IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGARDO P. YUSI; KEOLIS TRANSIT SERVICES, LLC,

Petitioners,
vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY ALLF, DISTRICT JUDGE,
Respondents,

and

HEATHER FELSNER,
Real Party in Interest.

Docket No.: 82625

Electronically Filed
Jul 01 2021 07:36 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

REAL PARTY IN INTEREST HEATHER FELSNER'S ANSWER TO PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed.

1. Real party in interest Heather Felsner is an individual and is not using a pseudonym.

2. Heather is currently represented by John B. Shook, Esq., Robert L. English, Esq., and the law firm of Shook & Stone in the district court and before the Court; and is represented by Tom W. Stewart, Esq., Ryan T. O'Malley, Esq., and The Powell Law Firm before this Court.

Dated this 1st day of July 2021.

/s/ Tom W. Stewart
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I. INTRODUCTION

Real party in interest Heather Felsner can audio record and have an observer present at her NRCP 35 neuropsychological exam. NRS 52.380 grants Heather these substantive rights, and the statute preempts any conflicting provisions of NRCP 35. Petitioners Keolis Transit Services, Inc., and Edgardo Yusi (collectively Keolis) disagree, and ask this Court to rewrite, misapprehend, or misapply the plain text of the statute. But, because the statute is constitutional, the discovery commissioner and the district court properly enforced it. Thus, the Court should deny the petition and hold that NRS 52.380 is constitutional.

Additionally, no dispositive threshold question exists here that separates the merits of this petition from the others pending before this Court. Heather properly presented her objections to her NRCP 35 exam to Keolis, the discovery commissioner, and the district court, consistent with EDCR 2.34 and the binding caselaw from this Court. Therefore, in denying Keolis's petition, the Court should also hold that *Valley Health Systems, LLC v. Eighth Judicial District Court*, 127 Nev. 167, 252 P.3d 676 (2011) does not extend to meet-and-confer conferences held pursuant to EDCR 2.34.

II. THE COURT SHOULD ENTERTAIN, BUT DENY, THE PETITION

The Court should entertain this petition because the conflict between NRCP 35 and NRS 52.280 is "an important issue of law [that] needs clarification and public policy is served by this court's invocation of its original jurisdiction" to resolve the conflict. *Walker v. Eighth Judicial Dist. Court*, 120 Nev. 815, 819, 101 P.3d 787, 790 (2004). Further, the interplay between EDCR 2.34 and *Valley Health* is a matter of "judicial economy and sound judicial administration [that] militate[s] [in favor of] issuing the writ." *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006).

But, the Court should ultimately deny the petition because the conflicts are easily resolved by examining the plain text, legislative history, and rationale behind NRS 52.380 and EDCR 2.34. *See Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013) ("[When a] statute's language is clear and unambiguous, this court will enforce the statute as written."); *Segovia v. Eighth Judicial Dist. Court*, 133 Nev. 910, 915, 407 P.3d 783, 788 (2017) (denying writ petition based upon legislative history).

III. ISSUES PRESENTED FOR REVIEW

1. Whether every conceivable objection in a discovery dispute must be explicitly raised during the informal meet-and-confer process in order to be considered by the discovery commissioner, the district court, and this Court.

2. Whether the plain text or legislative history NRS 52.380 requires good cause or permits the district court any discretion regarding audio recording or observers to an NRCP 35 exam.

3. Whether the substantive rights created by NRS 52.380—to record and to have an observer, including an attorney, present at a party's own NRCP 35 exam—supersede the conflicting strictures of NRCP 35 prohibiting such practices.

IV. STANDARDS OF REVIEW

Statutory interpretation is reviewed de novo. *Wilson v. Pahrump Fair Water, LLC*, 137 Nev., Adv. Op. 2, 481 P.3d 853, 856 (2021). Likewise, the district court's legal conclusions regarding court rules and rules of civil procedure are reviewed de novo. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012).

V. BACKGROUND AND CONTEXT

Background and context regarding NRCP 35 exams and legislative enactment of NRS 52.380 demonstrates the propriety of the district court's decision below and, thus, may be helpful in the Court's ultimate resolution of this original proceeding.

A. Compulsory NRCP 35 exams are not independent but, rather, inherently adversarial.

NRCP 35 provides that a court "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." NRCP 35(a)(1). Although NRCP 35 exams are commonly referred to as "independent medical exams," that phrase is a misnomer; indeed "[t]hese examinations are generally performed by a defense-selected, defense-paid doctor, not a court-ordered independent expert." *Davanzo v. Carnival Cruise Lines*, 2014 WL 1385729, at *1-2 (S.D. Fla. Apr. 9, 2014) (analyzing federal analog). As such, "it is somewhat artificial and unrealistic to describe such an exam as an [independent medical exam]. Instead, it is more accurate to view the examination as a compulsory examination" which is "more akin to a litigant attending a deposition than a medical patient seeing his doctor." *Id*. As a result, many courts recognize that the examination is not independent but, rather, is "inextricably intertwined with the adversarial process." *Goggins v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 1660609, at *3 (M.D. Fla. May 3, 2011).

B. The Legislature enacted substantive safeguards to protect vulnerable litigants during NRCP 35 exams.

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

However, despite the recommendations, the final adoption of NRCP 35 modified those safeguards in two crucial ways. First, the rule only allows audio-recording at the court's discretion "for good cause shown," rather than as a matter of right.[1] Second, the rule prohibits a "party's attorney or anyone employed by the party or the party's attorney" from serving as an observer of the examination, and

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

prohibits any observers at a "neuropsychological, psychological, or psychiatric examination, [unless] the court orders otherwise for good cause shown."[2]

Because the revisions to NRCP 35 omitted these crucial safeguards, the 2019 Legislature enshrined those substantive rights in statute. *See, e.g.*, Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of G. Galloway) ("The origins of this bill flow from a committee formed by the Supreme Court of Nevada two years ago to review, revise, and update our Nevada Rules of Civil Procedure—the rules that govern all civil cases.").

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

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

The result was NRS 52.380.[3] The statute mandates that, as a matter of right, a party may have an observer, including a party's attorney, present at her examination. *See* NRS 52.380(1)-(2). Further, the statute provides that the observer may, as a matter of right, "make an audio or stenographic recording of the examination." NRS 52.380(3). In addition to those substantive safeguards, the statute includes several procedural rights, including the right for an observer or the

---

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

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

examiner to suspend the examination and the ability to seek a protective order. *See* NRS 52.380(4)-(6).

VI. FACTS AND PROCEDURAL HISTORY OF THIS PETITION

A. The fall

Heather fell down the stairs of a coach operated by Keolis and Yusi. 1 Petitioners' Appendix (PA) 246. Heather suffered severe brain injuries due to the fall. 1 PA 246. Keolis and Yusi have conceded violations of applicable safety standards during deposition. 1 PA 246.

B. The meet and confer

More than two years after Heather filed suit, Keolis requested an NRCP 35 exam. *See, e.g.*, 1 PA 77 (outlining procedural history). In response, the parties conducted a meet and confer pursuant to EDCR 2.34(d)[4] in which Heather objected to the NRCP 35 exam taking place. 1 PA 2.

C. The motion practice

Following the unsuccessful meet and confer, Keolis filed a motion to compel an NRCP 35 exam with the discovery commissioner. 1 PA 1-66. Heather

[4] EDCR 2.34(a) provides that "[u]nless otherwise ordered, all discovery disputes . . . must first be heard by the discovery commissioner," and EDCR 2.34(d) mandates, in relevant part that discovery motions may not be filed without an affidavit "setting forth that after a discovery dispute conference . . . counsel have been unable to resolve the matter satisfactorily . . . [m]oving counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was [and was not] resolved . . . and the reasons therefor." That discovery dispute conference is colloquially known as a "meet and confer."

objected, arguing, among other things, that Keolis's proposed doctor should be precluded from conducting the exam because the doctor refused to allow a statutorily-permitted observer in the NRCP 35 exam. 1 PA 67-113. In doing so, Heather explained that NRS 52.380 preempted NRCP 35 and, thus, that an observer was allowed at any NRCP 35 exam. 1 PA 77.

Heather prevailed before the discovery commissioner, who concluded, among other things, that NRS 52.380 "involves and affects a substantive right" and that the parties' meet and confer complied with EDCR 2.34. 1 PA 227-36. Keolis then objected to the district court, rehashing the arguments raised before the discovery commissioner. 1 PA 237-44. Heather opposed the objection, again outlining her concerns regarding the NRCP 35 exam and NRS 52.380's preemption of NRCP 35. 1 PA 245-2 PA 268. The district court overruled Keolis's objection and affirmed the discovery commissioner's report and recommendation. 2 PA 274-76. This petition follows.

VII. LEGAL ARGUMENT

A. Heather properly preserved her argument regarding the constitutionality of NRS 52.380.

To begin, Keolis argues, without citing any relevant authority, that attorneys must present every conceivable objection during the informal meet and confer process in order to preserve those arguments for later review by the discovery

commissioner, the district court, or this Court.[5] Edgardo Yusi & Keolis Transit Services, LLC's Petition for Writ of Mandamus or Prohibition (Pet.) at 8-11. The dearth of citation is telling—no support exists for Keolis's argument, and Keolis's failure to present any cogent argument or relevant authority demonstrates that the Court need not consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

However, even if the Court were to consider Keolis's argument, the result would be the same. Keolis's argument fundamentally misunderstands the interplay between the meet and confer process—which is conducted between attorneys *prior* to judicial intervention—and the need to present discovery arguments to the discovery commissioner—which *is* judicial intervention allowing the lower tribunal the first opportunity to rule upon the unresolved discovery dispute.

1. *Valley Health* does not apply to the meet and confer process.

Parties need not raise every conceivable objection in a discovery dispute during an informal meet and confer in order to have their arguments considered by the discovery commissioner, the district court, and this Court. Nothing in *Valley*

[5] Ironically, Keolis failed to mention the unconstitutionality of NRS 52.380 until its reply brief before the discovery commissioner. *Compare* 1-66*, with* 1 PA 114-203. The failure to present an argument in a motion—and only doing so on reply—forfeits that argument. *See, e.g.*, *LaChance v. State*, 130 Nev. 263, 276 n.7, 321 P.3d 919, 929 n.7 (2014) (declining to address an argument raised for the first time on reply).

Health or in EDCR 2.34(d) requires it; rather, parties are merely required to attempt to resolve discovery disputes without court intervention and, if unable to do so, to provide all relevant argument first to the discovery commissioner. Heather complied with both of those requirements. Thus, the Court should reject Keolis's first argument.

The meet and confer process is intended to be a good-faith means of reducing motion practice rather than a procedural trap. Because "[d]iscovery is supposed to proceed with minimal court involvement," *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 297, 301 (D. Nev. 2019),[6] parties are required to meet and confer with each other prior to filing discovery motions, including those seeking to compel NRCP 35 exams. EDCR 2.34(d). The meet and confer is an "informal negotiation" between lawyers, *see Cardoza v. Bloomin' Brands, Inc.*, 141 F. Supp. 3d 1137, 1145 (D. Nev. 2015), in which the attorneys ultimately attempt "[t]o resolve the discovery dispute," and, if they are unable to do so, provide an affidavit detailing "what was [and was not] resolved . . . and the reasons therefor." EDCR 2.34(d). At bottom, the aim of the process is simply to see what can be

[6] In the federal court system, "the procedural interaction between a magistrate judge and a district court judge is similar to the interaction between the discovery commissioner and the district court." *Valley Health*, 127 Nev. at 173 n.8, 252 P.3d at 680 n.8. Additionally, EDCR 2.34 and its federal analog, United States District Court, District of Nevada Local Rule 26-6(c), are substantially similar. Thus, the Court should consider these cases as persuasive. *See Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

resolved prior to seeking judicial intervention. *See Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 120 (D. Nev. 1993). To that end, "litigants should not expect courts to look favorably on attempts to use the prefiling conference requirements as procedural weapons." *V5 Techs*, 334 F.R.D. at 302.

If the parties cannot resolve their discovery dispute informally, then they must file their discovery motions and raise all relevant discovery arguments before the discovery commissioner to give the "lower tribunal" the first opportunity to decide the issue, which is consistent with the purpose of having a discovery commissioner. *Valley Health*, 127 Nev. at 173, 252 P.3d at 679-80. If a party fails to raise an argument before the discovery commissioner, the party cannot raise that argument to the district court by way of objection to the discovery commissioner's report and recommendation. *Id.* The requirement to raise issues before the discovery commissioner affords litigants due process rights to have notice and an opportunity to be heard on the issues relevant to their discovery dispute. *See, e.g.*, Kevin Koller, *Deciphering De Novo Determinations: Must District Courts Review Objections Not Raised Before A Magistrate Judge?*, 111 Colum. L. Rev. 1557, 1595 (2011) (in requiring issues be raised first before federal magistrates, "Congress was attuned to the need to provide litigants due process, perhaps intimating that, as a statutory matter, courts should err on the side of preserving

due process"); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard.").

Here, Heather complied with EDCR 2.34(d) by conducting a meet and confer process with Keolis prior to any judicial intervention. 1 PA 2. During the meet and confer, Heather detailed many of her objections to the proposed NRCP 35 exam, which allowed Keolis the opportunity to learn that the exam would not be compelled prior to seeking judicial intervention irrespective of the conditions of that exam. 1 PA 2. Heather then complied with *Valley Health* by raising her arguments against compelling her NRCP 35 exam first before the discovery commissioner, and then before the district court. 1 PA 67-113 (discovery commissioner); 2 PA 250-55 (district court). Keolis was given an opportunity to respond to all of Heather's arguments before the discovery commissioner and the district court, and therefore had due process to respond to Heather's objections to the NRCP 35 exam. After considering the parties' arguments on the issues underlying this petition, the discovery commissioner and the district court both rejected Keolis's attempts to expand EDCR 2.34(d) and *Valley Health* beyond their plain text and underlying purpose. This Court should do the same and deny Keolis's petition.[7]

[7] Additionally, even if *Valley Health* did extend to the meet and confer process, this Court could still consider Heather's separation-of-powers argument because it is of a constitutional nature. *See, e.g.*, *Desert Chrysler-Plymouth, Inc. v. Chrysler*

B. NRS 52.380 does not require good cause and does not permit the district court any discretion.

Next, Keolis makes a fleeting reference to the constitutional-avoidance canon and invites the Court to rewrite NRS 52.380 to include a de facto "good cause" standard or to permit the district court discretion to allow an observer. Pet. at 11-16. "But, a court relying on [the constitutional-avoidance canon] still must interpret the statute, not rewrite it." *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018). Thus, the argument fails, and the Court should reject it.

Keolis's argument asks the Court to rewrite NRS 52.380 to allow the district court, not the examinee, to determine whether an observer may be present at the exam or whether the examinee may record the exam. Pet. at 11-16. "That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). Rather, the canon requires the Court to choose between two *plausible* interpretations of the statute so as to avoid those problems. *Degraw*, 134 Nev. at 333, 419 P.3d at 139.

Corp., 95 Nev. 640, 600 P.2d 1189 (1979) (considering separation-of-powers argument not raised before the district court).

But NRS 52.380 is not ambiguous, and Keoli's proposed interpretation is not plausible[8] because it asks the Court to interpret NRS 52.380 as a word-for-word copy of NRCP 35, the rule that the statute was *explicitly enacted to supersede*. "Surely, if the Legislature intended such an unusual distinction, it would have said so explicitly, but it did not." *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 755, 334 P.3d 408, 417 (2014). Because the Court can "presume that [the] legislature says in a statute what it means and means in a statute what it says there," *see BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004), and the absence of any burden or any discretion being afforded to the district court demonstrates that no such requirement exists, *see* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012), the Court can safely disregard Keolis's argument. In doing so, the Court should deny Keolis's petition.

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[8] Keolis's argument regarding discretion being afforded to the district court—whether directly or as a result of a purported ambiguity with the statute's use of the word "may"—is also non-sensical. "Discovery is supposed to proceed with minimal court involvement," *V5 Techs.*, 334 F.R.D. at 301, and NRS 52.380 was enacted, in part, to "keep[] us out of court, and . . . keep[] these cases moving." *See* Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of G. Bochanis). Because the Court should avoid an interpretation that reaches an absurd or unreasonable result, *see General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995), and the supposed ambiguity is belied by the statute's legislative history, *Taylor v. Truckee Meadows Fire Prot. Dist.*, 137 Nev., Adv. Op. 1, 479 P.3d 995, 1000 (2021) (looking to legislative history to resolve ambiguity), the Court can disregard Keolis's illogical argument.

C. NRS 52.380 is a substantive rule that preempts NRCP 35.

Finally, Keolis attacks NRS 52.380 directly by arguing the statute—explicitly passed to create rights for examinees in NRCP 35 exams—is actually procedural rather than substantive. Pet. at 17-22. This, too, fails—the plain text and legislative history of the statute demonstrate that its relevant portions are substantive, while the relevant caselaw and statute's presumptive constitutionality further demonstrate that the Court should deny Keolis's petition.

1. NRS 52.380 creates a substantive right to record and have observed one's own independent medical exam.

A substantive rule or statute is one that "creates duties, rights and obligations," while a procedural rule or statute merely "specifies how those duties, rights, and obligations should be enforced." *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1811 (2019); *see also* 1 James W. Moore, *Moore's Federal Practice* § 1.05[2][b], at 1-29 (3d ed. 2016) ("Substantive rights are rights established by law. The term 'substantive' does not mean rights that are 'important' or 'substantial,' but rather those that have been conferred by the Constitution, by statute, or by the common law."). A substantive statute supersedes a conflicting procedural statute or court rule. *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983).

The statute's plain language and legislative history confirm that NRS 52.380 creates a right to record and have observers, including an attorney, present at one's

own NRCP 35 exam. Thus, NRS 52.380's substantive provisions preempt NRCP 35's conflicting provisions.

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

"When the language of a statute is plain and unambiguous, [the Court] should give that language its ordinary meaning and not go beyond it." *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

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

Thus, the Court need not go beyond the statute's plain text to determine that those plainly substantive portions of the statute—NRS 52.380(1)-(3)—create the right to record and have observed one's own psychological, neuropsychological, or

psychiatric independent medical exam that supersede the conflicting portions of NRCP 35. Accordingly, because the district court adopted this rationale, the Court should exercise its discretion to affirm the district court's order.

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

Although the plain text of NRS 52.380 resolves this original proceeding, the statute's legislative history further confirms that the right to record and to have observers present are, and were intended to be, substantive rights that supersede NRCP 35.

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

Here, the legislative history explicitly states that NRS 52.380 was enacted to provide a substantive right to record and to have observers in one's own exam. Indeed, the Legislature considered arguments involving the substantive nature of NRS 52.380, and proponents of the bill outlined the necessity of providing

substantive rights to parties undergoing independent medical exams that did not exist prior to the statute's enactment:

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

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

> The reason we are before you today is because [A.B. 285] protects substantive rights. This is not a procedural rule, which you would usually find within our [Nevada Rules of Civil Procedure] . . . This bill . . . involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney.

See id. (statement of G. Bochanis).

Finally, the legislative history reveals that, although members of the committee tasked with recommending revisions to NRCP 35 for the 2019 overhaul of Nevada's Rules of Civil Procedure voted 7-to-1 to provide the substantive rights now embodied in NRS 52.380, the changes were not adopted in the 2019 update to the rules. *See id.* The failure to include the substantive protections within

NRCP 35 necessitated the proposal, and eventual enactment, of what is now NRS 52.380.

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

2. NRS 52.380 is presumptively constitutional.

Although legislation that violates the separation of powers is unconstitutional, *see Comm'n on Ethics v. Hardy*, 125 Nev. 285, 299, 212 P.3d 1098, 1108 (2009), all statutes are presumed to be constitutional and "every possible presumption will be made in favor of the constitutionality of a statute." *List v. Whisler*, 99 Nev. 133, 137-38, 660 P.2d 104, 106 (1983). In other words,

"unless it be demonstrated that there is clearly no rational and legitimate reason for the [enactment of the statute], [this Court] must uphold the law." *Mengelkamp v. List*, 88 Nev. 542, 545, 501 P.2d 1032, 1034 (1972); *see also* Michael L. Stokes, *Judicial Restraint and the Presumption of Constitutionality*, 35 U. Tol. L. Rev. 347, 372-73 (2003) ("While the fundamental principle of judicial review dictates that the judiciary must have the last word in constitutional matters, the other branches consider the matter first, and their conclusions deserve deference.").

Here, ample evidence of the rational and legitimate reasons for NRS 52.380's enactment further supports the statute's presumptive constitutionality. The Legislature heard testimony detailing the need for substantive safeguards for litigants undergoing NRCP 35 exams and the specific safeguards that were necessary to protect the litigants during those exams. The safeguards discussed in that testimony are now embodied as the substantive provisions of NRS 52.380. And, while this Court certainly has the last word in the constitutionality of the statute, the Legislature had the first word, and their conclusions regarding NRS 52.380 deserve deference. As a result, this Court should conclude that NRS 52.380's substantive provisions regarding the right to record and the right to have an observer at an NRCP 35 exam are constitutional.

3. The caselaw cited by Keolis further demonstrates the constitutionality of NRS 52.380.

The Nevada caselaw and statute cited by Keolis regarding the substantive-or-procedural debate further demonstrates the futility of their argument against the constitutionality of NRS 52.380. Indeed, where, as here, the Legislature conferred a substantive right, the statute was upheld. *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (1988) (conferring a substantive right to voir dire); NRS 41.085 (conferring substantive right to pursue wrongful death causes of action).

Further, as the partial dissent in *Berkson v. LePome*, 126 Nev. 492, 509, 245 P.3d 560, 571 (2010) (Pickering, J., concurring in part and dissenting in part) noted, the "conventional rules of statutory construction say" that statutes that may implicate the separation of powers "should survive judicial review" when "[t]ext, context, and history support" a "constitutionally benign reading." So too here. The text, context, and history of NRS 52.380 demonstrate that it is constitutional and should be upheld. Thus, the Court should deny Keolis's petition.[9]

[9] The Court need not consider the amicus brief of the American Board of Professional Neuropsychology because it merely asks the Court to second-guess the Legislature, a body presumed to know the state of the law when enacting new legislation, *see NAIW v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) ("[w]e presume that the Legislature enact[s a new] statute with full knowledge of existing statutes relating to the same subject"), and presumed to not favor the concerns of any industry over any other, *see Red Arrow Garage & Auto Co. v. Carson City*, 47 Nev. 473, 225 P. 487, 488 (1924) ("[w]e must presume the Legislature did not intend to favor any kind or class of business"). If revisions to

VIII. CONCLUSION

Because the substantive rights conferred by NRS 52.380 preempt the conflicting provisions of NRCP 35, Heather can audio record and have an observer present at her NRCP 35 neuropsychological exam. Additionally, because *Valley Health* does not extend to meet-and-confer conferences held pursuant to EDCR 2.34, Heather properly presented her objections to her NRCP 35 exam to Keolis, the discovery commissioner, and the district court. Thus, the Court should entertain, but ultimately deny, this petition.

Dated this 1st day of July 2021.

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NRS 52.380 are necessary to address the Board's concerns, "they are for the Legislature to craft, not this court." *SFR*, 130 Nev. at 755, 334 P.3d at 417.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains **5,237** words.

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

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

Dated this 1st day of July 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REAL PARTY IN INTEREST HEATHER FELSNER'S ANSWER TO PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS** with the Nevada Supreme Court on the 1st day of July 2021. Electronic Service of the document shall be made in accordance with the Master Service List as follows:

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