

¹³ NRCP 35(a)(2)(B) (emphasis added).

¹⁴ Compare NRCP 35 (2019) to any prior version.

¹⁵ *Id.*

¹⁶ *Id.*

available as part of discovery. Thus, Rule 35(a)(3), focuses on collection, preservation, and disclosure of evidence.

Rule 35(a)(4) likewise focuses on evidence by providing that the court may appoint a witness to observe the examination.¹⁷ The witness must be nominated by the examinee, but the court cannot appoint the party's attorney or an employee of the party or the attorney.¹⁸ Thus, the witness is someone familiar to the examinee but unlikely to be financially biased or ethically prohibited from testifying.¹⁹ Rule 35(a)(4) therefore creates a witness who can testify about what occurs during the exam. Thus, Rule 35 recordings and observers promote preservation of evidence.

Moreover, the witness observes but “must not in any way interfere, obstruct, or participate in the examination.”²⁰ Thus, Rule 35(a)(4) focuses on preservation of evidence through a court-appointed witness who may only observe.

Rule 35(a)(4)(B) provides that an observer may be present in a mental examination (*i.e.*, neuropsychological/psychological/psychiatric).²¹ Thus, the Rule gives the court the discretion to weigh the evidentiary value of a witness against

¹⁷ NRCP 35(a)(4).

¹⁸ NRCP 35(a)(4).

¹⁹ See Nev. R. Prof'l. Conduct 3.7.

²⁰ NRCP 35(a)(4)(C).

²¹ NRCP 35(a)(4) explicitly and NRCP 35(a)(3) implicitly.

alleged evidentiary harms of the witness’s presence, further confirming that Rule 35 is focused on evidence.

Ultimately, the purpose of Rule 35 is procedural — collection and preservation of evidence through examinations, court-ordered recordings, and a court-appointed witness.

B. NRS 52.380 Is A Substantive Statute, Focused On Protection Of Victims.

NRS 52.380 has a wholly different purpose and function from Rule 35. NRS 52.380 is designed to provide protections to victims who are ordered to be examined by the representative of the injuring party, from cases sounding in simple negligence to cases involving intentional torts such as assault, battery, sexual assault, and IIED cyber-bullying.²² The Statute protects victims in all civil cases where a medical examination is ordered.²³ These victims have experienced physical and/or psychological trauma and risk some level of revictimization during such an

²² See e.g. *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.”); see also (3 Def. App. 928-29). (President of the Association of Defense Counsel of Nevada, during the March 27, 2019, Assembly Judiciary Committee Meeting, confirming that the Rule 35 examining “doctor is actually serving as a representative of the defendant”).

²³ NRS 52.380(7) (applying to all civil cases in which a physical or mental examination is ordered by the court).

examination. The Statute's substantive protections apply to all mental and physical examinations ordered by a court in civil litigation.²⁴

The statutory observer has three characteristics unique to the Statute. First, the statutory observer may be the party's attorney or a representative of the attorney.²⁵ Second, the statutory observer may not participate in or interfere with the examination but has the authority to suspend the examination to obtain a protective order if the examiner becomes abusive or exceeds the scope of the examination.²⁶ Third, the statutory observer may make a recording of the examination, such that the examinee has the right to record what happens to his own person.²⁷ The statutory observer is focused, not on collection and preservation of evidence, but on protection of the examinee.

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²⁴ NRS 52.380(7).

²⁵ NRS 52.380(2).

²⁶ NRS 52.380(4).

²⁷ NRS 52.380(3).

C. NRS 52.380 And Rule 35 Can Be Read In Harmony.

This Court has stated, “[w]henever possible, we must interpret statutes to avoid conflicts with the federal or state constitutions.”²⁸

To that end, analysis of the Statute

begins with the presumption of constitutional validity which clothes all statutes enacted by the Legislature. All acts passed by the Legislature are presumed valid until the contrary is clearly established. In case of doubt, every possible presumption will be made in favor of the constitutionality of the statute, and courts will interfere only when the Constitution is clearly violated. Further, the presumption of constitutional creates a heavy burden for Defendant to show that the statute is unconstitutional.²⁹

Thus, Defendant must show that a conflict exists, that the Rule and Statute cannot be harmonized.³⁰ Defendant instead simply assumes that a conflict exists.

As explained below, the Statute and Rule are not in conflict, and Defendant’s argument therefore fails this essential step.

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²⁸ *Mangarella v. State*, 117 Nev. 130, 135, 17 P.3d 989, 992 (2001).

²⁹ *List v. Whisler*, 99 Nev. 133, 138, 660 P.2d 104, 106 (1983) (internal citations omitted) (emphasis added).

³⁰ *Hefetz v. Beavor*, 133 Nev. 323, 330, 397 P.3d 472, 478, n.5 (2017).

It is clear from the plain text that the Rule 35 witness and the NRS 52.380 advocate *cannot be the same person*:

<u>Rule 35 Witness</u>	<u>NRS 52.380 Advocate</u>
must be appointed by the court	is designated by the examinee or his attorney
cannot be the attorney or the attorney's agent	can be the attorney or the attorney's appointee
cannot interfere with, participate in or interrupt the examination in any way	may suspend the examination if the examiner is abusive or exceeds the scope of the examination
is merely an observer and cannot be anything more	is empowered to represent and protect the interests of the victim
cannot make a recording of the examination (which, even if granted by the court, must be arranged by "a party or the examiner")	may make a recording without leave of court

Moreover, nothing in Rule 35 prohibits the NRS 52.380 victim's advocate. Nothing in NRS 52.380 prohibits the Court from appointing a Rule 35 witness or ordering a Rule 35(a)(3) recording. Thus, the Rule and the Statute can operate

harmoniously without conflict. Therefore, the separation of powers doctrine is not implicated and the lower court's ruling should be upheld.³¹

II. The District Court Correctly Found That NRS 52.380 Creates Substantive Rights.

A Rule 35 examination is conducted by an examiner hired by the party that injured the victim in the first place. These victims risk being revictimized during the exam, irrespective of the intent of the examiner.

Thus, NRS 52.380 does not violate the separation of powers doctrine because the Statute is substantive, protecting victims in civil litigation by giving the victim the right to representation during the examination and protecting the victim against abusive behaviors by the examiner. Finally, NRS 52.380 protects the victim by allowing a recording to be made of the examination.³²

These are substantive rights: the right to representation during an adverse examination; the right to protection against abuse; the right to record what is happening to one's own person. These rights were intended by the Legislature to be substantive protections for victims. As the Statute confers a substantive right, it is

³¹ *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (District Court affirmed on appeal "if [it] reached the correct result, even if for the wrong reason.").

³² See NRS 52.380(2), (3), (5).

fully within the Legislature’s purview and does not violate the separation of powers doctrine.

As this Court noted in *Hefetz v. Beavor*,

[A] determination that a statute and court rule cannot be harmonized is but the first step in a separation of powers analysis. If there is a conflict . . . we must then determine whether the challenged statutory provision is substantive or procedural.³³

Defendant mischaracterizes the distinction between substantive and procedural statutes in relation to the separation of powers doctrine. In *Seisinger* — the Arizona case cited by this Court in *Hefetz* — the court held that a statute setting evidentiary standards for medical malpractice cases was substantive, even though rules of evidence are considered procedural.

The *Seisinger* court noted that “the precise dividing line between substance and procedure has proven elusive[]” because statutes, like rules, “often have both substantive and procedural aspects.”³⁴

However, this determination is defined by a relatively straightforward principle: “The ultimate question is whether the statute enacts, at least in relevant part, law that effectively ‘creates, defines, and regulates rights.’”³⁵ The *Seisinger*

³³ *Hefetz*, 133 Nev. at n.5 (quoting *Seisinger*, 203 P.3d at 489).

³⁴ *Seisinger*, 203 P.3d at 490.

³⁵ *Id.*

court concluded, “[a]lthough we maintain plenary power over procedural rules, we do not believe that power precludes the legislature from addressing what it believes to be a serious substantive problem.”³⁶

Like the *Seisinger* court, this Court has recognized that the Legislature can create substantive rights that affect the court’s procedure, and that sometimes those rights exist only within the context of court procedure.

In *Whitlock v. Salmon*, this Court addressed a separation of powers conflict between NRCP 47(a)(1966) and NRS 16.030 (6). At that time, Rule 47(a) gave the trial judge discretion to prohibit attorneys from conducting *voir dire*.³⁷ NRS 16.030 (a) affected that judicial discretion by vesting in attorneys the absolute right to conduct *voir dire*.³⁸

³⁶ *Id.* at 494.

³⁷ NRCP 47 (a) stated at the time: “the court shall conduct the examination of prospective jurors and may permit such supplemental examination by counsel as it deems proper.” *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988) (providing the text).

³⁸ NRS 16.030 (6) provides: “The judge shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted.” (emphasis added).

Although there was a clear conflict between Rule 47 and NRS 16.030, and although the statute clearly affected the court's procedure, this Court upheld the statute, stating that

the statute confers a substantive right to reasonable participation in voir dire by counsel; and this court will not attempt to abridge or modify a substantive right.[] NRCP 47(a) contemplated a healthy respect on the part of trial judges for appropriate supplemental participation by trial counsel in voir dire. Historically, in most of Nevada's courts of general jurisdiction, counsel have been accorded meaningful opportunities for involvement in the voir dire of prospective jurors.

The Legislature thus saw fit to enthrone the historical practice selectively enjoyed by counsel in most trial proceedings, in a substantive enactment that vouchsafes the right to all counsel in every department of our district courts.³⁹

As the foregoing makes clear, the process of *voir dire* exists solely within the context of court procedure, but this Court found that the Legislature intended to confer the right to attorney-conducted *voir dire* as a substantive right, and thus upheld the statute.⁴⁰

Nevada and Arizona are not alone in recognizing that substantive and procedure are not separated by a bright line. Statutes are not exclusively

³⁹ *Whitlock*, 104 Nev. at 26, 752 P.2d at 211 (internal citation omitted) (emphases added).

⁴⁰ The *Whitlock* court also noted that the statute was a progression of the judicial trend to allow *voir dire*; however, the Court clearly defined the legislative act as conferring a substantive right. *Id.*

“substantive” or exclusively “procedural”. Rather, a substantive statute may contain procedural elements while remaining constitutional. Courts across the country have addressed this “intertwining” of substantive and procedural aspects in determining constitutionality. The Utah Supreme Court in 2010, analyzed Utah’s “special mitigation” statute, which shifts the burden of claiming a homicidal act was attributable to a mental illness. They held that the statute constitutional, despite the fact that it shifted the burden of proof, which could be considered a procedural issue, in part because “a procedural rule may be so intertwined with a substantive right that the court must view it as substantive.”⁴¹

The Florida Supreme Court, in analyzing the constitutionality of a statute authorizing the recovery of expert fees and the procedure by which they could be recovered, stated as follows:

Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.⁴²

⁴¹ *State v. Drej*, 233 P.3d 476, 486 (UT. 2010).

⁴² *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).

The New York Supreme Court,

Appellate Division, explained in detail the gradation between substantive and procedural rights, stating:

The general rule, of course, is that rules as to burden of proof are remedial and relate to procedure. (8 N. Y. Jur., Conflict of Laws, § 35.)

However, where the rule as to burden of proof is such that it is inseparably connected with the substantive rights of the parties, the statute should be considered as affecting substantive rights, and should not be applied retrospectively to pending actions. The line of demarcation between a statute affecting substantive rights as opposed to one regulating procedure, is often hard to define. The answer cannot be determined by simply asking whether the outcome of the action might be affected, for rules of evidence or procedure often tend to affect the outcome of actions. Rather, the question to be asked is whether the substantive rights of the parties have been changed.

The gradations between procedure and substantive rights are shown in *Fitzpatrick v. International Ry. Co.* (252 N. Y. 127). In that case a cause of action for negligence arose in Ontario, Canada, which had a comparative negligence statute. In a suit brought in New York, the court charged that the burden of proving contributory negligence was upon the defendant. The defendant, on appeal, contended that the law of the forum, requiring that plaintiff establish his freedom from contributory negligence, should have been applied, since the rule related to burden of proof and was merely procedural. The court noted the Ontario act did more than touch or affect a matter of procedure, and, despite the plaintiff's contributory negligence, gave a right to recover, such right not being recognized at common law. It concluded that the New York rule on burden of proof had no application to the Ontario statute, since it would materially change the substantive rights of the parties. The court in passing, however, noted (p. 135): "If the Ontario act had merely dealt with this order of proof or burden of proof, and provided that the defendant, in common-law actions for negligence, had the burden of proving the plaintiff's contributory negligence [contrary to the New York rule that plaintiff has the burden of showing his freedom from

contributory negligence], we would have another question. There would then be the same substantial right as at common law, the change merely being in the procedure at the trial or in the burden of proof.⁴³

Chapter 52 of the Nevada Revised Statutes, “Documentary and Other Physical Evidence,” where NRS 52.380 appears, is an example of this intertwining or gradation between the substantive and the procedural. As this Court is aware, the entirety of Nevada’s Rules of Evidence is enacted by the Legislature (unlike in many other jurisdictions, including federal court) — a fact that is often confusing to *pro hac vice* litigants and even to new Nevada attorneys.

Thus, as Chapter 52 demonstrates, the Legislature validly exercises much discretion in making rules that affect how Nevada courts proceed in litigation. In fact, the phrase “the Court shall” appears more than 100 times in the Nevada Revised Statutes — and “[w]hen the Legislature, by statute, authorizes the exercise of an inherent judicial power, the courts may acquiesce out of comity or courtesy[.]”⁴⁴ Such a statute generally is unconstitutional only if it “attempts to limit or destroy an inherent judicial power[.]”⁴⁵

⁴³ *Reardon v. Joffe*, 25 A.D.2d 370, 372 (N.Y.A.D. 1 Dept., 1966).

⁴⁴ *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1220, n.4 (2000).

⁴⁵ *Id.* (citing *State v. Second Judicial Dist. Ct.*, 116 Nev. 953 (2000)).

Like the *Seisinger* Court, the Nevada Supreme Court looks to the legislative intent to determine whether a right conferred by the legislature is substantive. In the 1983 case of *State v. Smith*, the Nevada Supreme Court decided whether NRS 175.011(2) granting of the right to a jury trial was substantive or procedural. The Court looked to the intent of the legislature and determined that the legislature meant the statute to be procedural.⁴⁶ Because the legislature intended NRS 175.011(2) to be procedural, it was procedural.⁴⁷ This is in accord with *Seisinger* which held that the court's plenary power did not prohibit the "legislature from addressing what it believes to be a serious substantive problem" even though the remedy exists wholly in court procedure.⁴⁸

The Legislative History also shows that the Legislature intended the rights granted in NRS 52.380 to be substantive rights. During the course of hearings, Nevada's defense bar argued their opinion that A.B. 285 was unconstitutional

⁴⁶ *State v. Smith*, 99 Nev. 806, 808–09, 672 P.2d 631, 633 (1983).

⁴⁷ See also *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 176, 162 P.3d 148, 152 (2007) (looking to legislative intent to determine whether a right is substantive or procedural).

⁴⁸ *Seisinger*, 203 P.3d at 490.

because it was procedural.⁴⁹ Those advocating for the statute testified that the statute was substantive.⁵⁰ With the separation of powers doctrinal issue of procedural vs. substantive front and center, the Legislature passed the bill. Given the context of the bill, the Legislature must have intended to create a substantive right. To believe otherwise leads to the absurd result the Legislature intended to violate the Nevada Constitution. The Legislature intended the Statute to be substantive.

The Legislature has created other substantive rights that affect a trial court's procedure. In NRS 178A.170, the Nevada Legislature passed a similar statute, giving sexual assault victims the substantive right to have a support companion of his or her choice present during "[a]ny forensic medical examination." NRS 178A.170 (2).

⁴⁹ (3 PA 928-929) (Mr. Dane Littlefield testifying before the Senate Judiciary Committee: "In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one ... If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine");

(3 PA 998) (Mr. Brad Johnson testifying before the Senate Judiciary Committee: "It is not the Legislative Body that makes procedural rule; however, this bill does not address a substantive law. This bill violates the separation of powers. The state of litigation is not a matter that should be before the Legislative Body").

⁵⁰ (3 PA 989) (Mr. Galloway testifying before the Senate Judiciary Committee : "We want to emphasize that alleged victims are forced to undergo medical examinations to become whole again. The victims did not ask to be in this situation. This bill protects fundamental rights. This bill is a substantive law, not just procedural law.)

This would likewise affect Rule 35 examinations. Both NRS 178 (2) and NRS 52.380 allow for the victim examinee to have someone present during an exam, including neuropsychological exams. Both embody substantive victim's rights against litigious, adverse examination.

Under Nevada law, a substantive standard is one that “creates duties, rights and obligations,” while a procedural standard specifies how those duties, rights, and obligations should be enforced.⁵¹

On that basis, the Discovery Commissioner readily found (and the District Court affirmed and adopted the finding) that:

[t]he Statute creates substantive rights, including the right of the examinee to have his or her attorney or that attorney's representative serve as the observer, the right to have the observer record the examination without making a showing of “good cause,” and the right to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of “good cause.”⁵²

Thus, it is evident from these contents of the Statute that the Legislature sought to “enlarge or modify [the] substantive rights” of litigants undergoing NRCP 35 examinations.⁵³ The procedure for such examinations — as defined by NRCP 35 — failed to accommodate (or infringed upon) the “substantive rights” of the

⁵¹ *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019).

⁵² See 6 PA 1395 (Discovery Commissioner's findings); 1391-92 (affirmation and adoption by District Court).

⁵³ *Connery*, 99 Nev. at 345 .

examinee as the Legislature deemed them, and the Legislature therefore enacted this Statute to “enlarge or modify any substantive right[s][.]”⁵⁴

Such substantive lawmaking is clearly within the purview of the Legislature, and the Statute therefore survives constitutional scrutiny even if it conflicts with the Rule in any respect.

A. Defendant’s Reliance On *Freteluco* Is Misplaced Because *Freteluco* Addressed Only The *Erie* Doctrine, Not Separation Of Powers.

Defendant’s reliance on the Federal District Court case of *Freteluco v. Smith’s Food and Drug Centers, Inc.*, 336 F.R.D. 198 (D. Nev. 2020) is misplaced. *Freteluco* analyzed substance and procedure under the Erie doctrine, an analysis which is completely distinct from — and unrelated to — Nevada’s “separation of powers” substantive/procedural analysis.

In *Freteluco*, the federal court was faced with a dispute over the application of NRS 52.380 and FRCP 35.⁵⁵ However, rather than reviewing the contents of the Nevada state law at issue and addressing the separation of powers question, the federal court instead had to resolve an *Erie* doctrine question.⁵⁶

⁵⁴ *Id.*

⁵⁵ See *Freteluco v. Smith’s Food & Drug Centers, Inc.*, 336 F.R.D. 198, 202 (D. Nev. 2020).

⁵⁶ *Id.*

As the *Freteluco* court acknowledged, “[c]lassification of a law as ‘substantive’ or ‘procedural’ for Erie purposes is sometimes a challenging endeavor.”⁵⁷ The *Freteluco* court ultimately held that federal procedural law applied because the court found that FRCP 35 “is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.”⁵⁸

Here, because this Court is not faced with an *Erie* dilemma, the federal Rules Enabling Act, federal statutes, and the federal Constitution are not involved — rendering the substantive/procedural analysis of the *Freteluco* court inapplicable here.

The stark contrast between the analysis conducted by the *Freteluco* court and the question facing this Court cannot be overstated. As that court observed:

Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies **regardless of contrary state law**. [] []. **This analysis alone leads to the conclusion that Fed. R. Civ. P. 35 governs Plaintiff’s examination by Dr. Etcoff.**⁵⁹

⁵⁷ *Id.* at 202 (citing *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)) (emphasis added).

⁵⁸ *Id.* (citing *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)).

⁵⁹ *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965)) (emphases added).

By contrast, this Court obviously does not engage in *Erie* analysis (as the *Freteluca* court did) when considering a Nevada statute under separation of powers analysis. In *Whitlock v. Salmon* the legislature passed a statute granting parties the right to have counsel conduct *voir dire*, expressly holding that attorney-conducted *voir dire* is a substantive right under a separations of powers analysis.⁶⁰

The *Whitlock* court noted that Nevada and federal procedural law did not guarantee *voir dire* conducted by attorneys.⁶¹ The Nevada Supreme Court nevertheless held that the Nevada legislature “conferred a substantive right to reasonable participation in voir dire by counsel; and this court will not attempt to abridge or modify a substantive right.”⁶²

Most importantly here, this Court expressly noted that it was breaking from the federal practice in this analysis.⁶³ The federal court considers the issue of *voir dire* procedural for *Erie* doctrine purposes — but this Court, applying Nevada law

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 112.

regarding separation of powers, determined that the statute's prescriptions for *voir dire* were substantive.⁶⁴

Because Nevada's definition of substantive law under a separation of powers question is completely distinct from the federal *Erie* doctrine analysis, Defendant's reliance upon the *Freteluco* court's analysis is misplaced here.

B. Defendant's Reliance On *Sibbach v. Wilson & Co.* Is Misplaced Because *Sibbach* Addressed Whether Rule 35 Is Constitutional Generally, Not Whether The Legislature Can Create Substantive Rights In The Context Of Rule 35.

Defendant argues that the *Sibbach* court held that Federal Rule of Civil Procedure 35 "is a rule of procedure."⁶⁵ However, no one disputes that NRCP 35 is a procedural rule. Unlike the litigants in *Sibbach*, no one here challenges the constitutionality of a court's ordering a medical examination.⁶⁶

The question before this Court is not whether NRCP 35 itself is unconstitutional. Rather, the question here is whether the Legislature may — as it clearly did — create substantive rights within the context of a court-ordered medical

⁶⁴ *Flaming v. Colorado Springs Properties Funds I*, 98 F. App'x 796, 799 (10th Cir. 2004) (federal law supersedes state law regarding *voir dire*).

⁶⁵ *Petition*, 27-28.

⁶⁶ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11, 61 S. Ct. 422 (1941).

examination. The *Sibbach* case did not address that question, and Defendant's reliance on that case is therefore misplaced.

C. Defendant's Questioning Of The Wisdom Of The Legislature Is Immaterial.

Defendant questions the Nevada Legislature's decision to allow observers into neuropsychological examinations, stating "it is unclear how the Legislature reconciled these provisions [of NRS 52.380] with the concerns raised by the Nevada Board of Psychological Examiners, the Nevada Psychological Association and practitioners such as Dr. Kinsora."⁶⁷

However, the reasoning behind each legislator's vote is immaterial to whether the Statute meets constitutional muster. Defendant's apparent belief that the potential concerns raised by these organizations and individuals should have precluded passage of NRS 52.380 is irrelevant — the fact remains that the Statute was enacted by the Legislature.

Defendant asserts that:

[t]he Court enacted these amendments [to NRCP 35] 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

⁶⁷ *Petition*, 20.

lead [sic] to the prohibition against observers for neuropsychological examinations. This prohibition exists for numerous reasons.⁶⁸

Defendant then goes on to describe negative consequences that would allegedly result from the presence of an observer in the examination and/or the recording of the examination, including that it:

- violates the neuropsychologist's ethical guidelines and the published positions of professional organizations;
- goes against the stated position of the Nevada Board of Psychological Examiners;
- violates NAC 641.234;
- presents a risk to public safety;
- diminishes the value of test results;
- diminishes the usefulness of the neuropsychologist to the trier of fact; and
- diminishes the viability of the neuropsychologist by denying him/her the tools necessary to conduct valid assessments.⁶⁹

Ironically, Defendant's focus on these purported effects of observers and recordings on neuropsychological examinations completely undermines the very foundation of Defendant's Petition. Because this entire "parade of horrors"

⁶⁸ Petition at 17.

⁶⁹ *Id.* at 17 (citing 1 PA 155-56, 248-50; 2 PA 251-58).

attributed to the Statute by Defendant sounds in substantive policy, the Statute is clearly more than simple procedure, and thus is the proper domain of the Legislature if the Legislature so chooses — and it has so chosen.

III. If Any Portion Of NRS 52.380 Is Unconstitutional, This Court Must Consider Salvaging The Unconstitutional Portion By Adopting It Or By Deeming It Directory.

As the foregoing demonstrates, NRS 52.380 does not violate separation of powers, as it provides substantive rights to an examinee. However, if this Court disagrees, two additional steps of analysis are necessary before any conflicting portion is stricken.⁷⁰

These additional steps, as defined below, help to ensure that this Court follows its stated premise that “in construing statutes, ‘the first great object of the courts . . . [is] to place such construction upon them as will carry out the manifest purpose of the legislature[.]’”⁷¹

First, this Court may elect to voluntarily adopt any conflicting portion of the Statute to eliminate the separation of powers conflict.

Second, if this Court declines to adopt the conflicting portion, it may deem

⁷⁰ See *List*, 99 Nev. at 138 (Court will make every effort to find statute constitutional.).

⁷¹ *Am. Bankers Ins. Co.*, 106 Nev. at 882 (quoting *Thomas v. State*, 88 Nev. 382, 384 (1972)).

the conflicting portion merely directory. If this Court deems the Statute directory, it should direct the District Courts to incorporate such portion of the Statute into the “good cause” analysis of NRCP 35(a)(3) and (4).

A. This Court Should Elect To Adopt Any Unconstitutional Portions Of The Statute.

This Court may exercise its discretion — even where a statute violates separation of powers — to nonetheless adopt the mandate of the Legislature “because it serves a laudable goal[.]”⁷² As this Court has noted, “[w]hen the Legislature, by statute, authorizes the exercise of an inherent judicial power, the courts may acquiesce out of comity or courtesy[.]”⁷³ Such a statute is generally unconstitutional only if it “attempts to limit or destroy an inherent judicial power[.]”⁷⁴

In 2009, this Court reviewed a statute requiring trial courts to state on the record that they had considered certain sentencing enhancement factors.⁷⁵ This Court found that the statute unconstitutionally violated separation of powers and

⁷² *Mendoza-Lobos*, 125 Nev. at 641.

⁷³ *Blackjack Bonding*, 116 Nev. at n.4.

⁷⁴ *Id.* (citing *State v. Second Judicial Dist. Ct.*, 116 Nev. 953 (2000)).

⁷⁵ *Mendoza-Lobos*, 125 Nev. at 639.

noted that “[o]rdinarily, a statute which intrudes on the powers of the judicial branch is construed as directory rather than mandatory.”⁷⁶

However, rather than designating the encroaching portions as merely directory, the *Mendoza-Lobos* court adopted them in full, “elect[ing] to abide by the legislative mandate . . . because it serves the laudable goal of ensuring that there is a considered relationship between the circumstances in which the weapon was used — including the defendant’s history—and the length of the enhancement sentence.”⁷⁷

On that basis, this Court “direct[ed] the district courts to make findings regarding each factor enumerated in NRS 193.165(1) . . . when imposing a sentence for a deadly weapon enhancement.”⁷⁸ Thus, the statutory mandate was adopted as a mandate of this Court, thereby eliminating the separation of powers conflict.

Here, NRS 52.380 represents the will of the Legislature and establishes important protections for victims. Therefore, this Court should adopt any portions

⁷⁶ *Mendoza-Lobos v. State*, 125 Nev. 634, 641, 218 P.3d 501 (2009) (citing *State of Nevada v. American Bankers Ins.*, 106 Nev. 880, 883, 802 P.2d 1276, 1278 (1990); see also Section III.B, *infra*).

⁷⁷ *Mendoza-Lobos*, 125 Nev. at 641.

⁷⁸ *Mendoza-Lobos*, 125 Nev. at 641-42.

deemed unconstitutional.

B. Any Portion Not Adopted Should Be Deemed Directory As Part Of “Good Cause” Analysis Under Rule 35.

This Court does not always adopt a conflicting statute pursuing goals this Court finds worthwhile — instead, “[o]rdinarily, a statute which intrudes on the powers of the judicial branch is construed as directory rather than mandatory.”⁷⁹

A case exemplifying this approach involved statutes prescribing a five-day period in which sureties were required to present themselves to the court and the court was required to evaluate the sufficiency of those sureties.⁸⁰

This Court noted that the statute properly “demand[ed] diligence on the part of the litigants” (*i.e.*, a “laudable goal”) but could not thereby impose “an oppression upon the judge’s duties of deliberation and of orderly administration of justice.”⁸¹

On that basis, this Court held that

[t]he mandatory aspect of the statutes should, then, be confined to the individual action required. So far as the provisions may relate to judicial functions, they should be regarded as *directory only*.⁸²

⁷⁹ *Mendoza-Lobos*, 125 Nev. at 641 (citing *State of Nevada v. American Bankers Ins.*, 106 Nev. 880, 883, 802 P.2d 1276, 1278 (1990); *see also* Section III.B, *infra*).

⁸⁰ *Waite*, 69 Nev. at 233-34.

⁸¹ *Waite*, 69 Nev. at 233-34.

⁸² *Waite*, 69 Nev. at 233-34 (emphasis added).

If this Court finds any portion of NRS 52.380 unconstitutional and declines to adopt that portion, that portion should be deemed directory or advisory to the district courts. “[T]he first great object of the courts...[is] to place such construction upon [statutes] as to carry out the manifest purpose of the legislature.”⁸³ Thus, “[p]rior decisions . . . have held that a statute is directory rather than mandatory when the adjudicative function of the court is inherently threatened by legislative intrusion.”⁸⁴

The intent of the Legislature here is clear: to give victims substantive protections during adverse medical examinations.⁸⁵ If this Court finds an irreconcilable conflict, this Court should consider NRS 52.380 a directory statement from the Legislature, representing the will of the People.

The practical application of such a directory statement is readily apparent. In several instances, before protections automatically available under the Statute are ordered, Rule 35 requires a showing of “good cause,” which is defined as “a legally sufficient reason.”⁸⁶ Thus, any portion of the Statute deemed directory will instead be applied by the District Courts as constituting “good cause” (because it reflects the will of the People), thereby shifting the burden to the party seeking the examination

⁸³ *Am. Bankers Ins. Co.*, 106 Nev. at 882-83.

⁸⁴ *Id.*

⁸⁵ *See generally* NRS 52.380.

⁸⁶ BLACK’S LAW DICTIONARY 274-75 (11th ed. 2019).

to rebut “good cause” in that specific situation.

CONCLUSION

NRS 52.380 protections are substantive and therefore do not conflict with Rule 35. To the extent that NRS 52.380 is found to be in violation of separation of powers, this Court should either adopt the provision or deem it directory for purposes of Rule 35 “good cause” analysis. Plaintiff therefore respectfully asks this Court to affirm the decision of the District Court.

Dated April 26, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing REAL PARTY IN INTEREST KALENA DAVIS'S AMENDED ANSWER TO PETITION FOR WRIT OF MANDAMUS complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word processing program in 14-point Times New Roman type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because it contains approximately 6,879 words as calculated under NRAP 32(a)(7)(C).

Finally, I hereby certify that I have read the foregoing, REAL PARTY IN INTEREST KALENA DAVIS'S AMENDED ANSWER TO PETITION FOR WRIT OF MANDAMUS, and that 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 April 26, 2021.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On April 26, 2021, I caused to be served a true and correct copy of the foregoing **REAL PARTY IN INTEREST KALENA DAVIS'S AMENDED ANSWER TO PETITION FOR WRIT OF MANDAMUS** upon the following by the method indicated:

- ☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

/s/ Terri Szostek

An Employee of Clear Counsel Law Group