IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, vs. LAS VEGAS REVIEW-JOURNAL, Respondent.	Electronically Filed Dec 29 2020 04:57 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No.: 82229 Appeal from the Eighth Judicial District Court, the Honorable Jim Crockett Presiding

EMERGENCY PETITION FOR REHEARING UNDER NRAP 27(e)
(Relief needed before December 30, 2020)

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Appellant, Clark County Office of the Coroner/Medical Examiner ("Coroner"), by and through its attorneys of record, Marquis Aurbach Coffing and the Clark County District Attorney/Civil Division, hereby petitions this Court for rehearing of the Panel's December 29, 2020 Order on an emergency basis pursuant to NRAP 27(e).[1]

I. INTRODUCTION AND OVERVIEW OF RELIEF REQUESTED

The Coroner respectfully requests rehearing of the Panel's December 29, 2020 Order (the "Panel's Order"), in which a Panel of this Court denied the Coroner's Emergency Motion for a Stay Pending Appeal. In its order, the Panel overlooks or misapprehends certain facts and law to conclude that a stay in this matter is not warranted. Specifically, the Panel Order overlooks or misapprehends that (1) the object of the Coroner's Appeal would be entirely negated as the Coroner challenges the District Court's failed attempt to balance the proper interests involved and its conclusion that the Coroner waived its ability to redact the privilege it has maintained since 2017; (2) irreparable harm would occur to the decedents' family members as they would be forced to re-live the trauma of the death of their loved one and be subjected to embarrassment and stigmatization based on the disclosure of private health and medical information unrelated to the

[1] The November 20, 2020 Order on Remand is attached as **Exhibit 1**. The December 23, 2020 Order Denying the Coroner's Motion for Stay is attached as **Exhibit 2**.

cause or manner of death; (3) neither LVRJ nor the public would suffer any harm as LVRJ is in possession of much of the information and has reported on several child abuse deaths at issue; and (4) the Coroner presents a substantial case on the merits since the District Court: (a) failed to properly balance the non-trivial privacy interests against the public's interest in seeking the medical and health information unrelated to the cause and manner of death as directed by the Nevada Supreme Court;[2] and (b) concluded that the Coroner has effectively waived any right to assert privileges because it had not yet performed redactions, despite the fact that this Court has held that waiver is not a remedy afforded by the Nevada Public Records Act ("NPRA").

II. FACTUAL BACKGROUND

LVRJ initiated this case in the District Court challenging the Coroner's position on the confidential nature of juvenile autopsy reports.[3] After briefing and argument, the District Court determined that the requested autopsy reports were presumptively public records under NRS Chapter 239 and that the Coroner failed to meet its burden to demonstrate that the requested autopsy reports are

[2] *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 54, 458 P.3d 1048, 1056 (2020) (remanding the matter back to the district court for the LVRJ to prove that the information sought, i.e., the personal health and medical information unrelated to the cause and manner of death, advances significant public interest).

[3] *See* **Exhibit 1**.

confidential.[4] The Coroner appealed the District Court's order on the public records determination.[5]

On appeal, the Supreme Court concluded that the *CCSD* balancing test[6] pertaining to individuals' privacy interests apply to the instant case.[7] In applying the balancing test, the Court ruled that the Coroner satisfied its obligation under the *CCSD* balancing test in demonstrating that the juvenile autopsy reports contain personal health and medical information that involves a nontrivial privacy interest.[8] The Court then remanded the matter back to the District Court for the LVRJ to prove that the information sought, i.e., the personal health and medical information unrelated to the cause and manner of death, advances significant public interest.[9] In other words, this Court instructed the District Court to conduct a balancing test

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[4] *Id.*

[5] *Id.*

[6] *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018).

[7] *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 54, 458 P.3d 1048, 1056 (2020).

[8] *Id.*

[9] *Id.*

"to determine, under the [*CCSD*] test, what information should be redacted as private medical or health-related information."[10]

On remand, the District Court failed to properly balance the interests at stake. The Court weighed the following interests advanced by LVRJ:

> 41. In this case, **access to autopsy reports** generally furthers a number of significant policy interests which the Review-Journal has sufficiently established overcome the nontrivial privacy interests at stake.
>
> 42. For example, **access to autopsy reports** can provide the public with vital health information and protect the public. Information gathered by coroners is often a vital tool in tracking trends in causes of death, thereby increasing the public's understanding of how trends like opioid deaths or deaths from the ongoing COVID-19 pandemic affect their community.
>
> 43. **Access to autopsy reports** and reporting on autopsy reports can help the public assess prosecutors' theories and charging decisions—and can help exonerate the innocent.
>
> 44. **Access to autopsy reports** also promotes trust in law enforcement and promotes law enforcement accountability. This is so because access to and reporting on autopsy reports can both exonerate law enforcement officers accused of wrongdoing and shed light on police wrongdoing.
>
> 45. **Access to autopsy reports** serves the important public function of providing the public with information about crimes of significant public interest.
>
> 46. More fundamentally, **access to autopsy reports**, including the specific juvenile autopsy reports at issue in this case, provides the public with access to information about the Coroner's conduct. Given that the Coroner is a public servant and its work on behalf of the

[10] *Id.* at 58, 1059.

> public investigating suspicious deaths is a matter of vital public concern, access to information about the Coroner's work furthers democracy. Nev. Rev. Stat. § 239.001(1).
>
> . . .
>
> 48 Further, with respect to the juvenile autopsy reports at issue in this matter, **access to the reports** as requested by the Review-Journal will serve a significant public interest in assessing how well state and local child protective agencies are doing their job of protecting children who have been the victims of abuse and/or neglect. [11]

It is clear from the District Court's order that the balancing test performed was not based on access to medical and health information unrelated to the cause and manner of death, but to autopsy reports in general, which is contrary to the Nevada Supreme Court's opinion that there is more than a nontrivial privacy interest in health and medical information unrelated to cause of death. Because the Coroner only seeks to redact health and medical information unrelated to the cause and manner of death, the balancing of interests did not comport with this Court's instruction. To be sure, during the hearing, the District Court specifically recognized that in order to properly conduct a balancing test in accordance with this Court's direction, it must conduct an *in camera* review of the proposed redactions.[12] The Court further agreed that, for example in a case involving a burst appendix, any underlying health condition that did not result in the cause of death

[11] **Exhibit 1**.

[12] *See* Transcript of October 29, 2020 hearing attached hereto as **Exhibit 3** at 16.

and if the child had no underlying trauma related to the burst appendix, that the health and medical information unrelated to the cause and manner of death would be of no public interest.[13] Despite that acknowledgement, there was no weighing of the privacy interests against the public interests. Rather than appropriately weighing the interests as required, the District Court made a "wholesale determination" that disclosure is required.[14]

Instead, the District Court continued to deviate from the Nevada Supreme Court case and further concluded that the Coroner had waived its ability to assert any privileges as to any reports not attached to the initial filing[15] because redactions had not yet been made. Specifically, the Order provides:

> 66. . . . [T]he Court finds and concludes that the Coroner has waived its ability to redact any information contained within those reports. *Thompson v. City of North Las Vegas*, 108 Nev. 435, 439, 833 P.2d 1132, 1134 (1992) ("A waiver is an intentional relinquishment of a known right.")

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[13] *Id.* at 16-17.

[14] *Id.* at 18-20.

[15] Further, this is absurd as the District Court is suggesting that the Coroner should have redacted 680 reports prior to commencement of the case in 2017 when the Respondent made it clear it wanted unredacted reports, and prior to the ruling of this Court finding that the Coroner established a privacy interest, and prior to the hearing on remand where the District Court was directed to establish parameters with respect to medical and health information unrelated to the cause of death. Moreover, this would require the Coroner to expend unnecessary resources prior to a Court's final determination on whether redaction is permitted.

It is undisputed that waiver is not a remedy provided by the NPRA. Indeed, this Court reversed the District Court's prior conclusion that the Coroner has waived its ability to assert a privilege. *Clark Cty. Office of Coroner/Med. Exam'r*, 136 at 49, 458 at 1053 (the district court incorrectly concluded that the Coroner's office waived its reliance on NRS 432B.407(6)). Despite this clear ruling, the District Court yet again determined that the Coroner waived its ability to assert privileges because it had not physically performed redactions. It is also worth noting that not only have the records not been produced, but there has been no order from the District Court that the Coroner must perform redactions.

Based on the above flawed reasoning, the District Court ordered disclosure of the requested autopsy reports in unredacted form by November 30, 2020. Subsequently, the deadline for disclosure was extended to December 30, 2020. The Coroner sought a motion to stay pending appeal from this Court. On December 29, 2020, the Panel issued an order denying the Coroner's request for a stay. The Coroner now seeks rehearing on an emergency basis by no later than December 30, 2020.

III. LEGAL ARGUMENT

A. STANDARD FOR PETITIONS FOR REHEARING.

NRAP 40(c)(2) provides that the Court may consider rehearing in the following circumstances: (A) When the court has overlooked or misapprehended a

material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. Rehearing is necessary to allow the Court to consider several factual and legal points that the Court has overlooked. *See, e.g., Am. Cas. Co. of Reading, Pa. v. Hotel and Rest. Employees and Bartenders Intern. Union Welfare Fund,* 113 Nev. 764, 766, 942 P.2d 172, 174 (1997). In the instant case, rehearing is necessary to allow the Court to consider several factual and legal points the Panel has overlooked or misapprehended.

B. STANDARDS FOR GRANTING A STAY PENDING APPEAL.

1. NRAP 8 Considerations.

NRAP 8(a) provides that before moving for a stay in this Court, a party must generally seek a stay in the District Court. The Coroner satisfied this rule by first applying to the District Court for a stay.[16] In determining whether to issue a stay of a judgment or order, NRAP 8 outlines four factors for this Court to consider: (1) Whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) Whether the respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is

[16] *See* **Exhibits 2**.

granted; and (4) Whether appellant/petitioner is likely to prevail on the merits of the appeal.[17]

2. Stay Pending Appeal to Preserve the Status Quo.

The purpose of a stay of a district court judgment pending appeal is to preserve, not change, the status quo.[18] This Court recently confirmed this recognized purpose of a stay:

> The purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo . . .[19]

C. THE COURT OVERLOOKED OR MISAPPREHENDED THE NRAP 8(c) FACTORS FOR THIS COURT TO ENTER A STAY PENDING APPEAL.

1. The Object of the Coroner's Appeal Will Be Defeated, and the Coroner Will Suffer Serious Injury if a Stay is Denied.

With respect to the first factor, the object of the appeal will be lost if a stay is not entered. The purpose of the appeal is to challenge the District Court's Order to the Coroner to disclose unredacted autopsy reports to the LVRJ. Without a stay, the Coroner must comply with the Court Order requiring disclosure of these

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[17] *See Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 6 P.3d 982 (2000); *see also Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004) (holding that while no one factor is more important, "if one or two factors are especially strong, they may counterbalance other weak factors").

[18] *See U.S. v. State of Mich.*, 505 F. Supp. 467 (W.D. Mich. 1980).

[19] *See Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252, 1254 (2005) (collecting cases).

reports by December 30, 2020. The Panel Order overlooks or misapprehends that disclosure of the subject autopsy reports would be entirely contrary to the purpose of the Coroner's appeal, which is to request review by this Court of the District Court's Order improperly applying the balancing test because LVRJ failed to explain how the disclosure of medical and health information unrelated to the cause and manner of death, such as mental illness and genetic diseases, advance the various interests sought, including providing the public with information about crimes or promoting trust in law enforcement . Furthermore, it is the Coroner's position that the District Court erred in concluding that the Coroner has waived its ability to assert any privilege because it has not performed the redactions. Thus, disclosure of the autopsy reports in unredacted form prior to the completion of the appeal process would undermine the Coroner's argument and render the appeal moot.

Indeed, a denial of the stay effectively renders the entire appeal irrelevant and moot. That is, regardless of what the Court's ultimate decision on appeal may be, the Coroner is precluded from clawing back any records produced without redactions. Simply put, disclosure of the requested records prior to the Court entertaining the merits of the appeal negates the entire purpose of the appeal. A stay is imperative in light of the fact that the District Court ignored this Court's remand directives and made its own determinations without taking into account the

proper interests involved—whether access to medical and health information unrelated to the cause and manner of death advances the interests proposed by LVRJ. Here, the status quo must be maintained until the Court can review the record as a whole and reach a determination on the merits. Accordingly, this factor weighs in favor of the Court granting rehearing.

Importantly, the status quo would not result in any harm to LVRJ and, instead, would cause irreparable harm to the decedents' families. This is the second factor. Without a stay, irreparable or serious injury will result because once the autopsy reports, and the information contained therein, are disclosed to the LVRJ, there is no way to retract that information. The information which the Coroner seeks to protect concerns personal health and medical information relating to children that is otherwise not related to the cause or manner of death. Without a stay, the information that will be argued on appeal as confidential will have been divulged to the media, and, consequently, to the public at large. Dissemination would result in an unwarranted invasion of privacy. Moreover, release of this information would further victimize or traumatize the family members who have already suffered through the death of a loved one. Stigmatization and embarrassment to the decedents' family members will also occur based on the disclosure of medical and health information that is private in nature. And, as explained above, once this information is disclosed, not only is the instant appeal

rendered moot, but the decedents' family members are deprived of any privacy interests that may exist and that the Court could potentially conclude should remain redacted.

2. The LVRJ Will Not Suffer Any Serious Injury if a Stay is Granted.

Notably, an appeal in and of itself does not constitute harm for purposes of entering a stay. *See Fritz Hansen*, 116 Nev. at 658, 6 P.3d at 986-87. Put simply, there is no corresponding prejudice to the LVRJ. The LVRJ requested in April 2017 autopsy reports of juveniles dating back to January 2012. Failure to request these one, two, three, four and five-year old documents at an earlier date demonstrates that this matter is not urgent. If accessing these reports was an urgency, the LVRJ would not have waited so long to make its requests. If it is determined by the Court that the LVRJ is entitled to these documents, the LVRJ can move forward with its news story relating to these records at that time. The fact that the LVRJ is still interested in these particular records demonstrates that its interest in the story continues to exist.

The Panel Order overlooks or misapprehends that that LVRJ has been provided with lengthy spreadsheets identifying each individual decedent and their respective cause and manner of death. This is not an instance where the information sought is being withheld in its entirety. LVRJ has the majority of the information in its possession already. Quite tellingly, LVRJ, and other news

agencies, have specifically reported, and continue to report, on the deaths of children that are at issue here.[20] Therefore, this is not a matter of the Coroner delaying in providing information to LVRJ or the public; instead, this case concerns the privacy interests of the juvenile decedents and their family members. And, as this Court pointed out, while it is unclear how the unredacted Autopsy Reports will assist with that article, considering the LVRJ already has the cause and manner of death of each decedent, such a topic would not seemingly lose relevance overtime, and if unsuccessful on appeal, presumably the LVRJ will have the opportunity to report it. Accordingly, the public interest favors a stay.

3. The Coroner Presents a Substantial Case on the Merits of Appeal.

In explaining the fourth factor of NRAP 8(c), dealing with the likelihood of success on appeal, this Court has clarified that "a movant does not always have to show a probability of success on the merits, [but] the movant must 'present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.'" *Fritz*

[20] *See* https://www.reviewjournal.com/crime/courts/litany-of-torture-abuse-preceded-death-of-henderson-mans-3-year-old-daughter-prosecutor-says/; https://www.reviewjournal.com/crime/courts/las-vegas-police-investigate-death-of-baby/; https://m.lasvegassun.com/news/2014/feb/20/nellis-staff-sergeant-now-charged-murder-after-3-m/; https://lasvegassun.com/news/2012/mar/14/attorneys-ask-delay-hearing-dad-charged-child-abus/.

Hansen A/S, 116 Nev. at 658, 6 P.3d at 987 (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981)).

The Panel Order overlooks or misapprehends that the Coroner presents a substantial case on the merits with a serious legal question. As discussed above, the issue is whether autopsy reports may be produced in a redacted form. This Court previously concluded that the Coroner satisfied its obligation in demonstrating that a nontrivial privacy interest existed in the decedent's personal health and medical information unrelated to the cause and manner of death. The Court then remanded the matter back to the District Court for the LVRJ to show that the information sought—specifically the decedent's personal health and medical information unrelated to the cause and manner of death—advanced a public interest. On remand, the District Court reached the conclusion that the Coroner waived its ability to assert any privileges because the Coroner had not yet performed any redactions. This conclusion directly contradicts this Court's holding that the NPRA does not permit a waiver of any privileges.[21]

Additionally, the District Court erred in applying the balancing test—to the extent a balancing test was applied. In doing so, the District Court, improperly

[21] *Republican Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 32, 458 P.3d 328, 332 (2020) ("Waiving LVMPD's assertion of confidentiality would lead to an absurd penalty resulting in the public disclosure of Nevadans' private information . . . . [Waiver] undermines the NPRA's expressly listed exceptions for confidential information.").

performed the balancing test because it balanced the Coroner's established non-trivial privacy interests against the public's interest in access to autopsy reports, *generally*.[22] Instead, under the *CCSD* balancing test, the District Court was required to balance the public's interest in the specific information sought (i.e., the decedent's personal medical and health information unrelated to the cause and manner of death) against the competing privacy interests. Nothing in the order provides how medical and health information unrelated to the cause and manner of death advances an interest in: (1) trends in *causes of death*; (2) assessing prosecutors' theories and charging decisions; (3) trust in law enforcement; or (4) providing information about crimes. None of these interests can be advanced by someone's underlying medical or health condition that is in no way related to their cause or manner of death.

This subject matter involves an unsettled and contentious area of Nevada Public Records Law. This factor, combined with the other factors, that the object of the appeal will be lost, and irreparable injury will be sustained if the reports are disclosed prior to completion of the appeal process with no corresponding prejudice to the LVRJ, demonstrate the necessity of the stay.

The Court further abused its discretion when it found that the Coroner seeks to redact all information unrelated to the cause and manner of death. To the

[22] *See* **Exhibit 1** at ¶¶ 42-46.

contrary, the only information the Coroner seeks to protect via redaction is the confidential health and medical information—not all information—unrelated to the cause or manner of death. And, as the Coroner argued and articulated in its brief on remand, any information pertaining to child welfare or Department of Family Services would not be redacted as that information is not confidential medical or health information, even if it is unrelated to the manner or cause of death. *See* Coroner's Answering Brief attached hereto as **Exhibit 4**.

IV. CONCLUSION

In summary, the Coroner respectfully requests that this Court grant rehearing and enter a stay pending the appeal of the disclosure order prior to the December 30, 2020 deadline.

Dated this 29th day of December, 2020.

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NRAP 27(e) CERTIFICATE

I hereby certify that this Emergency Petition for Rehearing Under NRAP 27(e) relies upon issues raised by the Coroner in the District Court, and otherwise complies with the provisions of NRAP 27(e).

As set forth in the body of this petition, emergency relief is needed on or before December 30, 2020 because the Coroner has been ordered to produce the juvenile autopsy records in unredacted form by no later than December 30, 2020 or it may be faced with contempt sanctions.

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Opposing counsel and the Clerk of this Court were notified on December 29, 2020 that the Coroner was filing the instant petition. According to the attached certificate of service, all parties through their counsel of record have been served electronically though this Court's electronic filing system.

Dated this 29th day of December, 2020.

MARQUIS AURBACH COFFING

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 4,060 words; or

☐ does not exceed _____ pages.

Dated this 29th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **EMERGENCY PETITION FOR REHEARING UNDER NRAP 27(e)** was filed electronically with the Nevada Supreme Court on the 29th day of December, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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INDEX OF EXHIBITS TO
EMERGENCY PETITION FOR REHEARING UNDER NRAP 27(e)

Exhibit No.	Description
1.	Order on Remand (filed 11/20/20)
2.	Order Denying the Coroner's Motion for Stay (12/23/20)
3.	Transcript of October 29, 2020 Hearing
4.	Coroner's Answering Brief (10/07/20)

Exhibit 1

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **ORDER ON REMAND**

The Las Vegas Review-Journal's Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.001/Petition for Writ of Mandamus ("Petition"), having come on for hearing on remand from the Nevada Supreme Court on October 29, 2020, the Honorable Jim Crockett presiding, Petitioner the Las Vegas Review-Journal (the "Review-Journal") appearing by and through its counsel, Margaret A. McLetchie and Alina M. Shell, and Respondent the Clark County Office of the Coroner/Medical Examiner (the "Coroner") appearing by and through its counsel, Jackie V. Nichols, and the Court having read and considered all of the papers and pleadings on file and being fully advised, and good cause appearing therefor, the Court hereby makes the following findings of fact and conclusions of law:

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I.

PROCEDURAL HISTORY AND FINDINGS OF FACT

1. On April 13, 2017, the Review-Journal sent the Coroner a request (the "Request") pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq.* (the "NPRA") seeking all autopsy reports of all autopsies conducted on anyone under the age of 18 from 2012 through the date of the Request.

2. The Coroner responded to the Request on April 13, 2017, refusing to produce any of the requested autopsy reports, stating nothing more than it was "not able to provide autopsy reports."

3. On April 14, 2017, the Coroner, while continuing to withhold the requested records, provided the Review-Journal a spreadsheet created by undisclosed persons, broken down by year, containing some information but missing critical information, such as opinions of the medical examiner, physical observations, and the identity of the medical examiner performing the autopsies.

4. On May 26, 2017, the Coroner also provided a list of child deaths where autopsy reports were generated. As with the spreadsheet, while the list included the cause and manner of death, it omitted information regarding the identity of the examiner, the observations of the examiner, and the identity of the person(s) who compiled the list.

5. The Coroner did not provide the actual autopsy reports that were responsive to the request.

6. On July 11, 2017, the Coroner informed the Review-Journal that it had begun compiling and redacting autopsy reports in response to the records request, and provided sample files of three redacted autopsy reports from child deaths that were not handled by a child death review team as an example of the redactions the Coroner intended to make to all the requested reports. The Coroner also provided the Review-Journal with a spreadsheet identifying juvenile deaths that occurred in Clark County from January 2012 to the date of the request which included each decedent's name, age, race, and gender, as well as the cause, manner, and location of death.

7. The sample files were heavily redacted, omitting pathological diagnoses and opinions regarding cause of death.

8. The Review-Journal filed its Petition on July 17, 2017.

9. After full briefing by the parties, this Court conducted a hearing on the Review-Journal's Petition on September 28, 2017, and granted the Review-Journal's Petition in its entirety.

10. The Court entered a written order granting the Review-Journal's Petition and ordering the Coroner to produce the requested autopsy reports on November 19, 2017.

11. The Coroner filed a notice of appeal challenging the Court's November 19, 2017, order on November 28, 2017.

12. On appeal, the Coroner argued that it may refuse to disclose a juvenile autopsy report once it has provided the report to a Child Death Review ("CDR") team under Nev. Rev. Stat. § 432B.407(6). The Coroner further argued that the Court erred in ordering the Coroner to produce the reports in unredacted form.

13. The Supreme Court issued a decision on February 27, 2020. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020).

14. In its opinion, the Supreme Court rejected the Coroner's broad interpretation of Nev. Rev. Stat. § 432B.407(6), holding that the statute "applies exclusively to a CDR 'team,' not to the broad categories of individual public agencies that may be part of a CDR team" such as the Coroner. *Coroner*, 136 Nev. at 51, 458 P.3d at 1055. Under a narrow construction of this statute as mandated by Nev. Rev. Stat. § 239.001(3), the Court found that "only a CDR team may invoke the confidentiality privilege to withhold information in response to a public records request, and NRS 432B.407(6) makes confidential only information or records 'acquired by' the CDR team." *Id.* at 50-51, 1055.

15. The Supreme Court further found that the statutory scheme of NRS Chapter 432B "reflects a clear legislative intent to make certain information concerning child fatalities publicly available." *Id.* at 52, 1055; *see also id.* at 52-53, 1055-56 (discussing

legislative history of Chapter 432B).

16. After considering the statutory scheme and legislative history of Chapter 432B, the Supreme Court found that "the public policy interest in disseminating information pertaining to child abuse and fatalities is significant." *Id.* at 57, 1059.

17. However, the Supreme Court found that the Coroner had articulated a nontrivial privacy interest that could be at stake for some information contained in the records, and remanded the matter to this Court to apply the two-part balancing test adopted in *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 429 P.3d 313 (2018) ("*CCSD*") to determine what information in the autopsy reports must be disclosed under the NPRA and what information should be redacted. *Coroner*, 136 Nev. at 58, 458 P.3d at 1059.

18. The Review-Journal filed its Opening Brief on Remand on August 27, 2020.

19. The Coroner filed its Answering Brief on October 7, 2020. In its Answering Brief, the Coroner asserted that, in addition to the three sample redacted autopsy reports it previously produced to the Review-Journal, there are approximately 680 autopsy reports and 150 external examinations responsive to the Review-Journal's request.

20. The Review-Journal filed its Reply in support of its Opening Brief on Remand on October 22, 2020.

21. This Court conducted a hearing on the parties' briefs on remand on October 29, 2020.

22. At the October 29, 2020, hearing on remand, the Coroner stated that it had only redacted the three sample autopsy reports it provided to the Review-Journal pre-litigation and had not reviewed or performed redactions to the balance of the approximately 680 autopsy reports and 150 external examinations. (Recorder's Transcript of October 29, 2020, Hearing ("Transcript"), p. 23:8-14 (on file with this Court).)

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II.

CONCLUSIONS OF LAW

A. The NPRA

23. At its heart, this case is about the value of transparency in government and the value of public oversight. (Transcript, p. 13:15-16.) Governmental entities and their officers and employees exist to serve the public; thus, oversight of the actions and inactions of governmental entities is critical to ensuring that the public's interests are being served. (*Id*., p. 13:16-23.)

24. Governmental entities have been entrusted with certain authorities under the color of law to conduct the public's business. (*Id*., pp. 13:24 – 14:2.) The public entrusts governmental entities with that authority and has a right to expect and know that trust is not being abused. (*Id*., p. 14:3-4.)

25. The NPRA recognizes that access to the records of governmental agencies is critical to fostering democracy. Nev. Rev. Stat. § 239.001(1) (2017) ("The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law"); *see also Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 876, 266 P.3d 623, 626 (2011) (holding that "the provisions of the NPRA are designed to promote government transparency and accountability").

26. Given the central role access to public records plays in fostering democracy, the Legislature built certain presumptions into the NPRA. The NPRA starts from the presumption that all records of government must be open to inspection and copying. Nev. Rev. Stat. § 239.010(1); *see also Reno Newspapers, Inc. v. Sheriff*, 126 Nev. 211, 212, 234 P.3d 922, 923 (2010) ("*Haley*") (holding that the NPRA "considers all records to be public documents available for inspection and copying unless otherwise explicitly mad confidential by statute or by a balancing of public interests against privacy or law enforcement justification for nondisclosure").

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27. The NPRA also starts from the presumption that its provisions must be construed liberally in favor of access, Nev. Rev. Stat. § 239.001(2), and that "any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly." Nev. Rev. Stat. § 239.001(3).

28. Because the NPRA starts from the presumption that all records of governmental entities are public records and that its provisions must be interpreted liberally to increase access, if a governmental entity seeks to keep all or some part of public record secret, the NPRA places the burden of governmental entities to prove, by a preponderance of the evidence, that any information it seeks to keep secret is confidential. Nev. Rev. Stat. § 239.0113(2).

29. Further, a governmental entity seeking to withhold public records on the grounds that they are confidential must prove by a preponderance of the evidence that the interests in nondisclosure outweigh the strong presumption in favor of public access. *Reno Newspapers Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011); *see also Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630,635, 798 P.2d 144, 147-48 (1990).

30. The Nevada Supreme Court has held that because of the mandates contained in the text of the NPRA and its overarching purpose of furthering access to public records, governmental entities cannot meet their burden under Nev. Rev. Stat. § 239.0113(2) by relying on conjecture, supposition, or "non-particularized hypothetical concerns." *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 628, 6 P.3d 465, 472-73 (2000); *accord Haley*, 126 Nev. at 218, 234 P.3d at 927; *Reno Newspapers Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011).

31. In balancing those interests, "the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference." *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 (quoting *MacEwan v. Holm*, 226 Or. 27,359 P.2d 413, 421-22 (1961)).

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B. The CCSD Test

32. In *Clark County School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 429 P.3d 313 (2018) ("*CCSD*"), the Nevada Supreme Court adopted a two-part balancing test courts are to employ in cases in which the nontrivial personal privacy interest of a person named in an investigative report may warrant redaction.

33. Under the first prong of the *CCSD* test, the governmental entity seeking to withhold or redact public records must "establish a personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or ... more than [ ] de minimis." *CCSD*, 134 Nev. at. 707, 429 P.3d at 320 (internal quotations omitted).

34. If—and only if—the governmental entity succeeds in showing that the privacy interest at stake is nontrivial, the burden shifts to the requester to show that "the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest." *CCSD*, 134 Nev. at 707-08, 429 P.3d at 320 (internal quotations omitted).

35. In adopting this two-part test, the Supreme Court was careful to note that its new test did not alter a governmental entity's obligations under the NPRA or the Court's interpreting case law:

> This test coheres with both NRS 239.0113 and *Gibbons*, 127 Nev. at 877-78, 266 P.3d at 625-26. It is merely a balancing test—in the context of a government investigation—of individual nontrivial privacy rights against the public's right to access public information. *Carlson v. U.S. Postal Serv.*, 2017 WL 3581136, at *28 (N.D. Cal. Aug. 18, 2017). We explained in *Gibbons* that NRS 239.0113 requires that the state bear the burden of proving that records are confidential. *Gibbons*, 127 Nev. at 878, 266 P.3d at 626. The *Cameranesi* test does that, but also gives the district courts a framework to weigh the public's interest in disclosure, by shifting the burden onto the public record petitioner, once the government has met its burden. This ensures that the district courts are adequately weighing the competing interests of privacy and government accountability.

CCSD, 134 Nev. at 708–09, 429 P.3d at 321.

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C. Application of the CCSD Test to The Redacted Autopsy Reports

36. The Review-Journal has requested the Coroner produce, in unredacted form, autopsy reports for all decedents under the age of 18 who died between 2012 and the date of the Review-Journal's request.

37. In remanding this matter back to this Court, the Nevada Supreme Court found the Coroner had established the autopsy reports at issue here implicate a nontrivial personal privacy interest. Relying on a declaration of Clark County Coroner John Fudenberg, the Supreme Court found that the autopsy reports may contain medical or health-related information that may be entitled to protection. *Coroner*, 136 Nev. at 56, 458 P.3d at 1058.

38. The Supreme Court further noted that while "the public policy in disseminating information pertaining to child abuse and fatalities is significant," the "nature of the information contained in the juvenile autopsy reports that LVRJ seeks and how that information will advance a significant public interest" was "unclear." *Id.* at 57-58, 1059. Accordingly, the Supreme Court remanded this matter to this Court "to determine, under the [*CCSD*] test, what information should be redacted as private medical or health-related information." *Id.* at 58, 1059.

39. Having reviewed the post-remand briefings submitted by the parties, the Court finds that there are multiple significant public interests that would be served by release of the autopsy reports which outweigh the nontrivial privacy interests articulated by the Coroner. (Transcript, p. 28:2-6; *id.*, p. 28:18-22.)

40. Access to public records is always presumed to be in the public interest. *See* Nev. Rev. Stat. § 239.001.

41. In this case, access to autopsy reports generally furthers a number of significant policy interests which the Review-Journal has sufficiently established overcome the nontrivial privacy interests at stake.

42. For example, access to autopsy reports can provide the public with vital health information and protect the public. Information gathered by coroners is often a vital tool in tracking trends in causes of death, thereby increasing the public's understanding of

how trends like opioid deaths or deaths from the ongoing COVID-19 pandemic affect their community.

43. Access to autopsy reports and reporting on autopsy reports can help the public assess prosecutors' theories and charging decisions—and can help exonerate the innocent.

44. Access to autopsy reports also promotes trust in law enforcement and promotes law enforcement accountability. This is so because access to and reporting on autopsy reports can both exonerate law enforcement officers accused of wrongdoing and shed light on police wrongdoing.

45. Access to autopsy reports serves the important public function of providing the public with information about crimes of significant public interest.

46. More fundamentally, access to autopsy reports, including the specific juvenile autopsy reports at issue in this case, provides the public with access to information about the Coroner's conduct. Given that the Coroner is a public servant and its work on behalf of the public investigating suspicious deaths is a matter of vital public concern, access to information about the Coroner's work furthers democracy. Nev. Rev. Stat. § 239.001(1).

47. Relatedly, access to autopsy reports ensures that coroners' offices do their taxpayer-funded jobs correctly and do not engage in malfeasance. Access to autopsy reports, including the juvenile autopsy reports at issue in this case, fosters public confidence in the work of county coroners and medical examiners—and allows errors or wrongful behavior to be revealed, assessed, and corrected.

48. Further, with respect to the juvenile autopsy reports at issue in this matter, access to the reports as requested by the Review-Journal will serve a significant public interest in assessing how well state and local child protective agencies are doing their job of protecting children who have been the victims of abuse and/or neglect. Thus, not only will access further the NPRA's central purposes of transparency and accountability regarding one government agency, but it will also further transparency and accountability regarding multiple government agencies which share information. (Transcript, p. 14:10-15.)

49. While the Coroner is not charged with the protection of vulnerable children, as the agency responsible for investigating suspicious deaths, the Coroner is necessarily the agency who receives and examines deceased juveniles, including juveniles who were (or had been) under the supervision of local child protective services. Thus, access to the information the Coroner gathers during the examination of a juvenile who died after having been under the supervision of child protective services can help the public understand and assess how well child protective service agencies are fulfilling their responsibilities to Clark County's vulnerable children. (*Id.*)

50. In its decision, the Supreme Court noted that in addition to the three heavily redacted reports, the Coroner had provided the Review-Journal a spreadsheet containing the names, genders, ages, race, and the cause and manner of death for juveniles, and also noted that the CDR Teams provide information that is used to compile a statewide annual report. *Coroner*, 136 Nev. at 58, 1059. The Court then expressed uncertainty as to what "additional information" the Review-Journal seeks to obtain from the autopsy reports that would advance the public's interest. *Id.*

51. In its Supplemental Opening Brief on Remand, the Review-Journal provided myriad examples of how and why access to autopsy reports would advance the public interest. With respect to the juvenile autopsy reports at issue here, the Review-Journal has demonstrated that access to information about the Coroner's observations—and not just the Coroner's conclusions regarding the cause and manner of death—is critical to assessing the efficacy of child protective services.

52. A coroner's ultimate conclusion about the cause and manner of death for a decedent does not occur in a vacuum. In reaching a conclusion regarding cause and manner of death, a coroner necessarily assesses a wide array of information about the decedent, including the decedent's personal history such as a history of past abuse, prior involvement with child protective services or law enforcement, external and internal observations of a decedent's body that may be indicative of prior abuse, toxicological information, and evidence of past injuries like broken bones or damaged organs.

53. This sort of information is critical to the important goals of providing the public with a greater understanding of how state and local agencies tasked with protecting vulnerable children operate, identifying any shortcomings in those agencies' operations, and identifying what changes those agencies can and should make to prevent future deaths of children whose lives have been marked by abuse or neglect.

54. The spreadsheet provided by the Coroner and the CDR annual statewide reports are not sufficient replacements for direct access to this information. First, the annual statewide reports do not contain the Coroner's external or internal observations. Access to all of this type of information that is included in an autopsy report—but was not included in the Coroner's spreadsheet and is not provided in CDR reports—would advance the public interest by ascertaining the efficacy of Clark County's abuse and neglect system, an issue of great public importance.

55. Second, even if the autopsy reports did not include additional categories of information from the Coroner's spreadsheets or the CDR reports, access to the source material would still provide additional information as it would allow the Review-Journal to assess the accuracy of the information contained in the Coroner's spreadsheets and the CDR reports.

56. The NPRA does not limit a requester's information to that information that the government choses to filter, repackage, and provide. Instead, the NPRA is intended to provide the public with direct access to the government's records themselves. Limiting access to the direct source material would be antithetical to the central stated purpose of the NPRA: government accountability. Nev. Rev. Stat. § 239.001(1) provides that "[t]he purpose of [NPRA] is to foster democratic principles by providing members of the public with prompt access to inspect, copy or receive a copy of public books and records to the extent permitted by law." The NPRA further provides that all of its provisions "must be construed liberally to carry out this important purpose." Nev. Rev. Stat. § 239.001(2). In short, the NPRA reflects that the public is not required to trust the government. Instead, the public is entitled to public record so it can assess the conduct and effectiveness of government.

57. Accordingly, the Court hereby finds and concludes that the Review-Journal has established that the public interests in access far outweigh the nontrivial personal privacy interests advanced by the Coroner. (Transcript, p. 22:6-9.)

D. The Coroner Must Disclose the Juvenile Autopsy Reports in Unredacted Form

58. As noted above, prior to litigation the Coroner provided the Review-Journal with three sample autopsy reports as an example of the redactions the Coroner intended to make to all the requested reports.

59. In its Answering Brief, the Coroner represents that there are many more autopsy records responsive to the Review-Journal's request, including approximately 680 autopsy reports and 150 external examination. (*See* Coroner's October 7, 2020, Answering Brief, p. 25:18-19.)

60. At the October 29, 2020, hearing on remand, the Coroner stated that it had only redacted the three sample autopsy reports it provided to the Review-Journal pre-litigation and had not performed redactions to the balance of the approximately 680 autopsy reports and 150 external examinations. (Transcript, p. 23:8-14.)

61. The Coroner has never made redactions to the approximately 680 autopsy reports and 150 external examinations or considered whether, record by record, there is specific information that merits protection.

62. This is particularly troubling given that—as this matter was initiated in 2017 when the Review-Journal made its records request—the Coroner has had years to meet that burden. (Transcript, pp. 27:23 - 28:1; *id.*, p. 28:12-17.)

63. While the Court is satisfied that the Review-Journal has met its burden of establishing that there is a significant interest in access, it offered the opportunity to the Coroner to conduct an *in camera* review of proposed redactions. However, at the hearing, the Coroner remained steadfast that it would simply redact all information that the Coroner deems is not related to the cause of death. Such an approach is not consistent with the need for the information that the Review-Journal has demonstrated. First, one of the significant interests access will advance is ensuring the proper functioning of the Coroner's Office. It is

not possible to ensure that the Coroner reached the correct conclusion regarding cause of death if it refuses to produce any information it deems unrelated to the cause of death. Second, another significant interest in access advanced by access is ensuring oversight and accountability of the abuse and neglect system. There may be information that the Coroner deems unrelated to the cause of death that is nonetheless relevant to that inquiry, such as signs of historical abuse.

64. Moreover, the Court notes that the significant interests established by the Review-Journal can only be met by direct access to the records sought; the reports and spreadsheets otherwise available not only do not contain the information that is needed to advance the significant interests in access, it would undermine accountability to limit the Review-Journal to information filtered by the Coroner or other government employees and officials.

65. For these reasons, the Court finds and concludes that the Coroner's planned redactions would not satisfy the very significant public interests the Review-Journal has demonstrated that overcome the nontrivial but generalized privacy interests articulated by the Coroner.

66. Further, in light of the fact that the balancing test weighs heavily in favor of disclosure and the Coroner has made no effort to meet its burden of establishing a specific nontrivial privacy interest with respect to any of the specific information contained in those approximately 680 autopsy reports and 150 external examinations, the Court finds and concludes that the Coroner has waived its ability to redact any information contained within those reports. *Thompson v. City of North Las Vegas*, 108 Nev. 435, 439, 833 P.2d 1132, 1134 (1992) ("A waiver is an intentional relinquishment of a known right.")

67. Thus, the Coroner must provide directly to the Review-Journal the requested records in unredacted form and must do so within 30 days of the Court's October 29, 2020, hearing in this matter.

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E. Reproduction Costs

68. When the Review-Journal filed its Petition in 2017, the NPRA permitted governmental entities to charge requesters a fee—not to exceed 50 cents per page—for the "extraordinary use" of personnel and technological resources. Nev. Rev. Stat. § 239.055 (2017 version).

69. In its opinion, the Nevada Supreme Court rejected the Coroner's argument that it was entitled under Nev. Rev. Stat. § 239.055 to charge the Review-Journal a $45.00 hourly fee for staff to review the requested autopsy reports, and held that the plain language of the statute capped such fees at 50 cents per page. *Coroner*, 136 Nev. at 59, 458 P.3d at 1060.

70. Thus, to the extent the Coroner produces hard copies of the requested juvenile autopsy reports in this matter, it may charge not more than the lesser of its actual costs or the 50-cent cap set by Nev. Rev. Stat. § 239.055 (2017 version).

71. The Review-Journal has requested the Coroner produce the juvenile autopsy reports in electronic format.

72. Unless it is technologically infeasible, the Coroner must produce the juvenile autopsy reports if the format and medium requested by the Review-Journal. If the Review-Journal's chosen format and medium are infeasible, the Coroner must work with the Review-Journal to produce the records in another format and medium of the Review-Journal's choice unless no such choice is feasible.

73. Pursuant to Nev. Rev. Stat. § 239.052(1), the Coroner may only charge a requester for the actual costs it incurs in reproducing public records.

74. Thus, if the records are produced in an electronic format, the Coroner may charge the Review-Journal for only the actual cost of the medium it uses to produce the records.

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III.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Court hereby ORDERS as follows:

IT IS HEREBY ORDERED that the Coroner shall produce directly to the Review-Journal the requested juvenile autopsy reports in unredacted form by November 30, 2020. The Coroner should produce records on a rolling basis.

IT IS HEREBY FURTHER ORDERED that unless technologically infeasible, the Coroner is to produce the requested juvenile autopsy reports in the electronic format and medium requested by the Review-Journal or such alternate format and medium as requested by the Review-Journal.

IT IS HEREBY FURTHER ORDERED that the Coroner may charge the Review-Journal a fee for the cost of producing the requested juvenile autopsy reports in electronic format not to exceed the actual cost of the medium on which the juvenile autopsy reports are produced.

IT IS HEREBY FURTHER ORDERED that, to the extent the Coroner produces any of the requested records to the Review-Journal in a hard copy format, it may not charge more than the lesser of the actual costs of production or 50 cents per page for the reproduction of those records.

Dated this 20th day of November, 2020

70B 2FA DB77 008D
Jim Crockett
District Court Judge

_____ _____

Date DISTRICT COURT JUDGE

Respectfully submitted,

/s/ Margaret A. McLetchie

MARGARET A. MCLETCHIE, Nevada Bar No. 10931
ALINA M. SHELL, Nevada Bar No. 11711
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Counsel for Petitioner, Las Vegas Review-Journal, Inc.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Review-Journal, Plaintiff(s) vs. Clark County Office of the Coroner/ Medical Examiner, Defendant(s)	CASE NO: A-17-758501-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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Exhibit 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER,
Appellant,
vs.
LAS VEGAS REVIEW-JOURNAL,
Respondent.

No. 82229

FILED

DEC 29 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING STAY

This is an appeal from a district court order, entered on remand, directing appellant to provide unredacted copies of the juvenile autopsy reports requested by respondent under the Nevada Public Records Act. Appellant has filed an emergency motion seeking to stay the district court's order pending appeal. Respondent has filed an opposition.[1]

When considering a motion for a stay pending resolution of an appeal, we consider the following factors: whether (1) the object of the appeal will be defeated absent a stay, (2) appellant will suffer irreparable or serious harm without a stay, (3) respondent will suffer irreparable or serious harm if a stay is granted, and (4) appellant is likely to prevail on the merits of the appeal. NRAP 8(c); *see also Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000). The public interest may also be considered. *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. 174, 179 n.1, 415 P.3d 16, 20 n.1 (2018) (Cherry, J., concurring and dissenting) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (providing that federal district and appellate courts

[1]Respondent's motion for leave to file an opposition in excess of the NRAP 27(d)(2) page limit is granted; the opposition was filed on December 24, 2020.

will consider, as one factor, "where the public interest lies" when deciding a stay motion)).

Having considered the motion in light of these factors, we conclude that the factors do not militate in favor of a stay. Accordingly, we deny the motion for stay.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Silver

STIGLICH, J., dissenting:

I respectfully dissent. I would grant the stay to preserve the status quo until this court has an opportunity to address the merits of this matter.

_____, J.
Stiglich

cc: Hon. James Crockett, District Judge
Marquis Aurbach Coffing
Clark County District Attorney/Civil Division
McLetchie Law
Eighth District Court Clerk

Exhibit 3

Electronically Filed
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Plaintiff, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Defendant.	CASE#: A-17-758501-W DEPT. XXIV

BEFORE THE HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 29, 2020

RECORDER'S TRANSCRIPT OF VIDEO CONFERENCE HEARING
REGARDING BRIEFS ON REMAND

APPEARANCES (VIA BLUEJEANS):

For the Plaintiff:	MARGARET A. MCLETCHIE, ESQ. ALINA SHELL, ESQ.
For the Defendant:	JACQUELINE NICHOLS, ESQ.
Also Appearing:	BENJAMIN LIPMAN, ESQ. ART CAIN, REPORTER

RECORDED BY: NANCY MALDONADO, COURT RECORDER

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Las Vegas, Nevada, Thursday, October 29, 2020

[Case called at 9:31 a.m.]

THE COURT RECORDER: Page 7, A758501, Las Vegas Review Journal versus Clark County Office of the Coroner/Medical Examiner.

MS. MCLETCHIE: Good morning, Your Honor, Maggie McLetchie for the Las Vegas Review Journal, Inc., bar number 10931. On the telephone I have with me Benjamin Lipman, the general counsel for the Las Vegas Review Journal, as well as Art Cain [phonetic], a reporter for the Las Vegas Review Journal, and my co-counsel Ms. Alina Shell.

THE COURT: All right. Good morning.

MS. NICHOLS: Good morning, Your Honor, Jackie Nichols here on behalf of the Clark County Coroner's Office.

THE COURT: Okay. I think I'm hearing a young, future member of the bar on the phone somewhere. Okay. So --

MS. NICHOLS: Somebody's not on mute, Your Honor.

THE COURT: -- so these -- this matter's on for hearing on the briefs that were filed after remand. If you would, please, mute your microphones because we're getting feedback, just kind of an echo effect. I can hear my voice being repeated and that could be distracting.

THE COURT RECORDER: Judge --

THE COURT: So I've read the briefs and re-read the Supreme Court's opinion. And the issue was originally the Plaintiff

sought unredacted juvenile autopsy reports from the Clark County Coroner's Office for investigative reasons and in accordance with the law that allows obtaining that kind of information as public information.

The case went up to the Supreme Court. And the Supreme Court issued an opinion. And the bottom line is that there is a balancing test to be applied.

And the Supreme Court has remanded it with instructions for me to apply this balancing test with regard to what's called a non-trivial privacy interest, which would be the justification offered by the Coroner's Office for redacting or excluding information and whether or not that non-trivial privacy interest is outweighed by the significant public interest that is advanced by in this case the Review Journal.

The problem I see is, I mean, it's not a problem. It's just something that's going to require a lot of time and effort on the part of everybody.

In order for counsel for the Las Vegas Review Journal to see whether or not the claimed non-trivial privacy interest is something that's counterbalanced or they contend it is, they would need to have it articulated what the non-trivial interest is.

For example, there were references to three autopsy reports that was made in the briefs. One of them that was particularly horrific to read about had to do with the remains of a three-year old child that was discovered in a duffel bag.

The child was deceased and had had horrific, brutal physical injuries inflicted upon the child. I don't remember the child's gender.

And there were redactions made in the records supplied by the Coroner's Office on that, but not with any explanation, as I understand it, as to why that information was excluded.

Of course, it's hard to imagine something that wouldn't be relevant to cause of death, or evidence of previous child abuse injuries, or the possible aging of previous injuries.

And I don't mean where somebody can say that something happened on a particular day, but they can say whether or not there's evidence of healing fractures or bone callus, suggesting that the fracture happened a considerable length of time before.

And then correlating that information with complaints that were rendered to Child Protective Services, for example, to find out whether or not they adequately investigated and addressed concerns that were being expressed.

There definitely is a significant public interest that exists in knowing whether or not complaints of child abuse are being adequately addressed.

So that deaths and/or future child abuse can be prevented through the lawful efforts of government agencies that are entrusted with performing that service.

The members of the public trust and -- have confidence in or want to have confidence in the work being done by enforcement and investigative agencies that are designed to prevent serious injury and death. So it's a very significant interest.

But in my review of this, in the Supreme Court's opinion

regarding this balancing test, I have no problems applying the balancing test of course.

But I think it would require an evidentiary hearing on every juvenile autopsy record, where there are redactions that are not explained at all, okay, because presumptively, if there's no reason given for them, the presumption would be that the redactions are improper and would have to be removed, that that information would have to be provided.

On the other hand, wherever there are redactions and there is a reason offered for them that the Coroner's Office says is a non-trivial privacy interest, then the burden then shifts and we have to have the Review Journal provide proof there is a significant public interest that outweighs that non-trivial privacy interest.

So in the category of those that are redactions without explanation, I think the presumption is that those redactions are invalid and have to be removed. And the redactions have to be ablated.

And as to any other redactions, if there is an explanation offered, we would have to then go in an evidentiary hearing to conduct a balancing to see whether or not the Court feels that the non-trivial privacy entry -- interest permits the redaction or if the Court feels that the attempted redaction must be overruled and reversed on the basis of a significant public interest.

That's my understanding of what is the result of the Supreme Court's opinion, but I'd like to hear from each of you, particularly if you have a differing view.

So Ms. McLetchie, first of all, let me hear from you?

MS. MCLETCHIE: Thank you, Your Honor. Maggie McLetchie for the record. So, Your Honor, the way I view the decision from the Supreme Court is that the Court found that there was, albeit a generalized one, a non-trivial privacy interest and that it remanded this matter, shifted the burden to the Las Vegas Review Journal to establish that there was a public interest at issue that was significant as the information sought would advance that interest.

It's my view that we have now met that burden. And the Coroner's opportunity, if they were going to rely on anything other than the generalized sorts of assertions that they made previously in the declaration of John Hedenberg [phonetic], their opportunity to do so, Your Honor, was in their opposition.

As the Court is well aware, this is consistent with the fact that they -- although the burden shifts to us, they also have significant burdens in public records cases and public records cases are supposed be expedited.

While the issue of what the Review Journal's interest in access was was not previously before this Court because in its decision, the Supreme Court was looking at the CCFD decision and the Cameranesi test, which it had not adopted until after this Court made its decision.

As the Court just recognized, the Nevada Supreme Court also found that there was at least one significant interest at stake.

And I want to point out that in our opening brief, we explained

that there's not just one interest, but multiple interests that access will advance.

Just generally, Your Honor, access to autopsy reports does vindicate the dead, it protects the living, and it serves as a check on government.

Here, there's two important interests at stake, the one the Court recognized, which is assessing whether the child abuse and neglect system is working and whether there have been deaths of vulnerable children that could have and should have been prevented.

While the Coroner minimizes those interests at stake, it was exploitative, and improperly relies on cases regarding death images to support its effort to overcome access.

Public policy strongly favors access for the reasons the Court articulated. We explained, consistent with the order from the Supreme Court on remand, what specific information we needed and why we needed direct access to the complete picture of all of these autopsy reports, Your Honor, both the cause of death information and other observations to assess performance of both the Coroner and the child -- the Coroner and the child and abuse neglect system.

The Coroner in response didn't come forward with any more specific arguments. And it's our view that now the balancing necessarily weighs in favor of disclosure.

And there would not be a reason for a further evidentiary hearing, because they haven't come forward and said we do have other specific information that would outweigh the significant interests and

access in that -- in this case.

They just haven't done that. Instead, they chose to stand on their legal arguments and the prior evidence, which was limited to the Hedenberg Declaration.

Here, I also want to point out that the Coroner repeatedly argues in their opposition that this isn't really about government oversight, because these records don't pertain to the Coroner's performance, but rather, the abuse and neglect system.

But first, FOIA is much more limited than the Public Records Act. And as the Supreme Court has made clear, when applying the CCSD or Cameranesi test, this Court still needs to work within the framework of the NPRA, which is not limited to records that may provide as a -- provide a check on government authority.

I do recognize, however, that in fact in the NPRA, it does recognize the general interest and access to any public record for the very reason it does promote transparency and democracy, but there's just no basis for the Coroner's position that the idea that the child and abuse system is a separate system unrelated to the Coroner's Office that it doesn't further access.

Similarly, Your Honor, I also want to point out that while we didn't previously brief this issue and we have now, there's also a separate interest in just making sure the Coroner gets it right.

And that, Your Honor, I think is why it's so important that we -- that we're not limited to information that's filtered by either attorneys for the Coroner's Office or unknown personnel for the

Coroner's Office. We're entitled to direct access consistent with the Public Records Act to be able to assess this information.

The spreadsheet is highly insufficient. It just shows name, age, sex, race, location, manner, and cause of death, very minimal information.

The Supreme Court has already resolved the question of whether they have to provide information about cases that were referred to the Child Act's review team.

The answer to that question is, yes, there is no privilege that applies there. They previously did provide some information, but again, only for cases that went to the CDR team.

With regard to the reports, and that's what we need access to, Your Honor, full access to the reports. They have redacted significant information.

And as the Court has already recognized, we have very little information. They have not come forward with evidence to support the bases for these redactions.

And this is factual information about not just the manner and cause of death, but also information that may not in the Coroner's view be related to the cause of death.

The Coroner repeatedly argues, look, we will -- we provided information that we think is related to the cause of death. But as I pointed out, sometimes coroner's offices get it wrong.

And the public is entitled to assess whether or not the Coroner did get it wrong and to look at further information, like the toxicology

information, like the full observations to assess that question.

Further, there may be information about abuse that's not directly related to the specific cause of death, but is relevant to the history with this child and the broader questions the Review Journal has raised about the abuse and neglect system, information like evidence of broken bones.

Their effort to distinguish the Dehan Hunt [phonetic] case, I think, is somewhat telling. They say, look, it was found that the abuse in that case was not substantiated.

But just like coroner's offices and other branches of government, sometimes, the abuse and neglect system gets it wrong and the public is entitled to assess whether or not there was a history of abuse that findings were made that were unsubstantiated that should have been substantiated, and whether these cases should have been looked at more closely.

Again, we should not be limited to redacted information, a spreadsheet, or information that the Coroner picks and choose that it thinks is relevant to our analyses. We are entitled to full access.

With regard to the balancing, I think the time to do the balancing is now, Your Honor. And I don't think that the Coroner has come forward with anything that merits an evidentiary hearing.

All that they've come forward with is that they've met their initial burden and they're standing by the prior evidence that they submitted, again, the declaration of John Hedenberg.

We've now answered the Supreme Court question -- the

Supreme Court's questions about what significant interests are at stake, not just the child and abuse and neglect questions, but also questions regarding the performance of the Coroner. And we've demonstrated how full access furthers those interests.

In contrast, the interests asserted by the Coroner are very generalized. They may cause access and disclosure of information may cause privacy concerns is what they assert.

In contrast, the very significant public interest at stake here outweighed those generalized concerns. The Coroner claims the Review Journal has no evidence and that -- but we cannot be required to prove what's in autopsy reports that we haven't seen.

Instead, the duty was on them in their answering brief on remand, Your Honor, to come forward with information outlaying why we should have access.

The cases the Coroner relies on with regard to the balancing test are all cases about the interests of surviving kin. They're all cases about death images that are or cases about death images that are just inapplicable here.

And I do want to point out, Your Honor, that in this, while kin do have this, the family does have a right, a statutory right, to access information about autopsy reports.

Here, we're talking about some cases in which there may not be anyone to stand up for these vulnerable children to get the autopsy reports to see if the Coroner got it wrong.

The family members may be the very people that are

implicated in the abuse. And so, there's no one to stand for these children other than the public. Public interest is great, Your Honor.

And that's my -- those are the points I want to make on the access issues. If the Court would like me to address the extraordinary use fees, I'm happy to do so as well.

THE COURT: No, we'll get to that in a minute.

MS. MCLETCHIE: Okay.

THE COURT: Let me hear from Ms. Nichols regarding the Coroner's position. And let me alert you to the fact that it appears that the Coroner's Office wants to also serve as the judicial decider of this by providing a spreadsheet and then redacted records.

And we're supposed to accept on face value their contention that that's everything that pertains to the cause of death. Anything we've redacted, you don't need to see.

And this is all about the value of transparency in our government and the value of public oversight. When a public servant, someone in government, is performing a task, and is continually aware of the fact that their actions or inactions are subject to public scrutiny that they are always being exposed to the risk of being evaluated, having performance evaluations conducted on their work, I think that serves a very significant public interest, because the job of those of us who work in government is to serve the public. That's the reason for our existence.

We've been entrusted with certain authority and certain responsibilities, certain abilities to conduct investigations and command

performances in productions of documents and materials and testimony under the color of law.

And the public not only trusts that we will do that properly, but has the right to expect that we will do it properly also.

And so, the problem I see with the Coroner's almost glib redactions is that it's as if the Coroner's Office doesn't accept the fact that they are a public servant, who the public has entrusted with the very important function and who the public has a right to know if those public servants are in fact doing their job.

And the cross-pollination of information, for example with juvenile autopsies and the effectiveness of Child Protective Services and other governmental entities that are asked to investigate allegations of child abuse is inescapable in terms of the interrelationship and how the information from one can provide information that helps to assess the efficiency of the other.

So I suppose rather than an evidentiary hearing, because I -- hearing Ms. McLetchie speak, I think I'm inclined to agree that to suggest that we would have to go through an evidentiary hearing at this point is -- I don't think that's correct timing-wise.

So there is a possibility that the Coroner's Office could submit for in camera review its positions for redactions. And I realize when I offer that up, that there are many, many records that would need to be reviewed.

But my concern is that I don't want to make a decision that forces the parties to unnecessarily go back to the Supreme Court for

further guidance, when I think all that needs to be accomplished can be accomplished at this level.

So, with that in mind, Ms. Nichols, what is your view on behalf of the Coroner's Office?

MS. NICHOLS: Well, Your Honor, I'd like to start with the Coroner's position of the Supreme Court opinion. So the Supreme Court said that the Coroner satisfied its obligation under the balancing test, demonstrating that a non-trivial privacy interest existed in these reports and that non-trivial privacy interest is the interest of the juveniles in relation to their personal health information that is not related to the cause and manner of death.

And so, what we're looking at here is --

THE COURT: Here's the problem.

MS. NICHOLS: -- if a --

THE COURT: Here's the problem. That sounds as if it's a unilateral determination being made by the Coroner, that the Coroner is saying we've redacted this. Nothing to see here regarding cause of death.

And that is a position that would defy scrutiny and oversight because any time the Coroner makes that assertion, that would be the end of the inquiry.

And that's why what Ms. McLetchie says is that they feel, the newspaper feels, that they have met their burden by showing multiple significant public interest, which outweigh, even if we assume that you have established a non-trivial privacy interest.

She says the burden has now shifted back to the Review Journal, which means it would go to another level of analysis or you would need to be able to articulate how that non-trivial interest, which the Supreme Court said was sufficiently shown, which then gives rise to the newspaper saying we have shown multiple reasons how there are multiple significant public interests which outweigh that, which I agree with. I agree that they have done that.

And that to me means that it is now the Coroner's Office to be able to then refute that that significant public interest outweighs the non-trivial privacy interest.

And, of course, you can't do that by standing on what you said before. You can only do that by standing on evidence and information that's presented after the Court finds, as it does, that the Review Journal has established multiple significant public interests that greatly outweigh the non-trivial privacy interest that the Supreme Court found in terms of the if the child's interest and privacy as to personal health information.

So go from there, please.

MS. NICHOLS: Okay, Your Honor, so then the next step, I think, would be based off of my understanding of the Court's position is the question becomes how can the Coroner basically justify its redactions in the personal health information, making sure that this personal health information does not in fact actually relate to the cause and manner of death?

And I think the only way to demonstrate that is what this Court suggested is submitting these autopsy reports, one, in an redacted

format to the Court and then in a redacted format with the Coroner's proposed redactions, explaining those redactions that they are personal health information and that they do not relate to the cause and manner of death.

THE COURT: Okay, I'm willing to do that.

MS. NICHOLS: And I think that -- I think that's the appropriate step to take in order for the Court to properly balance the interests that are at issue here.

Because I do understand the Review Journal's public interests. And I do think that they are valid interests, but they don't apply to every single juvenile autopsy report.

So in the sense that a juvenile was not abused and just had their appendix burst, there -- the fact that they have a blood disease that a blood disease, or they're anemic, or they have some other underlying health condition that did not result in the cause of death, I don't think that that serves any public interest.

THE COURT: Yeah, except keep in mind the death certificates never list only one cause of death. They are usually three items that are listed on a death certificate.

There's a primary, secondary, and contributing or underlying medical condition. And in the world of proximate cause and legal cause, those do have a bearing on cause of death.

However, I would be willing to conduct an in camera review of the unredacted juvenile autopsy reports with an accompanying explanation on a redacted version by a qualified expert, whether it's the

Coroner's Office or someone in the Coroner's employ who's a medical doctor, somebody who's qualified to sign a death certificate opining as to why the redacted material was not relevant to the cause of death in this case.

And, of course, if the child had no evidence of trauma ever and died from a burst appendix, and there's no indication that there was any trauma related to the burst appendix, that's a pretty straightforward proposition.

But that's not what anybody's terribly concerned about here. So I hope that that's clear, too.

So with that in mind, Ms. Nichols, does that address your concerns in terms of what you would like to be able to do with regard to the redactions?

MS. NICHOLS: Yes, Your Honor.

THE COURT: All right, Ms. McLetchie, what are your thoughts regards me reviewing these in camera?

THE COURT RECORDER: Hold on. She's muted. She was the one giving --

MS. MCLETCHIE: Your Honor, here's -- just to be clear, the Supreme Court did not limit this Court's consideration to what information we can have about the cause and manner of death.

And I want to be clear that I think we're kind of having a circular problem here where the Coroner wants to now make proposed redactions of information that it believes are of information that is not related in its view to the cause and manner of death.

This is the central problem and I don't think this is something that the Court can resolve in camera. And I don't think it's something that we can litigate in the dark.

Here's the problem, Your Honor. First, what they believe may be the cause and may be related to the cause and manner of death, they may have gotten wrong.

They may have gotten the cause of death wrong. There may be information that's related to the cause and manner of death that they don't realize is related. Coroners do get it wrong.

THE COURT: I follow what you're saying.

MS. MCLETCHIE: Second --

THE COURT: I follow what you're saying, but we need to get off center here. And if I make a wholesale determination without having done a balancing as that meets the Supreme Court's directions, it's just going to send everybody back to the Supreme Court for another opinion and another remand.

I would like to get this handled here at the District Court level, so that if you do have to go back to the Supreme Court, it won't be for lack of effort in resolving this matter.

And so, you may be right. It may be that after I conduct an camera review, I am of the view that as to some of the contentions, I can make a determination that I agree with the redactions. They don't seem to have any relevance to cause of death or the suggestion of prior physical abuse leading up to a cause of death.

On the other hand, there might be some where I say, you

know, I think this is a self-serving effort to not make full disclosure of information.

And so, as to these, I want to conduct an evidentiary hearing, but the Supreme Court can't and won't be able to do this. It's just not something that an appellate court has the time or inclination to do.

I have both the time, inclination to do both. And I want to get the parties on a path, where the materials are being disclosed without unnecessary or improper redactions.

And yet, where redactions are appropriate, they would be upheld. If after my in camera review, I'm of the decision that there are some, which I cannot make a determination on the basis of only an in camera review, then I think those would need to be brought forth in an evidentiary hearing.

To do either polar opposite won't get us anywhere. It'll put the case in a stall position, and meanwhile, the object of this, which was to obtain this information, will be defeated and the expenses on both sides will only grow. So I'm trying to be practical here and bring about resolution that both parties can work with.

So with regard to with the -- how many juvenile autopsy reports are at issue?

MS. MCLETCHIE: Your Honor, this is Maggie McLetchie for the record. I don't have that exact number. But before we move on, I obviously have stated my concerns about delaying this and letting the Coroner have another bite at the apple, but before we move on to the number of autopsy --

THE COURT: Well, no, wait. This is not another bite at the apple. This is giving them the necessary opportunity, which they're entitled to, to try to rebut the position you're arguing, which I find compelling, that there is a significant public interest that greatly outweighs the non-trivial privacy interests, which the Coroner's Office has set forth.

So now we're going to the third phase. And in that third -- we can't simply have a case in chief, a defense case, and then no opportunity for rebuttal because that would defy logic.

So it's not another bite at the apple any more than any rebuttal case ever is. So start from there.

MS. MCLETCHIE: And I understand the point, Your Honor. And I understand the desire to get this case resolved in its entirety once and for all without further Supreme Court review.

My point is just that there's nothing in the Cameranesi test that then says and then, they can assert again some new privacy interest or more detailed privacy interest.

Essentially the way I see the Cameranesi test, Your Honor, they had the burden to come forward with some non-trivial privacy interest, and then, the Court found that they did.

And then, the burden shifts to us to show how our interest and access outweighs that asserted privacy interest. It doesn't now shift back to them to give them another opportunity in a more detailed manner establish any specific privacy concern. So that's my position, Your Honor.

THE COURT: Let me first say this.

MS. MCLETCHIE: With -- sure.

THE COURT: First of all, with regard to your position, I do find that your significant public interest substantially outweighs their non-trivial privacy interest.

So in terms of your record if this case goes up, I do find that the multiple significant public interests that have been identified in your briefs in my mind far outweigh the non-trivial privacy interest that the Coroner's Office has asserted.

However, I do think that if given the chance to look at a case that's in this posture, the Supreme Court is going to say, okay, but did the Coroner's Office come forward then and say, well, we would like to rebut that because we think we can?

And I think that given what's at stake with these public records, and the non-trivial privacy interest, and the significant public interest, it makes sense to me that the trial court should do everything it can to make sure that that non-trivial privacy interest is considered, that the significant public interest is considered.

And when it is found that the significant public interest outweighs the non-trivial privacy interest, it seems appropriate to me that the Court should give the Coroner's Office in this setting the opportunity having heard my view of why I think the significant public interest significantly outweighs the non-trivial privacy interest to articulate a justification for their otherwise generically explained redactions, which are only these -- this is a non-trivial privacy interest of the minors' health

information. So that's what I want to do.

So, Ms. Nichols, can you tell me how many juvenile autopsy reports we're talking about?

MS. NICHOLS: Your Honor, this is going to be an approximation. I don't have the exact number, but I believe it's based off of their request and their time period. It's 6- to 700 juvenile autopsy reports.

THE COURT: Okay, okay. And have you previously made redactions in each of these 6- to 700 autopsy reports that were requested?

MS. NICHOLS: No, Your Honor.

THE COURT: You haven't?

MS. NICHOLS: We have not. We did the sample that we initially provided them before the lawsuit --

THE COURT: Well, I understand --

MS. NICHOLS: -- came about.

THE COURT: -- I understand about the sample, but if you haven't made redactions on these reports other than the samples, then you haven't shown a non-trivial privacy interest as to those that were not sampled. You just haven't.

MS. NICHOLS: Well, Your Honor, it's my understanding that the Review Journal does not want them redacted. They want them unredacted.

And so, if the Court orders them to be redacted, my concern, of course, is that they're going to say that they don't want them, which --

THE COURT: Well, no, no.

MS. MCLETCHIE: -- goes to the second argument --

THE COURT: No, my point is if you haven't already made redactions prior to the Nevada Supreme Court's decision, then it's too late for you now to assert that as to those juvenile autopsy reports that have been requested.

MS. NICHOLS: Your Honor, I disagree because they haven't been produced. So we haven't waived our ability to argue that.

THE COURT: How so?

MS. NICHOLS: Because they haven't been produced. The other side doesn't know. So we reserve the right to redact those.

The Supreme Court dealt -- already made that finding that we did assert a privacy interest --

THE COURT: As to --

MS. NICHOLS: -- even though they weren't produced.

THE COURT: -- those where you redacted, but you couldn't have made that if you didn't already make the redaction.

The redaction was justified on the basis that it was a non-trivial privacy interest. If you haven't made redactions, then you haven't asserted a non-trivial privacy interest. Do you understand?

MS. NICHOLS: No, Your Honor, I'm sorry, I would have to disagree because they haven't been produced.

THE COURT: I know they haven't been produced.

MS. NICHOLS: And so, we know what redactions would be made to the report.

THE COURT: How could you know that if you haven't considered them and made them already?

MS. NICHOLS: Because it would be anything that's not related to the cause and manner of death.

THE COURT: Yeah, that's circular. That is circular. That should have already been done.

If you were going to stand on redactions and your claim of a non-trivial privacy interest, you needed to do that. And then, all those would come under the umbrella of the Supreme Court's decision that you have made a declaration of a non-trivial privacy interest that shifts the burden.

Having not done so, as to those other 6- or 700 reports, I think there's a very legitimate argument that you've waived the redaction opportunity as to all those that were other than the sample three or four cases.

Ms. McLetchie, what are your thoughts?

MS. MCLETCHIE: I would agree with that, Your Honor. And I think it illustrates the fact that whether under the CCSD test or any other test, the -- when looking at public records, the government is supposed to produce as much as possible.

And they're supposed to make case-by-case and information-by-information specific determinations of what can and can't be produced.

That's also consistent, for example, not just with their initial evidentiary burden in any public records case, but also with the statutory

mandate redact as little as possible and produce as much as possible.

They first relied in this case, Your Honor, on the general idea that they didn't -- that they were beyond the reach of the Public Records Act and autopsy reports weren't public records.

And now, they're -- and clearly they're -- that was never, other than a few sample reports they made, they never made a specific case-by-case determination that there's a privacy interest at stake that outweighs the interest in access.

And hearing Ms. Nichols speak, she is, I think, misreading the Supreme Court decision and taking the position that there's a bright line rule that says that all information concerning not related to the cause of -- cause and manner of death in the Coroner's determination is not a public record.

That is not what the decision says. And if those are the redactions they're going to make, I don't know what point there even would be to a review in camera.

If there were to be an in camera review, obviously, we would want two things. And that's as much information as possible on a privilege log through the inherent problems with in camera review.

And we'd want to reserve the right for direct access if -- at least by attorneys on the case and potentially an expert for the Las Vegas Review Journal, so that we can assess their determinations.

But again, the decision by the Supreme Court was not that any information that's not related to the cause and manner of death is properly redacted. That would have been a very easy decision for them

to make and they could have just remanded for that.

That the -- position of the Coroner's Office as Ms. Nichols has made clear today is that they're never going to produce any information that's in their determination not related to the cause and manner of death.

And for that reason, I think that the Court is right that they have waived any arguments that there are specific redactions and specific information that when the balancing test is now applied on remand, that that information specifically outweighs the interest and access as articulated by the Review Journal. Again, they could have made these arguments in their answering brief. Their position is abundantly clear.

And I think for that reason, no in camera review is needed. And I think that the -- we are -- we're entitled to full except perhaps for the sample autopsy reports the Court has indicated.

And I think it's time, Your Honor, to move on in the case. We requested this information back in 2017. And, obviously, there is a significant policy interest in assessing not just the Coroner's performance, but the child and abuse neglect system.

We've seen with reporting in other states like Colorado, that this kind of access has led to significant positive policy changes. And I think the time for delay is over, Your Honor.

THE COURT: Well, I agree. And the heel dragging that's gone on as a member of the community, it's just upsetting to see that there's this kind of heel dragging that would go on in a public records

case, but it has. And so, here we are today.

So I do completely agree that there is a significant public interest, multiple significant public interests that are articulated in the Review Journal's briefing in this case, which I completely agree with. And that those outweigh the non-trivial privacy interest that has been asserted by the Coroner's Office in the sample cases.

For example, I think there were three, three or four. And so, even as to those cases, those reports should be produced in an unredacted form because I have -- I am finding that it's the significant public interests plural greatly outweigh the non-trivial privacy interest that is advanced by the Coroner's Office as to those samples.

Likewise, that is even more so as to the balance of the reports, which have not been produced or offered even in the redacted form, because that means that even at this late date, the Coroner's Office made no effort to provide redacted reports on the balance of the 6- or 700 reports that came within the description of the materials that were requested by the Review Journal.

Accordingly, I am finding that a significant public interest plural greatly outweigh the non-trivial privacy interests that have been argued and advanced by the Coroner as to all of the juvenile autopsy reports requested within the time frame that -- made by the Review Journal newspaper. And they therefore must be produced in unredacted form within 30 days from today's date.

Secondly, there is the issue of copy charges and what the Coroner's Office argues is their desire to be able to charge for

extraordinary use of personnel.

The Supreme Court was pretty clear on that and said the Coroner's Office can inform the records requester what those actual costs will be per hour, per person, what the estimated overall cost will be, et cetera. And they can charge them, but they are capped at 50 cents per page.

So you can -- you must inform the requester you're going to be charging $45 an hour for somebody to review them and that's going to require 14 hours of time by one person and $75 an hour and 10 hours for another person. And you can add up all those charges and tell the requester that they will be responsible for them.

And they will, but only up to a maximum charge that equates to 50 cents per page. And that's in the Supreme Court's opinion on page 24. So I think that addresses the extraordinary use of copy charges.

Any additional items that either side feels need to be addressed this morning following the Supreme Court's remand, Ms. McLetchie?

MS. MCLETCHIE: If -- just to be clear, Your Honor, and I don't know how -- we didn't raise the cost issue in our opening brief. I'm not sure that it was really properly addressed in the answering brief.

We did address it in brief form in the reply, but one thing I wanted to make clear about the extraordinary use, I would agree with the Court about the Supreme Court's findings.

It upheld this Court's ruling. It rejected the hourly rate

argument that the Coroner had previously made. And based on the law of the case doctrine, Your Honor, I think that the Court's order in the -- they did raise other arguments on appeal regarding the Court's determination as to what were the appropriate costs and fees in this case for the Coroner to charge.

And the Supreme Court implicitly rejected any other arguments. In this Court's order in my -- from my point of view, the November 9th, 2017 order, paragraph 52 to 57, those stand under the law of the case doctrine.

And the Court has already made those determinations. Even if it had not, we have other arguments that asked about why 5287 cannot be applied, why it's not retroactive.

And I also want to point out that the Supreme -- the Coroner seems to think that the -- that there's now a flat 50 percent fee that could be charged, assuming you could apply the now repealed extraordinary use provision, but the Supreme Court as the Court just made crystal clear never said there was a flat 50 cent per page fee.

Instead, the Court said that there was a cap.

THE COURT: That's a cap.

MS. MCLETCHIE: There were other limitations. Correct.

THE COURT: Okay. Okay.

MS. MCLETCHIE: And there were other limitations, Your Honor, as well, but it's been repealed.

And more importantly, the Supreme Court rejected their arguments on appeal as to this Court's determination regarding the cost

and fees the Coroner could charge in this case.

In fact, the only costs the Court -- the Coroner could charge, the Court has already determined is the cost of a medium that they provide records on.

THE COURT: All right. Agreed. Now I also want to alert both sides that given my ruling today, it seems only a matter of time before I declare the Plaintiff to be the prevailing party.

And that will become relevant on the issue of fees and costs. I think that the effect of today's ruling is that the Plaintiff becomes the prevailing party. I don't know if it's premature to make that determination, but I do know that it is a predicate to a determination on the fees and costs.

But before we get to that, Ms. Nichols, are there any other items which you feel need to be addressed in light of this case having been remanded from the Supreme Court?

MS. NICHOLS: So, Your Honor, I guess I was kind of confused by Ms. McLetchie's argument just now. Are you saying that the Coroner is not allowed to charge for extraordinary use of personnel?

THE COURT: No, the Supreme Court said that you are allowed to, but that when all is said and done regards to what those actual internal costs are, and they have to be actual costs, and they have to be disclosed to the requester, they cannot total more than 50 cents per page.

So, for example, if you had 500 pages of materials that you produced and you had internal costs, hourly and equipment wise and

perhaps special consultants that were $2,300, you would have to notify the requester that that's what it was going to be costing you to get this job done. But with 500 pages of records, the most you could actually charge them for would be $250. That's --

MS. NICHOLS: Understood, Your Honor.

THE COURT: Okay. All right.

MS. NICHOLS: Yeah, absolutely. I just want [indiscernible].

THE COURT: All right.

MS. MCLETCHIE: Your Honor, if I may, I think there are a few other remaining issues then on fees and costs that need to be addressed.

And that's that the -- the Supreme Court did say -- did talk about the prior extraordinary use fee provision and did say what the Court -- what the Coroner could charge for. However, it did not overturn anything about this Court's ruling on fees and costs and what the Coroner could charge.

And those rulings were that the Coroner could not charge for legal fees, for confidentiality claims, which obviously make sense in light of the Court's current rulings. There won't be redactions, so there can't be costs associated with that.

And it's hard to imagine what the extraordinary use costs would be now even if it were applicable since they can't redact information.

I don't think that there -- under certain circumstances, it's true. There was an extraordinary use provision that under which extraordinary

use fees could be charged.

But here, we have a different situation than what the Coroner articulated previously. Besides the debate between the hourly fee and the per page cap that applied, there was also litigation -- the litigation previously in this Court also addressed whether or not they could charge for privilege review. That was at the heart of the issues on appeal.

And this Court has found that they can't redact any information. So, obviously, there is no privilege review to charge for.

And their arguments on extraordinary use fall apart. There is no extraordinary use. Their extraordinary use demand was based on the idea that they had to --

THE COURT: All right --

MS. MCLETCHIE: -- do a privilege review and redact information.

THE COURT: Since I'm a very practically oriented person, let me just bring up a very practical point. For many years now, the cost for medical records under NRS 622.061 have been capped at 60 cents per page.

And that's because before that statute was enacted, sometimes if you made a request for medical records, even if the doctor only saw the person one time and had three pages of medical records, you would get a bill for $250 for the doctor's time in reviewing the records before they were copied. And so, a statute was enacted, so that the costs for medical records would be capped at 60 cents a page.

Now, obviously, when a doctor's office had to produce three

pages of records and mailed them back to you for $1.80, the doctor's office got the short end of the stick because it cost them a lot more $1.80 to have a staff member pull the chart, copy it, mail it, and so forth.

But when a hospital made a copy of 3,000 pages of records, they also charged 60 cents a page. And when they collected $1,800 for working a photocopy machine hard to produce materials at 5 or 6 cents per click, they did very well.

But it was considered that that was a trade-off. In order to avoid the overcharging on the small pages, people were willing to accept the fact it would be more on the -- now you would think that somebody could say, well, geez, you don't have to charge 60 cents a page. You could have charged us 25 cents a page when you were cranking out 1,800 pages of materials.

But as we know, when someone is told that's the maximum you can charge, they're going to charge the maximum. And so, I appreciate the arguments you're making, Ms. McLetchie, regarding whether they can charge for privilege or this or that, but if the maximum charge is 50 cents per page, they're going to charge you 50 cent per -- 50 cents per page.

And all of those considerations you're talking about now that could go into making up that number, they don't matter. You're going to get a bill for 50 cents a page. Whether that includes requested charges for privilege exam and expert consultant and all that, it won't matter. It's 50 cents per page.

And as the Supreme Court noted, the statute is very clear on

this and it makes no exceptions for that. So I don't think that the arguments about what goes into making up the charges that they throw at the requester is of any consequence, okay?

What else?

MS. MCLETCHIE: Your Honor, so I would just disagree with the analogy to the medical records, the medical record statute, because here, it specifically says that this 50 cent per page, this only applies assuming it even is still alive. I think it's not because it's been repealed, but it only ever applied, Your Honor, if there were extraordinary use of personnel.

Here, they're not redacting anything. There is no extraordinary use. The Public Records Act, all the provisions of the Public Record Act, have to be applied in a manner that's consistent with the mandates of the NPRA --

THE COURT: All right, I --

MS. MCLETCHIE: -- and the Court's already determined --

THE COURT: -- have to disagree with you. Putting together and copying 6- to 700 juvenile autopsy reports is an excessive use of personnel.

It's going to require people doing more than just incidentally making a copy of something that they generated. So I think it's an argument that's not worth making.

Anything else?

MS. MCLETCHIE: I would just point the Court to its prior ruling that the Las Vegas Review Journal indicated it was to receive

electronic copies of the requested records.

The LBG -- LBRJ is not requesting hard copies and the NPRA does not permit a per page fee to be charged for electronic copies. That's because the only cost for electronic copies is that of the media on a CD. The Court finds that the Coroner's Office may not charge any additional fee besides the cost of the CD.

THE COURT: That's fine. If electronic media is used --

MS. MCLETCHIE: I would argue that under the law of the case doctrine --

THE COURT: That's fine if electronic media's used, that's fine, but if we're talking about a per page --

MS. MCLETCHIE: And that's what we've requested, Your Honor.

THE COURT: -- for a hard copy, it's 50 cents per page max. All right, anything else?

MS. MCLETCHIE: I don't have anything else, Your Honor.

THE COURT: Ms. Nichols?

MS. NICHOLS: No, Your Honor.

THE COURT: All right, so Ms. McLetchie, I need you to prepare the order finding that the significant public interests greatly outweigh the non-trivial privacy interests that were advanced by the Coroner's Office, as to both the sample autopsy reports that were provided in redacted form and as to the other 6- or 700, and that's an approximate number, juvenile autopsy reports that were not provided at all in either redacted or non-redacted form, such that the Review Journal

is entitled to receive and the Coroner's Office must provide unredacted copies, if it's in digital format, in digital format, of all of the juvenile autopsy reports that were originally requested by the Plaintiff back in I guess it was 2017. Or was it earlier?

MS. MCLETCHIE: Your Honor, it was April of 2017.

THE COURT: Okay, in April of 2017.

And with regard to extraordinary use, the -- if the juvenile autopsy reports are provided in hard copy paper format, the charges are capped at 50 cents per page.

If they are provided in digital format, wasn't there a digital media cost that was described?

MS. MCLETCHIE: Your Honor, your prior order did give them the right to charge us for the cost of a medium such as a CD.

THE COURT: Okay, so that'll be the order as to that also.

And then, finally, the order should provide that based upon today's ruling, the Court finds that the Plaintiff is the prevailing party and will consider its supplemental application for fees and costs, including those that were previously awarded.

Anything else for the Plaintiff?

MS. MCLETCHIE: No, I think I have that all down. Thank you, Your Honor.

THE COURT: Ms. Nichols, anything else from the Coroner's Office?

MS. NICHOLS: No, Your Honor.

THE COURT: All right, thank you.

[Proceedings concluded at 10:32 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

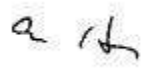

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Exhibit 4

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: 24 **Date of Hearing:** October 29, 2020 **Time of Hearing:** 9:00 A.M.

RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S ANSWERING BRIEF

Respondent, Clark County Office of the Coroner/Medical Examiner ("Coroner"), by and through their attorneys of record, Craig R. Anderson, Esq. and Jackie V. Nichols, Esq., of the law firm Marquis Aurbach Coffing and Laura C. Rehfeldt, Esq., Deputy District Attorney with the Clark County District Attorney/Civil Division, hereby submits their Answering Brief. This Answering Brief is made and based upon all papers, pleadings, and records on file herein, the

attached Memorandum of Points and Authorities, and any oral argument allowed at a hearing on this matter.

Dated this 7th day of October, 2020.

MARQUIS AURBACH COFFING

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The Coroner appealed this Court's decision that the Coroner failed to comply with the Nevada Public Records Act (NPRA) in relation to the disclosure of juvenile autopsy reports and the Supreme Court reversed and remanded, in part, the matter back to this Court. On remand, this Court must first determine whether Las Vegas Review-Journal ("LVRJ") has satisfied its obligation under the balancing test pertaining to individuals' nontrivial privacy interests.

Under the balancing test, the Coroner demonstrated that the decedents' medical and health information unrelated to the cause of death involved a nontrivial privacy interest that warrants protection. Now, the burden shifts to LVRJ to demonstrate: (1) the public interest sought to be advanced is a significant one; and (2) the information sought is likely to advance that interest. LVRJ hangs its hat on the fact that autopsy reports in general are public records, and therefore, the release of the juvenile autopsy reports in this case is necessary. This argument fails for numerous reasons. First, the Supreme Court expressly recognized that although autopsy reports are public records, the reports contain sensitive private information that warrant redaction. Thus, LVRJ must demonstrate how the specific information sought—the medical and health information unrelated to the cause of death—advances a public interest. LVRJ cannot meet this burden.

In support of its position, LVRJ claims that autopsy reports generally shed light on the function of the Coroner's office and criminal investigations, provides the public with vital health information, promotes law enforcement accountability, provides the public with information regarding crimes of significant public interest and sheds lights on the child welfare programs in Clark County. The myriad of examples cited by LVRJ do nothing to support its position. To the contrary, it demonstrates that LVRJ does not need access to medical and health information unrelated to the cause of death of the decedent. Every example noted by LVRJ specifically pertains to the cause and manner of death. As the Coroner explained previously, LVRJ has been provided with this information. Additionally, the Coroner agreed to provide LVRJ with redacted autopsy reports. Any information related to the cause and manner of death would not be

redacted. Put simply, LVRJ has not demonstrated that there is a significant public interest that would be advanced by access to an individual's private medical and health information unrelated to the cause of death. Even so, any public interest in such information is so minimal that the balancing of the interests weighs in favor of the individuals and not public access.

Finally, in the event that the LVRJ does seek access to the redacted autopsy reports, the Coroner is entitled to charge 50-cents per page for preparing and producing the requested records. There are approximately 830 reports that were responsive to LVRJ's request. Previously, the Coroner estimated that each report is, on average, ten pages, equating to 8,300 pages. The Coroner also informed LVRJ that it would take approximately one hour to redact 4-5 reports. With 830 reports to prepare for production, that amounts to 166 hours to prepare the requested records. Undeniably, 166 hours amounts to extraordinary use of personnel, permitting the Coroner to charge 50-cents per page. As such, the Coroner seeks payment in the amount of $4,150.00 for the redacted reports.

II. PROCEDURAL HISTORY

A. THE CORONER MET ITS OBLIGATION UNDER THE NPRA PRIOR TO LVRJ FILING ITS PETITION.

On April 13, 2017, Arthur Kane and Brian Joseph, Investigative Reporters for the LVRJ, emailed a public records request to the Coroner for juvenile autopsy reports from January 1, 2012 to present. *See* LVRJ's Appendix of Exhibits in Support of Petition for Writ of Mandamus on file herein at LVRJ 0006. That same day, the Coroner's office explained that it would not provide the autopsy reports due to the fact that the autopsy reports contained medical and confidential information about the decedent's body and, instead, provided LVRJ with a spreadsheet identifying all deaths under the age of 18 that occurred within its jurisdiction. *See* LVRJ 001-014. This initial spreadsheet of data consisted of the Coroner case number, name of decedent, date of death, gender, age, race, location of death, and cause and manner of death. *See* LVRJ 009-014.

Unsatisfied with this data, LVRJ then reached out to the Clark County District Attorney's Office, Civil Division (D.A.'s Office) to obtain access to the juvenile autopsy reports. LVRJ

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015. In response, the D.A.'s Office reiterated that the juvenile autopsy reports contained sensitive information and the basis for non-disclosure was the legal analysis in AGO 82-12, as well as the policy of Assembly Bill 57, which was pending at the time of the request. LVRJ 018.

In an attempt to work with LVRJ in good faith, the Coroner, John Fudenberg, met in person with Mr. Joseph and Mr. Kane on May 7, 2017 to try to determine the specific information the reporters sought. *See* The Coroner's Response to Petition and Memorandum on file herein (Response), at Exhibit A, ¶ 7. After the meeting, Mr. Fudenberg compiled a second spreadsheet consisting of the same data as the spreadsheet sent on April 13, 2017, but listed only the cases on which autopsies were conducted. *Id.*; *see also* LVRJ 033, 047-071. LVRJ obtained this information on May 9, 2017. *Id.*

As the parties continued to work together, LVRJ provided the D.A.'s Office with a prioritized list of autopsy reports. LVRJ 075-077. In response, the D.A.'s Office explained that, due to the magnitude of the request, the records could not be provided within the five-day period required under the NPRA. LVRJ 088-092. After reviewing a portion of the autopsy reports, the D.A.'s Office informed LVRJ those autopsy reports could be provided within the next 30 days provided that LVRJ commits to the proposed fees. LVRJ 087-088. To that end, the D.A.'s Office gave LVRJ sample autopsy reports and clarified that the redactions consisted of "information that is medical, relates to the status of the decedent's health (or the mother of the baby), could be marked with stigmata or considered an invasion of privacy by the family." *Id.* On the other hand, the D.A.'s Office advised LVRJ that "[s]tatements of diagnosis or opinion that are medical or health related that go to the cause of death are not redacted." LVRJ 088; *see also* LVRJ 095-122.

Despite receiving the spreadsheets of data and the Coroner's proposal to provide redacted copies of the juvenile autopsy reports for a fee, LVRJ filed a petition for access to the records on July 17, 2017. *See* LVRJ's Petition for Writ of Mandamus on file herein. The Coroner contended that it satisfied its burden under the NPRA in demonstrating that the juvenile autopsy reports contained confidential information not subject to disclosure. *See* Response, *generally*.

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Relying on the recent *CCSD*[1] balancing test, the Nevada Supreme Court agreed. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020).

B. THE SUPREME COURT SHIFTED THE BURDEN TO LVRJ.

On appeal, the Supreme Court determined that the Coroner "demonstrated that a nontrivial privacy interest is at stake in the potential disclosure of juvenile autopsy reports." *Clark Cnty. Office of Coroner/Med. Exam'r*, 136 Nev. at 56, 458 P.3d at 1058. The Court reasoned that Mr. Fudenberg's declaration explained that an autopsy requires a complete physical examination of the decedent and typically incorporates review of medical records and health history completed prior to the physical examination. *Id.* As explained by Mr. Fudenberg, this may include the decedent's sexual orientation, preexisting medical conditions, drug or alcohol addiction, and various types of diseases or mental illness, as well as other personal information that the decedent or the decedent's family might wish to remain private. *Id.*; *see also*, Response at Exhibit A. This explanation and reasoning "comports with the general understanding that an autopsy report may 'yield detailed, intimate information about the subject's body and medical condition.'" *Id.* (citing *Globe Newspaper Co. v. Chief Med. Exam'r*, 404 Mass. 132, 533 N.E.2d 1356, 1357 (1989). Furthermore, such information may "reveal volumes of information, much of which is sensitive medical information, irrelevant to the cause and manner of death[.]" *Id.* (quoting *Penn Jersey Advance, Inc. v. Grim*, 599 Pa. 534, 962 A.2d 632, 638 (2009)).

The Supreme Court further concluded that the authorities relied on by the Coroner reflected a policy favoring the protection of private medical and health-related information. *Id.* at 56-57, 458 P.3d at 1058. In that respect, the Court approved of the Coroner's reliance the public policy considerations outlined in AGO 82-12. *Id.* Similarly, the Court recognized that although NRS 432B.4095 does not render juvenile autopsy reports entirely confidential, the

[1] *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018). Notably, the opinion was issued subsequent to this Court's decision in granting LVRJ's Petition.

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penalty provision reinforces the Coroner's assertion that juvenile autopsy reports may include confidential information that should be redacted before disclosure. *Id*. at 57, 458 P.3d at 1059.

There is a public policy interest in disseminating information pertaining to child abuse and fatalities. *Id.* The Court cautioned, however, that it is entirely unclear what *additional* information LVRJ seeks from the redacted juvenile autopsy reports and how that information will advance a significant public interest. *Id*. at 58, 458 P.3d at 1059. On remand, the Supreme Court directed this Court "to determine, under the *Cameranesi*[2] test, what autopsy report information should be disclosed under the NPRA and what information should be redacted as private medical or health-related information."

III. LEGAL ARGUMENT

A. LEGAL STANDARD PURSUANT TO THE *CCSD* BALANCING TEST.

Nevada adopted the two-part test articulated in *Cameranesi v. United States Department of Defense*, 856 F.3d 626, 637 (9th Cir. 2017) (the *Cameranesi* test) for "determin[ing] if a government entity should redact information in a public records request." *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018). The first step in a *Cameranesi* analysis requires the government to establish that disclosure implicates a personal privacy interest that is nontrivial or more than de minimis. *Id*. If the government shows that the privacy interest at stake is nontrivial, the requester must then show that the public interest sought to be advanced is a significant one and the information sought is likely to advance that interest. *Id*. If the second prong is not met, the information should be redacted. *Id*. The *Cameranesi* test thus balances "individual nontrivial privacy rights against the public's right to access public information." *Id.* at 708, 429 P.3d at 321. This balancing test approach "ensures that the district courts are adequately weighing the competing interests of privacy and government accountability." *Id.* at 709, 429 P.3d at 321; *see also Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) (explaining that the Freedom of Information Act (FOIA) protects against "unwarranted 'invasions' of privacy" and that such invasions "trigger[ ]

[2] *Cameranesi v. United States Dep't of Def.*, 856 F.3d 626, 637 (9th Cir. 2017).

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a weighing of the public interest against the private harm inflicted," and concluding that "the release of photos of the decedent at the scene of his death and autopsy qualifies as such an invasion").

In *Cameranesi*, the Ninth Circuit explained:

> First, we evaluate the personal privacy interest at stake to ensure "that disclosure implicates a personal privacy interest that is nontrivial or ... more than [ ] de minimis." (citation omitted). Second, if the agency succeeds in showing that the privacy interest at stake is nontrivial, the requester "must show that the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest." Lane v. Dep't of Interior, 523 F.3d 1128, 1137 (9th Cir. 2008) (alteration in original) (quoting Favish, 541 U.S. at 172, 124 S.Ct. 1570) (internal quotation marks omitted); see also Yonemoto, 686 F.3d at 694. "Otherwise, ***the invasion of privacy is unwarranted***." Favish, 541 U.S. at 172, 124 S.Ct. 1570.

(Emphasis added). That is, if the requester cannot satisfy its burden, there is no balancing test to be performed by the court—the inquiry ends. *See CCSD*, 136 Nev. at 56, 458 P.3d at 1058 ("If the second prong is not met, the information should be redacted.").

To determine whether LVRJ has met its burden, the Court must consider two factors in evaluating the public interest in disclosure. First, the court "examine[s] whether the public interest sought to be advanced is a significant one—one more specific than having the information for its own sake." *Cameranesi*, 856 F.3d at 640. (internal quotations omitted and citation omitted). Second, the court looks to "whether the requested information is likely to advance that interest." *Id*. (internal quotations omitted).

In considering whether the public interest is significant, "the only relevant public interest in the . . . balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.* (citation omitted). The requested information must "contribute significantly to public understanding of the operations or activities of the government." *Id.* (citation omitted). "In other words, information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct is not the type of information" that is subject to disclosure for purposes of public record requests. *Id.* (internal quotation marks omitted).

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In examining whether the requested information is likely to advance a significant public interest, the Court considers whether it will appreciably further the public's right to monitor the agency's action. *Id.* (citation omitted and internal quotation marks omitted). If the information sought does not add significantly to the already available information concerning the manner in which the agency has performed its statutory duties, the court must give the public interest less weight. *Id. see also U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991) (holding that the public interest did not outweigh a nontrivial privacy interest where obtaining the names and personal information of the returnees "would not shed any additional light on the Government's conduct of its obligation").

To summarize, the Nevada Supreme Court concluded that the Coroner demonstrated that a nontrivial privacy interest existed within the juvenile autopsy reports, satisfying the first prong of the balancing test. Thus, it is for this Court to first determine whether LVRJ has met its obligation under the second prong. If it has not, the inquiry ends and the Coroner is entitled to redact the medical and health information as initially proposed. On the other hand, if the Court finds that LVRJ met its burden under the second prong, it must balance the individual's nontrivial privacy rights against public's interest in access.

Here, LVRJ cannot show that disclosure of each decedent's personal medical and health information advances a significant public interest. Rather than focusing on this specific inquiry, LVRJ contends in blanket fashion that autopsy reports generally serve a public interest. This assertion is insufficient to warrant disclosure of the private medical and health information of the decedents. Even if the Court finds that LVRJ established that the private medical and health information advances a significant public interest, upon weighing the interests involved, the Court must find that the privacy interests at stake outweigh the public interests in access. Finally, if LVRJ demands that the Coroner provide it with the redacted juvenile autopsy reports, the Coroner is entitled to charge 50-cents per page for preparing the requested records.

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B. LVRJ HAS NOT SATISFIED ITS BURDEN UNDER THE *CCSD* BALANCING TEST.

In spite of devoting nearly seven pages to the legal standard under the *CCSD* balancing test, LVRJ entirely ignores its obligation to demonstrate that the ***redacted information***, i.e., the medical and health information of the decedent, advances the public interest, and instead, argues that autopsy reports are public records. Based on the Supreme Court's opinion in the instant case, it is undisputed that autopsy reports are public records. The Supreme Court, however, also recognized that autopsy reports inherently contained sensitive medical and health information that warrant redaction. As a result of the Supreme Court's finding that the Coroner satisfied the first prong under the *CCSD* balancing test, the burden shifts to LVRJ to specifically articulate the redacted medical and health information advances a significant public interest. LVRJ's attempt to meet its burden fails and the Coroner is entitled to redact medical and health information that is unrelated to the cause and manner of death.

1. Access to Private Medical and Health Information Unrelated to a the Cause of Death does not Advance a Significant Public Interest.

The Supreme Court expressly concluded that autopsy reports are public records. That, however, is not the issue presented before this Court. The issue is what *additional information* is needed from the redacted autopsy reports to further the public policy interest in disseminating information pertaining to child abuse and fatalities. The detailed spreadsheet and the redacted autopsy reports satisfy this public policy interest. Unredacted autopsy reports will only exploit the personal privacy interests at stake and do little, if nothing, to advance public interest pertaining to child abuse and fatalities.

2. Access to Private Medical and Health Information Unrelated to a the Cause of Death is not Necessary to Assess Coroner Performance and Increase Public Confidence in Coroners and Official Accounts

To be clear, the Coroner has not refused to release autopsy reports altogether. Prior to the instant litigation, the Coroner provided LVRJ with sample autopsy reports and simply redacted private medical and health information that was unrelated to the cause of death. Again, LVRJ

fails to articulate what additional information from the redacted juvenile autopsy reports is necessary to assess the Coroner's performance and increase public confidence in the Coroner.

LVRJ cites to *People v. Dungo*, to argue that "an autopsy report may satisfy the public's interest in knowing the cause of death." 55 Cal. 4th 608, 621, 286 P.3d 442, 450 (2012), *as modified on denial of reh'g* (Dec. 12, 2012). However, in the instant matter, the cause of death, along with other information, was previously released to LVRJ in the form of a spreadsheet and redacted autopsy reports. *Dungo* does not support the proposition that additional private and health information is necessary to further other significant public interest goals.

LVRJ also cites to an article from the Los Angeles Times, but this is irrelevant as it does not even discuss the review and disclosure of autopsy reports to the public or how additional information would have effected this change. Opening Brief at 15. The article indicates that "[c]ornea removals are disclosed on public autopsy forms."[3] Nevada does not have a law requiring public autopsy forms.

LVRJ also directs this Court to an article involving the death of Dale Earnhardt, a famous racecar driver. Opening Brief at 15. That article discusses expert review of various documents related to Earnhardt's autopsy. It appears from a lawsuit initiated by the media for access to Earnhardt's autopsy photographs, that the coroner had *voluntarily* released the autopsy report and related documents to the public, however the court determined that the release of the photographs would constitute a serious invasion of privacy. *See Campus Commc'ns, Inc. v. Earnhardt,* 821 So.2d 388 (Fla. App. 2002). This actually supports the Coroner's position that the entirety of autopsy reports are not subject to public disclosure. Furthermore, an agency's decision to publish an autopsy report cannot be imputed to all other agencies, especially with respect to juvenile autopsy reports as in this case.

[3] *See* Ralph Frammolino, *Harvest of Corneas at Morgue Questioned,* L.A. Times, Nov. 2, 1997, https://perma.cc/RWB7-KW4A.

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3. Access to Private Medical and Health Information Unrelated to a the Cause of Death Would not Provide the Public with Vital Health Information and Protect Consumers.

LVRJ further argues that releasing full autopsy reports is necessary for tracking trends in causes of death. In support of this position, LVRJ relies on the COVID-19 pandemic as an example. Opening Brief at 15. However, as this Court is well aware, that type of information would be included in the redacted autopsy reports to the extent it relates to the cause of death. For example, if a juvenile's cause of death was COVID-19 or if COVID-19 was related to the cause or manner of death, this would not only be information provided on the spreadsheet, but would be information would remain unredacted in the autopsy report. Again, LVRJ fails to address the Nevada Supreme Court's question in that matter as to "what *additional* information LVRJ seeks to glean from the requested juvenile autopsy reports that, in unredacted form, would advance that public's interest." *Clark Cty. Office of Coroner/Med. Exam'r*, 136 Nev at 58. The Coroner is simply protecting private medical and health information unrelated to the death of a juvenile. As already recognized by the Supreme Court, this information pertains to a nontrivial privacy interest.

4. Access to Private Medical and Health Information Unrelated to the Cause of Death do not Further the Integrity of Criminal Investigations.

LVRJ points to the shooting death of Ahmaud Arbery and how the "autopsy report provided the public valuable information about how many times Mr. Arbery was shot by his assailant, the nature of death (homicide), and that fact that Mr. Arbery had no drugs or alcohol in his system at the time he was shot and killed. Opening Brief at 16. The information LVRJ notes in the reference to the Ahmaud Arbery case would not be redacted from an autopsy report if it related to the manner and cause of death. In fact, the sample redacted autopsy reports provided to LVRJ by the Coroner included the nature of death, cause of death, and, if drugs or alcohol were related to the cause of death, that information was also provided.

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LVRJ also cites to a journalist from The Patriot-News who used official records, "including coroner records and autopsy reports", to aide in exoneration of multiple people. Opening Brief at 16. However, there is no mention of coroner's records or autopsy reports in the article or, as with all of the articles cited by LVRJ, how private medical or health information would advance the public's interest more than the information that the Coroner has already provided.

5. Access to Private Medical and Health Information Unrelated to the Cause of Death does not Promote Law Enforcement Accountability and Confidence in Law Enforcement.

LVRJ again generalizes the release of autopsy reports but does not address the issue in front of this Court. LVRJ cites to an example where law enforcement was believed to have been the cause of a man's death, but was exonerated after the coroner released the actual cause of death – excited delirium. Opening Brief at 17. Another example provided by LVRJ is a police shooting of a seventeen-year-old boy. The autopsy report showed officers had shot the teenager sixteen times. *Id.* Once more, the cause and manner of death is already within LVRJ's possession. The redacted juvenile autopsy reports would also reveal any information that was related to the cause and manner of death. Simply put, LVRJ fails to provide this Court reasoning about how the private medical and health information that is unrelated to the decedents' cause and manner of death advances a significant public interest that would warrant disclosure.

6. Access to Private Medical and Health Information Unrelated to the Cause of Death Does Not Provide the Public with Information Regarding Crimes of Significant Public Interest

In support of its brief, LVRJ cites to autopsy reports related to eight family members who were shot dead in Pike County, Ohio. Opening Brief at 18. LVRJ fails to mention that the issue of releasing the autopsy reports was addressed by the Ohio Supreme Court. *See State ex rel. Cincinnati Enquirer v. Pike Cty. Gen. Health Dist.*, 154 Ohio St. 3d 297, 114 N.E.3d 152 (2018). This case is irrelevant as the Ohio Supreme Court stated specifically that the case does not arise

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under the Ohio Public Records Act. *Id.* at 299. In Ohio, there is a specific statute which states "the records of the coroner . . . including . . . the detailed descriptions of the observations written during the progress of an autopsy and the conclusions drawn from those observations filed in the office of the coroner . . are public records." *Id.* at 300. There is no such statute in Nevada and thus, this article is not relevant to the disclosure of complete, unredacted juvenile autopsy records in Nevada.

LVRJ further cites to the autopsy report of the 1 October shooter Stephen Paddock—specifically that he was not under the influence of any substances and he took his own life.[4] Yet again, this type of information would not be redacted. Suicide is a manner of death and the spreadsheet provided for the manner of death in all the decedents listed.

7. LVRJ Fails to Offer One Reason What Additional Information is Needed to Further a Significant Public Interest.

LVRJ argues that access to unredacted juvenile autopsy reports will somehow assist with public understanding on whether child protectives services is doing their job. To support their argument, LVRJ cites to a Colorado investigation. Opening Brief at 19. In Colorado, there was an investigation in which the news outlet focused on 72 children that were known to Colorado's child welfare system and who died as a result of family abuse or neglect. *Id.* Indeed, the focus of the report is on the state's child welfare system and interaction with the child. The report heavily relied on various Child Fatality Prevention Team Reports.[5] The disclosure of the Child Fatality Prevention Team Report, absent confidential information, is permitted by law in Colorado. *See* C.R.S. 26-1-139(4)(i)(III). In contrast, Nevada law expressly and unequivocally provides that

[4] It is also important to point out that the Coroner was ordered to produce the autopsy report of Steven Paddock. See Eighth Judicial District Court, Case No. A-17-764842-W. More importantly, the Court there determined that the Coroner did not establish by a preponderance of the evidence that any interest in nondisclosure outweighs the strong presumption in favor of public access. *See* Notice of Entry of Order. Also, the Court concluded that any privacy concerns could be addressed by redacting the names and identifying information from the reports. *Id.* In contrast, the names of the individuals here have been provided and the Supreme Court already concluded that the Coroner met its burden under the balancing test.

[5] *See generally* The Failed to Death series and related articles are accessible online https://www.denverpost.com/tag/failed-to-death-series/ (last accessed September 25, 2020).

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information acquired by and records created by a Child Death Review team are confidential. *See* NRS 432B.607. Thus, this argument is not persuasive, as Nevada maintains a statute that directly addresses the records at issue in Colorado.

LVRJ further cites to a Texas article which pertained to the coroner's findings (i.e., cause and manner of death), which have already been disclosed to LVRJ. Opening Brief at 20. Furthermore, unlike Nevada, Texas explicitly recognizes that autopsy reports are subject to public dissemination. *See* Tex. Atty. Gen. Op. 2001-2357. There is simply no Nevada authority or public policy that supports the notion that a juvenile decedent's personal medical and health information is subject to public disclosure.[6]

LVRJ then addresses Clark County and argues that Clark County's child protective services may be suffering from some of the same issues as the other cites' child welfare agencies. To the extent the juvenile autopsy reports reference child protective services or Department of Family Services, that information would not be redacted as it is not personal medical or health information. LVRJ references several juveniles as examples. First, LVRJ notes that Aaron Jones was murdered sometime in January 2017 by his own father after suffering extreme abuse and neglect. Opening Brief at 20. At the time of the request, Jones' autopsy was still pending further investigation. *See* LVRJ 071. Similarly, LVRJ's reference to Dejan Hunt who was found dead in August 2018 also falls outside the scope of the request. Opening Brief at 20. With respect to Aralee Jo Ballance, the spreadsheet provided to LVRJ notes that her death was a homicide stemmed from complications of a non-accidental injury. LVRJ 061. The article cited by LVRJ specifically provides that an allegation of abuse was reported on the first day she was born, but that allegation was unsubstantiated.[7] But, as the Coroner continues to represent, medical and health information specifically related to the cause and manner of death would not be redacted.

[6] Many of the articles cited by Petitioner were also cited by the Amici Brief filed in support of Petitioner with the Nevada Supreme Court in this matter. The Nevada Supreme Court was not persuaded by these articles and neither should this Court be.

[7] https://www.reviewjournal.com/local/local-las-vegas/mother-boyfriend-deny-inflicting-injuries-that-killed-4-month-old-girl/ (Last Accessed October 6, 2020).

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By way of example, Abygaile Bennett died in 2016 as a result of "blunt chest trauma due to assault due to **chronic physical abuse**." LVRJ 068 (emphasis added). As evidenced by the cause of death on the spreadsheet, Abygaile suffered from chronic physical abuse. Likewise, it was determined that Baby Girl Slazar's death was caused by birth asphyxia due to neglect of care of newborn. LVRJ 068. The spreadsheet data provided to LVRJ contains much of the very information it seeks. *See, e.g.*, LVRJ 049 (Dyon Johnson: cause of death blunt head trauma due to child abuse); 051 (Rayea Dawn Forsgren: cause of death abusive head trauma, manner of death homicide); 058 (Aiden James Leach: cause of death abusive head trauma, manner of death homicide); 059 (Devin Isaiah Aguilar, cause of death abusive head trauma, manner of death homicide; Draven Kierstead, cause of death abusive head trauma, manner of death homicide). LVRJ has information regarding the abuse and neglect of the juvenile decedents at its fingertips but has ignored, or refused to analyze, the very information already provided by the Coroner. While it is the Coroner's position that the spreadsheets provide LVRJ with sufficient information, the Coroner agreed to provide LVRJ with redacted autopsy reports so that it can confirm the information already provided to it within the spreadsheets.

In sum, although the LVRJ may articulate how autopsy reports in general are likely to advance that significant public interest, it does not address how the medical and health information unrelated to the decedents' cause of death advances a significant public interest. Most, if not all, of the rationales provided in LVRJ's brief relate to information that the Coroner has already provided or can be provided by the redacted autopsy reports. LVRJ did not meet its burden to show "that the public interest sought to be advanced is a significant one and the information sought is likely to advance that interest." *Clark Cty. Office of Coroner/Med. Exam'r* 136 Nev. at 55. Therefore, since the second prong is not met, "the [medical and health] information should be redacted." *Id.* at 56.

C. ALTERNATIVELY, THE BALANCING OF INTERESTS WEIGHS IN FAVOR OF REDACTION.

Alternatively, in the event the Court concludes that LVRJ has articulated that the redacted medical and health information of the decedents will advance a significant public interest, the

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Court must nonetheless balance the individual privacy interests against the public's interest in access. Courts have recognized that surviving family members retain an interest in the decedent upon passing. *See March v. Cnty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (recognizing a common law right to non-interference with a family's remembrance of a decedent); *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 168 (2004) ("Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."). Indeed, the Supreme Court recently recognized that "Nevada's common law protects personal privacy interests from unrestrained disclosure under the NPRA." *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018). To reach this conclusion, the Court relied on the common law tort of invasion of privacy. *Id.* While it is an issue of first impression in Nevada, California has recognized a decedent's family member's right to assert an invasion of privacy claim. *See Catsouras v. Dep't of Cal. Hwy. Patrol*, 181 Cal.App.4th 856, 874, 104 Cal.Rptr.3d 352, 366 (2010); *see also Montesano v. Donrey Media Grp.*, 99 Nev. 644, 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984) (identifying the elements for a tort of invasion of privacy and relying on *Forsher v. Bugliosi*, 26 Cal.3d 792, 163 Cal.Rptr. 628, 608 P.2d 716 (1980)).

In *Reid v. Pierce County*, 136 Wash.2d 195, 198, 961 P.2d 333, 335 (1998), relatives of deceased persons sued a county for common law invasion of privacy with respect to allegations of appropriation and display of photographs of deceased relatives. In that case, the court discussed the privacy interest in autopsy records and held that "the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the dignity of the deceased." *See also Galvin v. Freedom of Info. Comm'n*, 201 Conn. 448, 461, 518 A.2d 64, 71 (1986) (autopsy reports are not accessible to the general public as information in autopsy reports could cause embarrassment or unwanted attention to the family of the deceased); *Larry S. Baker, P.C. v. City of Westland*, 627 N.W.2d 27, 15 (Mich. App. 2001) (notions of privacy in state law applied to

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deceased individuals and their families and outweighed public interest in accidents and injuries information).

Here, the balancing of interests tips in favor of the individuals' privacy interests at stake as any interest in the private medical and health information unrelated to a decedents' cause of death is minimal. First, LVRJ contends that the sample reports provided contain extensive redactions without any indication of the purported basis of redactions. Opening Brief at 22. When the sample reports were initially provided, it was specifically explained that the redactions pertained to medical and health information unrelated to the death of the decedent, and may include medical and health information related to the mother. LVRJ 088-089. To LVRJ's concerns about child welfare and abuse, each of the samples expressly note that there were not injuries identified on external and internal examination. LVRJ 095-122. While LVRJ contends that substantial portions of the sample reports were redacted, LVRJ provides no basis, let alone any explanation, as to why that information serves a significant public interest as it was not related to the cause of death.

Without any evidence, LVRJ asserts that the autopsy reports may contain information that is critical to assessing Clark County's child protective services. Opening Brief at 23. The list of information LVRJ believes would be provided in an autopsy report includes: factual information about manner of death, information about decedent's history (prior abuse), older injuries, and toxicological information. It bears repeating, the Coroner's position is that all information related to the cause and manner of death would be unredacted. An example may prove helpful for the Court. As indicated with Abygaile Bennett, the Coroner noted she suffered from chronic physical abuse because that was related to the cause of her death. On the other hand, for instance, had Abygaile suffered from congenital heart failure and died as a result, and her prior chronic physical abuse did not play a role in her death, that information would necessarily be redacted as that information would private medical and health information involving a nontrivial privacy interest.

Attempting to justify disclosure of the autopsy reports, LVRJ claims that this information is necessary to provide the public with a greater understanding of how state and local agencies

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protect vulnerable children and the shortcomings of the agencies. It is worth noting that the Coroner is not responsible for protecting vulnerable children. It is the responsibility of the Coroner to investigate death within Clark County that are violent, suspicious, unexpected or unnatural in order to identify and report on the cause and manner of death. Clark County Code § 2.12.060.

Finally, LVRJ asserts that the Coroner's interests are relatively minimal and cannot outweigh the public interest at stake. Opening Brief at 26. This argument is inherently flawed. It is not the Coroner's interest at stake. As the Supreme Court noted, the information contained in the autopsy reports pertain to a nontrivial privacy interest. The balancing test, therefore, pertains to the individual's interest in privacy against the public's interest in access. Then, LVRJ mistakenly contends that the Coroner has not satisfied its burden because its concerns are "non-particularized hypothetical concerns." This misrepresentation, however, directly conflicts with the Supreme Court's finding that the Coroner has, in fact, established a nontrivial privacy interest. As demonstrated by the case law cited above, there is a significant interest in protecting the medical and health information unrelated to a decedent's cause of death. LVRJ has not proved otherwise. Accordingly, the Coroner is entitled to disclose the juvenile autopsy reports in a redacted format as initially proposed.

D. THE CORONER IS ENTITLED TO CHARGE FOR REDACTED AUTOPSY REPORTS.

On appeal, the Supreme Court determined that NRS 239.055 provides a 50-cent cap for a government entity's extraordinary use of personnel and technological resources to prepare the requested information in response to a public records request. *Clark Cty. Office of Coroner/Med. Exam'r*, 136 Nev. at 59, 458 P.3d at 1060 (2020). Accordingly, should LVRJ demand that the Coroner produce redacted autopsy reports, the Coroner is entitled to charge 50-cents per page.[8]

[8] It appears from LVRJ's brief that they only seek unredacted copies of the autopsy reports. As mentioned above, it is the Coroner's position that the spreadsheets have provided sufficient data to LVRJ. Nevertheless, prior to litigation the Coroner did agree to provide the autopsy reports in redacted format. In the event that LVRJ would like the redacted autopsy reports, the Coroner is seeking fees for the preparation of production of such records.

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1. NRS 239.055 is Applicable to this Case.

Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively. *Sandpointe Apts. V. Eighth Jud. Dist. Ct.*, 313 P.3d 849, 853 (2013) (citations omitted). Deciding when a statute operates retroactively is not always a simple or mechanical task. *Id.* at 854. Broadly speaking, courts take a commonsense, functional approach in analyzing whether applying a new statute would constitute retroactive application. *Id.* (citations omitted). Central to this inquiry are fundamental notion of fair notice, reasonable reliance, and settled expectations. *Id.* (citations omitted). Thus, a statute has a retroactive effect when it takes away or impairs vested rights acquired after existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past. *Id.* (citations omitted). In *Sandpointe Apts.*, the court determined NRS 40.459(1)(c) would have a retroactive effect because the trustee's sale occurred before the effective date of the enacted statute, impairing and limiting the rights of the assignee. 313 P.3d at 857.

The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our republic. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Nevada has long viewed retroactive statues with disdain, noting that such laws are odious and tyrannical and have been almost uniformly discountenanced. *Sandpointe Apts.*, 313 P.3d at 858-59 (citing *Milliken v. Sloat*, 1 Nev. 573, 577 (1865). Thus, a statute will not be applied retroactively unless:

> 1. The Legislature clearly manifests an intent to apply the statute retroactively; or
>
> 2. It clearly, strongly, and imperatively, appears from the act itself that the Legislature's intent cannot be implemented in any other fashion.

Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008). In applying the above standard, the *Sandpointe Apts.* court determined that the legislature did not intend for the statute to apply retroactively because: (1) the Legislature provided that the statute would become effect upon passage and approval, which was not enough to overcome the presumption; and (2) nothing in the statute itself demonstrated that the

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Legislature's intent can only be implemented by applying the statute retroactively. 313 P.3d at 858-859. With respect to the second prong, the court found that although application of the statute would have a broader effect and would vindicate its purpose more fully, that is not sufficient to rebut the presumption against retroactivity. *Id.* The court held the newly enacted statute still had the ability to reach a large portion of the population when applied prospectively. *Id.* at 859.

During the 2019 legislative session, Senate Bill 287 ("SB 287") was introduced and made several amendments to the NPRA. In particular, the original bill made the following relevant amendments:

> NRS 239.005 Definitions. As used in this chapter, unless the context otherwise requires:
>
> 1. "Actual cost" means the direct cost ~~related to the reproduction~~ *incurred by a governmental entity in the provision* of a public record, *including, without limitation, the cost of ink, toner, paper, media and postage*. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record, *including, without limitation, any overhead costs of the governmental entity and any labor costs incurred by a governmental entity in the provision of a public record.*
>
> NRS 239.052 Fees: Limitations; waiver; posting of sign or notice.
>
> 1. Except as otherwise provided in this subsection, a governmental entity may charge a fee for providing a copy of a public record. Such a fee must not exceed the actual cost to the governmental entity to provide the copy of the public record unless a specific statute or regulation sets a fee that the governmental entity must charge for the copy. A governmental entity shall not charge a fee for providing a copy of a public record if a specific statute or regulation requires the governmental entity to provide the copy without charge.

See SB 287 (As Introduced). Additionally, SB 287 provided for the repeal of NRS 239.055 in its entirety. *Id.* By repealing NRS 239.055, and adding language to NRS 239.005(1) that expressly excluded "labor costs" from the definition of "actual costs," SB 287, as introduced, would have eliminated any argument that public entities could recoup labor costs. The initial provisions of SB 287 also included language that the bill would have applied to pending actions as well as to actions filed on and after October 1, 2019. *Id.*

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SB 287 was referred to the Senate Committee on Finance and the Committee on Finance heard and passed amendments to SB 287 on May 31, 2019. *See* Hearing on SB 287 Before the Senate Committee on Finance, 80 Leg. (Nev. May 31, 2019). Senate Amendment No. 1075 modified the proposed changes to NRS 239.005 as follows:

> NRS 239.005 Definitions. As used in this chapter, unless the context otherwise requires:
>
> 1. "Actual cost" means the direct cost ~~related to the reproduction~~ *incurred by a governmental entity in the provision* of a public record, *including, without limitation, the cost of ink, toner, paper, media and postage*. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record~~, *including, without limitation, any overhead costs of the governmental entity and any labor costs incurred by a governmental entity in the provision of a public record*~~.

Senate Amendment No. 1075 to SB 287 (Nev. June 1, 2019). There were no changes made to the repeal of NRS 239.055. *Id.* The Senate Committee on Finance, however, also modified the application of SB 287 to apply to all actions filed on or after October 1, 2019, which eliminated the immediate application of SB 287. *Id.* In other words, the Legislature expressly rejected the notion that the provisions of SB 287, including the repeal of NRS 239.055, would apply retroactively.

Amendment No. 1075 passed the Senate, and Senators Kieckhefer and Scheible then presented the first reprint of SB 287, which included the changes made by Senate Amendment No. 1075, to the Assembly Committee on Government Affairs. *See* Hearing on SB 287 Before the Assembly Committee on Government Affairs, 80 Leg. (Nev. June 3, 2019).[9] In particular, Senator Scheible discussed Amendment No 1075 in relation to NRS 239.005:

> …[W]e've tried to strike a balance here on Section 3, Subsection 1 to say that a government agency can recoup the costs that are actually incurred in procuring the records, so it spells out

[9] The minutes of the Hearing on SB 287 Before the Assembly Committee on Government Affairs on June 3, 2019 are not yet available. Therefore, the citations to this hearing reference the video of the hearing, made available at https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6505/Overview (last accessed June 10, 2020).

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> specifically ink, toner, paper, media and postage and it specifically exclude[d] any costs that would be incurred regardless of whether or not they had to procure the record…***[O]ne of the areas we had difficulty with was whether or not overhead, and personnel, and labor costs should be included in the definition of an actual cost***. And so you'll notice that Section 3, Subsection 1 does not address that question specifically because it was our determination that in some cases ***it's appropriate*** and in a lot of cases it's not. It's certainly not appropriate for a government agency to depend on fees for providing public records in order to pay their power bill and in order to make any portion of their annual budget. ***However, when a public record request comes in that is incredibly onerous, that is incredibly large*** – we heard testimony on the Senate side about organizations that for legitimate reasons were requesting tens of thousands of documents and cities, counties, local jurisdictions had to ***call their employees in over the weekend*** to work a Saturday or they had to ***invest in another printer*** to leave the copier and copy room available for all of their daily functions and still be able to complete a project of copying ten thousand pages of some of their records. ***And so we want to make sure they're able to account for those costs*** and that's why we came to the decision we did in Section 3, Subsection 1.

Id. at 6:29-9:15 (emphasis added).

Based on this representation, Assemblyman Carrillo inquired on the limitation of the production of records in relation to costs. *Id.* at 34:00 – 35:30. In response, Senator Kieckhefer explained:

> The government under this section will continue, as they are now, to be able to charge the requester to recover their actual cost. As Senator Scheible indicated, there are some terms that are not included in this definition [Section 3, Subsection 1], we would leave that to the process itself and the indication of those fees that can be charged relating to what is reasonable. But, the purpose is to say if there is a ***broad request that requires a lot of resources of the governmental entity, they can recoup those costs so that the cost is not passed on to the tax payers more broadly*** but are the responsibility of the requester.

Id. (emphasis added). Later, Assemblyman Smith pressed for more clarity on when a public entity could charge. *Id.* at 49:00-50:50. In asking his question, Assemblyman Smith wanted to know the line between what constitutes an "extraordinary" request of public resources and what does not. *Id.* Senator Kieckhefer responded:

> I think you'll notice at the back of the bill at page 11, we're

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> striking NRS 239.055 relating to extraordinary use, and we are hinging the ability to recoup costs on actual costs so that ***any*** actual costs incurred by an extraordinary request would ***still*** be able to be recouped under 239.010 [sic] ***which is their ability to charge fees to recoup those costs***. [10] So we're trying to ***simplify*** it by not having that arbitrary line of what is extraordinary and what's not. ***Whatever the cost is, they can recover***.

Id. (emphasis added). Ultimately, the Assembly Committee on Government Affairs passed SB 287. *See* SB 287 (As Enrolled).

The Legislative Counsel's Digest within SB 287 also sheds light on the Legislature's intent of SB 287. Explaining the provisions of SB 287, the summary provides:

> With certain exceptions, existing law prohibits a governmental entity from charging a fee for providing a copy of a public record that exceeds the actual cost to the governmental entity to provide the copy. (NRS 239.052) Section 3 of this bill clarifies that the actual cost to a governmental entity includes such direct costs as the cost of ink, toner, paper, media and postage. Section 13 of this bill eliminates the authority of a governmental entity to charge an additional fee for providing a copy of a public record when extraordinary use of personnel or resources is required. (NRS 239.055)
>
> . . .
>
> Section 11 of this bill provides that ***the provisions of the bill*** apply to actions filed on and after October 1, 2019, which is the effective date of this bill.

See SB 287. The only interpretation that can be obtained from this language is that SB 287, which includes the repeal of NRS 239.055, applies only to actions filed on and after October 1, 2019.

The same reasoning and logic used in *Sandpointe Apts.* must be used in this case. In an attempt to apply Senate Bill 287 retroactively, LVRJ will likely focus on the preamble and purposely ignore the express language regarding the application of the amended provisions. *See* Opp. at 11-13. Indeed, Section 11 of SB 287 explicitly provides:

> The amendatory provisions of this act apply to **all actions** filed **on or after October 1, 2019**.

[10] The ability to charge is in NRS 239.052.

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(emphasis added). By this very language, it is clear that the amendments, including the repeal of NRS 239.055, only applies to actions filed on or after October 1, 2019 and should not be applied retroactively.

Determining the extent to which existing legislation is repealed is ultimately an issue of statutory construction. Norman J. Singer, Sutherland Statutory Construction § 23:6 (7th ed. 2019); *see also Chapman Indus. v. United Ins. Co. of Am.*, 110 Nev. 454, 456–57, 874 P.2d 739, 740 (1994). Courts find that when a legislature passes a repealing act and does not substitute anything else for it the effect is to obliterate the act as if it had never been passed. *Id.* The intent of the legislature to set out the original act or section as amended is most commonly indicated by a statement that the original law is amended "to read as follows." *Id.* at § 23:12. This rule of construction is not absolute and does not apply when the intent of the legislature is otherwise. *Id.*

The legislative history demonstrates that the amendment to NRS 239.005 and repeal of NRS 239.055 were a cohesive revision to clarify the law on what a government entity could charge in procuring records in response to a public record request. The Legislative Counsel's Digest discusses the cost provisions, i.e., amendment to NRS 239.005 and repeal of NRS 239.055 together as a unified modification to the NPRA. The Legislative Counsel's Digest further indicates that the provisions of SB 287, including Section 13 (which repealed NRS 239.055) would not go into effect until October 1, 2019 and only applied to matters filed on or after October 1, 2019.

Moreover, as initially proposed, SB 287 not only repealed NRS 239.055 but also explicitly precluded a governmental agency from recovering overhead costs such as labor. The Legislature, however, recognized the detriment government agencies were likely to face if requests for records were broad and burdensome for the agency to produce and expressly rejected the language prohibiting an agency's ability to recoup labor costs. *McKay v. Bd. of Cty. Comm'rs*, 103 Nev. 490, 492 n.2, 746 P.2d 124, 125 (1987) (holding that the failure to adopt proposed language in a bill is evidence of the Legislature's intent to the contrary). Testimony from the Senators demonstrate that the repeal of NRS 239.055 was made in conjunction with

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amendments to NRS 239.005, resulting in the repeal of NRS 239.055 applying to matters filed on or after October 1, 2019.

Any other interpretation would produce absurd, unreasonable results. *See Rural Tel. Co. v. Pub. Utilities Comm'n,* 133 Nev. 387, 389, 398 P.3d 909, 911 (2017). The immediate repeal of NRS 239.055 creates a gap within the statutory scheme and allowed requesters a period of time to submit broad, burdensome requests without incurring labor costs. That is, if the "amendatory" provisions of SB 287 only apply to matters filed on or after October 1, 2019, including the modifications made to NRS 239.005, but the repeal of NRS 239.055 immediately went into effect the day Governor Sisolak signed the bill, government agencies would have been precluded from charging for extraordinary use of personnel for any pending case and newly filed action through October 1, 2019. Nothing in the legislative history reflects this intent. Rather, Senator Kieckhefer's testimony regarding the amendment to NRS 239.005 and repeal of NRS 239.055 illustrates the intent to simplify the law to allow government agencies to recoup costs they incur, including labors costs in certain instances. In other words, the repeal of NRS 239.055 was based upon, and in conjunction, with the amendment to NRS 239.005. With this legislative history, the Court must conclude that the Legislature intended for the repeal of NRS 239.055 and amendment to NRS 239.005 to take effect simultaneously—on matters filed on or after October 1, 2019. Therefore, NRS 239.055 applies to the instant case.

2. <u>The Coroner is Entitled to 50-Cents Per Page for its Extraordinary Use in Produce Records.</u>

a. The Coroner will incur extraordinary use of its personnel.

Prior to the recent amendment, the NPRA permitted government agencies to charge an additional fee in preparing records responsive to public record requests when the agency exerts extraordinary use of personnel. NRS 239.055. "Extraordinary use" is undefined within the NPRA. Accordingly, this Court must apply the plain and ordinary meaning of "extraordinary use" to NRS 239.055. *In re Resort at Summerlin Litig.*, 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006). "Extraordinary" is defined as "[b]eyond what is usual, customary, regular, or common." Black's Law Dictionary (11th ed. 2019). "Use" within the context of NRS 239.055 refers to the

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use of personnel or technological resources when preparing records in response to a request. NRS 239.055; *Clark Cty. Office of Coroner/Med. Exam'r*, 136 Nev. at 59, 458 P.3d at 1060. Thus, for purposes of NRS 239.055, "extraordinary use" refers to an agency's unusual, irregular, or uncommon reliance on personnel or technological resources in preparing records responsive to a request.

On August 27, 2002, the Nevada Attorney General issued an opinion regarding Washoe County's questions about the fees to be charged in copying public records, specifically with extraordinary staff time. *See* Op. Nev. Att'y Gen. No. 2002-32. Relying on the legislative history of Assembly Bill 214 (1997), the Attorney General determined the authority granted to a governmental agency to recover actual costs for the "extraordinary use" of personnel in retrieving and copying public records may have, at least in part, been intended to make the agency whole in responding to nuisance inquiries or any inquiry that takes up an unusual amount of staff time. *Id.* at p. 245. In defining extraordinary use, the Attorney General found that public records requests should generally take no more than 30 minutes to respond and anything over the 30-minute mark was extraordinary. *Id.*

Here, the Coroner previously estimated that each Autopsy Report is approximately ten pages and it would take an hour to redact approximately 4-5 Autopsy Reports. *See* Exhibit A, ¶ 14. There are approximately 680 Autopsy Reports, and 150 external examinations, in response to LVRJ's request. *See* LVRJ 048-071. Accordingly, it would take the Coroner, at a minimum, 166 hours to review, redact, and quality control the requested records. This certainly surpasses the 30-minute benchmark and qualifies as extraordinary use of personnel as it would take a single person, on a full-time basis, over a month to prepare the requested records.

If this Court rejects the 30-minute benchmark announced in the Attorney General Opinion, it is nevertheless undeniable that the Coroner will exert extraordinary use of its personnel in producing the 830 documents (approximately 8, 300 pages) to LVRJ. The NPRA requires an agency to respond to the requester within five business days. NRS 239.0107. It then must follow that the reasoning of the 5-day rule is the Legislature determined that records can generally be provided to a requester within five business days, and if not, the requester should be

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given a date when the records can be produced. NRS 239.0107. Following this logic, if preparing records responsive to a request takes longer than the five business days allotted in NRS 239.0107(1), then it requires extraordinary use. Even adopting a five-day benchmark, the Coroner will utilize extraordinary use of its personnel in providing 830 documents in response to LVRJ's public record request.

a. The 50-Cent Fee is Reasonable and Actually Incurred.

The same Attorney General Opinion mentioned above explains that the extraordinary use of personnel should be based on the actual hourly wage of the lowest compensated individual reasonably available and qualified to respond to the public records request. *Id.* at 246. It was the Attorney General's belief that this standard comports with the definition of "actual costs" in Chapter 239 of NRS as being "the direct cost related to the reproduction of a public record." NRS 239.005(1). The hourly rate of lowest compensated employee who is qualified to prepare and produce the requested records is $45.00. *See* Exhibit A, ¶ 14. Furthermore, the Coroner typically charges $1.00 per page per copy in accordance with NRS 239.052. *Id.*, ¶ 13. The Supreme Court, however, concluded that NRS 239.055 caps an agency's fee to 50-cents per page. *Clark Cty. Office of Coroner/Med. Exam'r*, 136 Nev. at 59, 458 P.3d at 1060 (2020). Here, 50-cents per page is reasonable because the amount that the Coroner would actually incur in responding to LVRJ's request would be $7,470.00 for the staff time preparing the records and approximately $8,300.00 for the copies of the records. The 50-cent per page limitation allows the Coroner to recover a maximum of $4,150.00.[11] Thus, the Coroner is entitled to $4,150.00 should LVRJ demand that the Coroner produce all redacted juvenile autopsy reports.

IV. CONCLUSION

Based on the foregoing, Coroner requests the Court conclude that LVRJ did not satisfy its burden under the established balancing testing in demonstrating that the private medical and health information unrelated to the cause of death advances a significant public interest. Even if the Court somehow determines that LVRJ did meet its burden, upon the balancing of interests, it

[11] This number is an estimation of the 830 reports at approximately 10 pages per report.

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is clear that the individuals' privacy interests in their personal medical and health information outweigh any public interest in access. Finally, should LVRJ request that the Coroner produce the redacted autopsy reports, the Coroner is entitled to charge 50-cents per page.

Dated this 7th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S ANSWERING BRIEF** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of October, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[12]

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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[12] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).