IN THE SUPREME COURT OF THE STATE OF NEVADA

YEONHEE LEE,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE DAVID M JONES, DISTRICT JUDGE,

Respondent,

and

ALBERTO EDUARDO CARIO,

Real Party in Interest.

Supreme Court Case No.: _____

District Court Case No.: A-19-803446-C

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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NRAP 26.1 DISCLOSURES

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

Yeonhee Lee ("Ms. Lee") is an individual.

Ms. Lee is represented by Damon N. Vocke, Dominica C. Anderson, and Tyson E. Hafen of Duane Morris LLP.

DATED: April 30, 2021 **DUANE MORRIS LLP**

By: /s/ *Tyson E. Hafen*
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ROUTING STATEMENT

Pursuant to NRAP 17 and 21(a)(3)(A), this Petition falls within the literal language of Rule 17(b)(13), and as a result, might normally be assigned to the Court of Appeals in the first instance. This is no ordinary discovery dispute, however. Rather, the Petition presents an important separation of powers question regarding the scope of this Court's exclusive authority to promulgate procedures to ensure the fair and efficient functioning of the Nevada Judiciary and the extent to which the Nevada Legislature may encroach on that authority, as it surely has done here. Specifically, the Legislature has endeavored to nullify this Court's 2019 amendments to Nevada Rule of Civil Procedure 35 ("NRCP 35"), which governs independent medical examinations, through promulgation of a statute, NRS 52.380, that expressly contradicts NRCP 35 in myriad ways. This brazen effort to infringe on this Court's authority presents a serious separation of powers issue.

Moreover, medical examinations undertaken pursuant to NRCP 35 are performed routinely in personal injury cases, with hundreds (at least) conducted each year. The requirements of NRCP 35 and NRS 52.380 irreconcilably conflict. In particular, Rule 35 does not permit counsel to attend the medical examination and allows for recording of the examination only upon a showing of good cause. NRS 52.380 allows counsel for the examinee (but not opposing counsel) to be present, permits counsel for the examinee (but not opposing counsel or the examiner) to

record the examination without any prior showing and allows counsel for the examinee to suspend the examination under certain circumstances. This sharp conflict must be resolved promptly and definitively so that the lower courts and litigants may know with which requirements they must comply. Indeed, currently pending in this Court is a Petition for Writ of Mandamus or Other Extraordinary Relief in Docket Number 81912. In that matter, the Honorable Judge Adriana Escobar of the Eighth Judicial District Court ruled that NRCP 35, not NRS 52.380, applies to independent medical examinations. Moreover, previously pending before this Court was a Petition for Writ of Mandamus and/or Prohibition in Docket Number 82618. That petition sought review of an order of the Honorable Christy Craig of the Eighth Judicial District Court adopting a Discovery Commissioner's Report and Recommendation which held that NRS 52.380 trumped NRCP 35 where the two conflicted. That petition was recently withdrawn as moot when the case settled. Already, then, there have been conflicting rulings on NRCP 35 and NRS 52.380, two of which are now pending before this Court.

Accordingly, this Petition falls squarely within NRAP 17(a)(11) as it raises a question of first impression about the separation of powers embodied in the Nevada Constitution. The Petition also falls within NRAP 17(a)(12), as it raises a question

of statewide public importance. The Court should, therefore, retain this case.

DATED: April 30, 2021 **DUANE MORRIS LLP**

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NOTICE OF FILING OF WRIT PETITION

Pursuant to NRAP 21(a)(1), a petition for a writ of mandamus or prohibition directed to a court shall be accompanied by a notice of the filing of the petition, which shall be served on all parties to the proceedings in that court. Therefore, all parties of the Eighth Judicial District Court Case No.: A-19-803446-C are hereby placed on notice of this Petition filed by Petitioner Yeonhee Lee.

DATED: April 30, 2021 **DUANE MORRIS LLP**

By: /s/ *Tyson E. Hafen*
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I. OVERVIEW AND RELIEF SOUGHT

Petitioner, Yeonhee Lee, respectfully submits this *PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION* ("Petition"). The Petition is brought pursuant to NRAP 21(a) for issuance of a writ of mandamus directing the district court to comply with the provisions of NRCP 35 and/or for issuance of a writ of prohibition directing the district court to refrain from following NRS 52.380, which represents an unconstitutional infringement by the Nevada Legislature of this Court's inherent power to promulgate rules to govern the procedures of the Nevada Judiciary.

The relief sought is this Court's intervention by way of extraordinary writ requiring compliance with NRCP 35 and/or prohibiting compliance with NRS 52.380, which violates the separation of powers embodied in the Nevada Constitution.

II. ISSUE PRESENTED FOR REVIEW

The issue presented is whether the procedures for independent medical examinations provided for by NRCP 35 shall be governed by the provisions of that Rule, or instead, the dictates of NRS 52.380, which was passed by the Nevada Legislature in 2019 primarily at the behest of lawyers who were unhappy with the

amendments to NRCP 35 that this Court promulgated. No facts relevant to this Petition are in dispute and the necessary background is provided herein.

III. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. This Court Undertook a Rigorous Process to Amend NRCP 35.

On February 10, 2017, this Court established a committee (the "Revision Committee") to review and recommend updates to the Nevada Rules of Civil Procedure. Appendix ("App.") at 0001-2. To accomplish this task, the Revision Committee created subcommittees to evaluate the Rules and develop proposed amendments. One subcommittee was the Discovery Subcommittee, which was responsible to evaluate NRCP 16, 16.1, 26-37 and 45. App. at 0004-5.

The Revision Committee held regular meetings at which the various subcommittees reported on their progress. The minutes of a number of these meetings reflect that the Discovery Subcommittee gave substantial attention to NRCP 35, including in particular to the issues of attendance at the independent medical examination and the circumstances under which the examination could be recorded. *See* App. at 0008, 12-14, 18, 23-24, 25-26, 29-30, 34-35.

The members of the Discovery Subcommittee were unable to agree on appropriate amendments to NRCP 35. Instead, three alternative versions of amended Rule 35 were created for the Court's consideration, each addressing in different ways the issues of attendance and recordation. *See* App. at 0034-35.

On August 17, 2018, Justices Mark Gibbons and Kristina Pickering of this Court petitioned the Court to, *inter alia*, amend the Nevada Rules of Civil Procedure. Included with the Petition were the Revision Committee's proposed draft amendments, including the three alternative amendments to NRCP 35. App. at 00037-49. After due consideration, on December 31, 2018, this Court issued an order amending the Nevada Rules of Civil Procedure, such amendments to become effective on March 1, 2019. App. at 0050-59.

Included in the amendments was new NRCP 35, which differed from each alternative that the Revision Committee had proposed. The Rule provides in pertinent part:

> **(a) Order for Examination**.
>
> (1) **In General**. The court where the action is pending may order a party whose mental or physical condition – including blood group – is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. . . .
>
> (3) **Recording the Examination**. On request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded. . . .
>
> (4) **Observers at the Examination**. The party against whom an examination is sought may request as a condition of the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. The observer

> may not be the party's attorney or anyone employed by the party or the party's attorney.
>
> (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.
>
> (C) An observer must not in any way interfere, obstruct, or participate in the examination.

See App. at 0055-59.

In contrast to old NRCP 35, which was silent on recordation and attendance, current Rule 35 provides clear instructions on both issues. It reflects this Court's careful evaluation and balancing of the many considerations in favor of and against allowing recordation and observers and establishes a middle ground that neither wholly permits nor wholly prohibits either. The Rule also reflects the Court's sound judgment that allowing counsel for the examinee to attend the examination would be prejudicial to the opposing party and its counsel and introduce an adversarial, partisan atmosphere into what would otherwise be an objective inquiry.

B. A Group of Disgruntled Attorneys Seeks Relief from the Nevada Legislature.

Evidently displeased with new NRCP 35, a group of dissatisfied attorneys, including former members of the Discovery Subcommittee, asked the Nevada Legislature to nullify the Rule by legislative fiat. The proponents of legislative action could not have been clearer about their intent. As Graham Galloway, representing the Nevada Justice Association, testified to the Assembly Committee on Judiciary:

> 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* (NRCP) – the rules that govern all civil cases. . . . The committee was broken down into subcommittees, and I chaired the subcommittee that handled this Rule 35 medical examination issue. . . . We voted 7-to-1 to make substantial changes, the changes that are set forth embodied in the bill before you, Assembly Bill 285. Unfortunately, when our recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.

App. at 0060, 62-63, Minutes of the Meeting of the Assembly Committee on Judiciary, 80th Session, March 27, 2019. This "reassessment" led to the Nevada Legislature, which passed NRS 52.380. It provides in pertinent part:

> **NRS 52.380 Attendance by observer**.
>
> 1. An observer may attend an examination but shall not participate in or disrupt the examination.
>
> 2. The observer attending the examination pursuant to subsection 1 may be:

> (a) An attorney of an examinee or party producing the examinee; or
>
> (b) A designated representative of the attorney . . . .
>
> 3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.
>
> 4. The observer attending the examination pursuant to subsection 1 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. . . .

App. at 0091.

Predictably, NRS 52.380 is shockingly one-sided and profoundly different from all three alternatives of NRCP 35 proposed to this Court. It permits the examinee's attorney to observe and record the examination without any showing, but does not permit opposing counsel to be present and makes no provision for opposing counsel or the examiner to record the examination. Moreover, the statute permits the attorney observer to suspend the examination if, in the attorney's view, the examiner is being abusive or is exceeding the permissible scope of the examination. This new power introduces precisely the adversarial, partisan atmosphere that NRCP 35 prudently avoids. It is hardly surprising that nothing like

NRS 52.380 was ever proposed to this Court and unfortunate that the Nevada Legislature was lured into enacting it.

C. The Relevant Proceedings Below

On September 2, 2020, the Petitioner (defendant in this personal injury case) moved for an order compelling the plaintiff to submit to an independent medical examination. App. at 0106-163. The motion sought, *inter alia*, clarification that the examination would be conducted in accordance with NRCP 35. The plaintiff opposed the motion, arguing that NRS 52.380, not NRCP 35, applied to the matters of observers and recordation. App. at 0164-170. Petitioner filed a reply brief in further support of her motion. App. at 0171-181.

On September 30, 2020, the Discovery Commissioner issued a Report and Recommendation providing that NRS 52.380 applied. App. at 0182-188. Petitioner timely objected to the Report and Recommendation, and plaintiff opposed the Objection. App. at 0189-229; 0230-327. By minute order dated April 5, 2021, the District Court overruled Petitioner's objection. App. at 0328. A formal order denying the Petitioner's objection was entered on April 28, 2021. App. at 0329-330. This Petition followed.

IV. ARGUMENT

A. The Court Should Exercise its Discretion to Consider this Petition.

This Court has stated:

> A writ of mandamus may issue to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. A writ of mandamus, however, will not issue if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. This court considers whether judicial economy and sound judicial administration militate for or against issuing the writ. **However, even when a remedy at law exists, the court may exercise discretion to entertain petitions for extraordinary relief under circumstances revealing urgency and strong necessity, or when an important issue of law requires clarification and sound judicial economy favors granting the petition. Because writs of mandamus are extraordinary remedies, this court has complete discretion to determine when it will consider them**.

City of Las Vegas v. The Eighth Judicial Dist. Court ex rel County of Clark, 124 Nev. 540, 543-44, 188 P.3d 55, 58 (Nev. 2008) (citations, quotation marks and footnotes omitted) (emphasis added). *See also Cote H. v. The Eighth Judicial Dist. Court ex rel County of Clark*, 124 Nev. 36, 39, 175 P.3d 906, 908 (Nev. 2008) (court has complete discretion to determine whether it will consider petition for writ of mandamus or writ of prohibition; while generally an appeal constitutes adequate and speedy remedy, court nonetheless has exercised its discretion to intervene when an important issue of law needs clarification and sound judicial economy and administration favor granting the petition).

Applying these principles, this Court often has exercised its discretion to review writ petitions that present important discovery issues in need of prompt

clarification, including in instances involving interpretation of the Nevada Rules of Civil Procedure. In *Okada v. The Eighth Judicial Dist. Court ex rel Clark County Nevada*, 131 Nev. 834, 359 P.3d 1106 (Nev. 2015), for example, the petitioner contended that 1) the district court ignored a common-law presumption that depositions should be conducted where the witness resides as well as NRCP 30(d)(1)'s presumption that depositions be limited to one day; and that 2) as a result, the court wrongly denied petitioner's motion for a protective order. *Id*., 131 Nev. at 837, 359 P.3d at 1108.

Although acknowledging that, in general, it did not consider petitions seeking review of discovery orders (subject to limited exceptions not present in *Okada*), this Court nevertheless decided to entertain Okada's petition. As the Court explained:

> [I]n certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.
>
> Here, . . . we exercise our discretion to consider Okada's petition because it raises important issues of law that need clarification. Namely, although Okada asks this court to resolve his motion for a protective order based on the correct legal standards, this court has not previously considered what those standards are. . . . Accordingly, this opinion sets forth basic frameworks for district courts to use in addressing issues regarding the location and duration of depositions of parties.

Id., 131 Nev. at 840, 359 P.3d at 1110-1111 (citations, footnotes and quotation marks omitted).

Similarly, in *Department of Taxation vs. The Eighth Judicial Dist. Court ex rel Clark County Nevada*, 466 P.3d 1281 (Nev. 2020), this Court considered and granted a petition for a writ of prohibition seeking review of a district court order compelling the petitioner to seize cell phones belonging to non-parties and to produce the phones' data in discovery. The Court explained:

> [W]e generally decline to consider discovery orders by writ petition. However, we have elected to intervene where . . . an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction. . . .
>
> Here, the [petitioner] maintains it has no duty to seize the personal cell phones [of certain third parties] to produce the content therein under NRCP 16.1(a)(1)(A)(ii) because it does not have possession, custody, or control of the cell phones of these nonparties. Because this court has yet to define possession, custody, or control within the meaning of the Nevada Rules of Civil Procedure, and because diverging federal authority risks imposing inconsistent results for different litigants, we exercise our discretion to consider this petition for a writ of prohibition in the interest of clarifying the law in Nevada.

Id. at 1283 (citations and quotation marks omitted). *See also Mays v. The Eighth Judicial Dist. Court ex rel Clark County Nevada*, 105 Nev. 60, 61-62, 768 P.2d 877, 878 (Nev. 1989) (court grants writ petition seeking review of district court order

granting defendant's motion to waive the requirements of then newly-adopted NRCP 16.1 and 26).

This Petition readily satisfies applicable standards. NRCP 35 and NRS 52.380 directly conflict with respect to the procedures for conducting independent medical examinations. NRCP 35 generally permits an observer, but not counsel for the examinee, does not allow the observer to interfere with the examination, and requires a showing of good cause for recordation. NRS 52.380 permits recordation without a showing. Moreover, the statute not only permits counsel for the examinee to observe the examination but also to suspend it if, in counsel's view, the examiner is being abusive or exceeding the permissible scope of the examination. There simply is no reconciling these plainly contradictory requirements. Without a resolution by this Court, lower courts undoubtedly will come to different conclusions regarding which provision to apply. Indeed, at least three judges of the same judicial district already have reached different conclusions with respect to this issue as reflected by this Petition, the petition pending in Docket No. 81912, and the petition formerly pending in Docket No. 82618. And because independent medical examinations are conducted so frequently, this conflict has the potential to permeate the Nevada Judiciary. Therefore, this Petition presents an important legal issue requiring prompt clarification, and judicial economy and public policy are served by entertaining it.

But there is a more compelling reason to grant the Petition. NRS 52.380 is nothing less than a brazen effort by certain members of the bar to nullify the Court's carefully-chosen amendments to NRCP 35 by successfully exhorting the Legislature to enact a provision that strikes at the heart of this Court's rule-making authority. Unless the Court makes clear, promptly and definitively, that so gross an infringement shall not be tolerated, other members of the bar, and the Nevada Legislature itself, shall feel entitled to act whenever this Court promulgates or amends a rule of civil procedure that they consider unsatisfactory. This scenario would be intolerable, and the Court should grant this Petition to ensure that it never comes to pass.

B. This Petition Should be Granted and NRS 52.380 Ruled Unconstitutional.

1. NRS 52.380 Violates Nevada's Separation of Powers Doctrine.

NRS 52.380 is unconstitutional because it impermissibly impinges upon this Court's power to regulate and control proceedings of the Nevada Judiciary. The constitutional issue turns on whether NRS 52.380 grants substantive rights, which the Legislature may regulate, or instead controls court procedures, which are the province of the judiciary.

The Nevada Constitution divided the government into the Legislative, the Executive and the Judicial branches. *Berkson v. LePome*, 126 Nev. 492, 498, 245

P.3d 560, 564 (Nev. 2010). "[N]o persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others...." Nev. Const. art. 3, § 1. This means that the legislative and executive branches of government may not exercise powers properly belonging to the judicial department. *Graves v. State*, 82 Nev. 137, 413 P.2d 503 (Nev. 1966).

The function of the judicial department is the administration of justice. The judiciary, as a coequal branch of government, possesses the inherent power to administer its affairs. *Dunphy v. Sheehan*, 92 Nev. 259, 266, 549 P.2d 332, 336–37 (Nev. 1976). The scope of judicial power "include[s] rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice." *Goldberg v. The Eighth Judicial Dist. Court In and For Clark County*, 93 Nev. 614, 616, 572 P.2d 521, 522 (Nev. 1977). That is, "[t]he judiciary has the inherent power to govern its own procedures . . . ." *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (Nev. 1983).

As to procedural rules in particular, this Court has stated that "the inherent power of the judicial department to make rules is not only reasonable and necessary, but absolutely essential to the effective and efficient administration of our judicial system, and it is our obligation to insure that such power is in no manner diminished or compromised by the legislature." *Goldberg*, 93 Nev. at 617, 572 P.2d at 523. In

Goldberg, the Court cited a law review article's "cogent arguments against relying upon legislative management of judicial affairs":

> [L]egislatures are not held responsible in the public eye for the efficient administration of the courts and hence do not feel pressed to constant re-examination of procedural methods. . . . Court rules, on the other hand, are flexible in application, easy of clarification, and rapid of amendment should amendment be required. They are the work of an agency whose whole business is court business and for whom court efficiency can become a major interest, an agency keenly aware of the latest problems and fully capable of bringing to bear in their early solution a long and solid experience.

Id. (*citing* Levin and Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U.Penn.L.Rev. 1, 10 (1958)). "Any infringement by the legislature upon such power is in degradation of our tripartite system of government and strictly prohibited." *Id.* at 521.

Applying the foregoing doctrine, this Court has ruled that the legislature violates separation of powers when it "enact[s] a procedural statute that conflicts with a pre-existing procedural rule, . . . and such statute is of no effect." *Berkson,* 126 Nev. at 499, 245 P.3d at 565 (internal quotations omitted); *see also Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. County of Washoe*, 122 Nev. 1298, 1305, 148 P.3d 790, 795, n. 29 (Nev. 2006) ("Under the separation of powers doctrine, the Legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule") (internal quotation marks omitted). A statute is

unconstitutional if it "interferes with the judiciary's authority to manage the litigation process and [the] court's ability to provide finality through the resolution of a matter on appeal." *Berkson,* 126 Nev. at 501, 245 P.3d at 566. Indeed, a "procedural statute that conflicts with a preexisting procedural rule is of no effect, and the rule supersedes the statute and controls, so as not to interfere with the judiciary's inherent authority to procedurally manage litigation." *Washoe Med. Ctr.*, 122 Nev. at 1305, 148 P.3d at 795, n. 29 (citations and internal quotation marks omitted).

NRS 52.380 expressly contravenes NRCP 35. As noted above, the provisions conflict in several respects concerning who may observe a medical examination, whether the observer may interfere with the examination, and when the examination may be recorded. A court bound to follow the statute would necessarily find that it interferes with the court's ability to manage litigation under NRCP 35.

In short, NRS 52.380 is nothing less than an attempted abrogation of Rule 35. Indeed, the legislative history of the statute reflects that this was precisely the intention of the statute's proponents. As such, the statute is a blatant assault on this Court's inherent authority to manage the Nevada Judiciary, and therefore, an unconstitutional violation of the separation of powers doctrine embodied in the Nevada Constitution. Accordingly, the Court should grant this Petition and issue a writ directing the district court to comply with NRCP 35 and/or prohibiting the district court from following NRS 52.380.

2. Most Courts from Other Jurisdictions have Determined that Their Counterparts to NRCP 35 are Procedural.

Both federal and state courts have determined that rules similar to NRCP 35 that provide for medical examinations are procedural and that ordering examinations falls within the judiciary's inherent power.

The United States Supreme Court has long recognized that the equivalent Federal Rule of Civil Procedure 35 is procedural rather than substantive. That is, Rule 35 regulates "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14, 61 S.Ct. 422, 426 (1941); *see also Schlagenhauf v. Holder*, 379 U.S. 104, 113, 85 S.Ct. 234, 240 (1964) (reaffirming that "the Rule was a regulation of procedure"); *cf. Beach v. Beach*, 114 F.2d 479, 481 (D.C. Cir. 1940) (rejecting "contention that the rule modifies the 'substantive rights' of litigants"). Or, put differently, Rule 35 governs only "the manner and the means" by which the litigants' rights are "enforced" rather than "the rules of decision by which [the] court will adjudicate [those] rights." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407, 130 S.Ct. 1431, 1442 (2010).

State courts have cited to the foregoing federal cases in holding that state medical examination rules are procedural and within the judiciary's inherent powers. *See, e.g.*, 8B Fed. Prac. & Proc. Civ. § 2231, *Validity and Construction of*

Rule (3d ed.) ("Rule 35 is procedural and permits examination regardless of what the law of the state may be. However, state provisions for physical and mental examination, in most cases closely modeled on Rule 35, are now virtually universal. In other states the matter is thought to be an inherent power of the court."). An Illinois appellate court, for instance, discussed the above federal cases and stated that the Illinois equivalent to Rule 35 was within the judiciary's "inherent power to order physical examinations in appropriate cases." *Kaull v. Kaull*, 26 N.E.3d 361, 380–86, 2014 IL App. (2d) 130175, ¶¶ 56-70 (Ill.App. 2 Dist. 2014); *cf. People ex rel. Noren v. Dempsey*, 139 N.E.2d 780, 783–84, 10 Ill.2d 288, 293–94 (1957) ("In the light of the comprehensive discovery allowed today, it would be difficult to justify an exception that would single out for disparate treatment the case of the plaintiff who seeks damages because of his physical condition."). In general, "according to the great weight of authority in this country and the distinct modern trend of the courts, trial courts, in actions to recover damages for personal injuries, have an inherent discretionary power to order a reasonable physical examination of the plaintiff . . . ." 71 A.L.R.2d 973, *Court's power to order physical examination of personal injury plaintiff as affected by distance or location of place of examination* (1960).

This authority confirms that NRCP 35 is an appropriate exercise of the Nevada Judiciary's "inherent power to govern its own procedures." *Connery*, 99 Nev. at 345,

661 P.2d at 1300. Unquestionably, NRS 52.380 impermissibly encroaches on that power and is therefore unconstitutional.

3. Decisions from Other Jurisdictions in Related Contexts Further Demonstrate that NRS 52.380 Violates the Separation of Powers Embodied in the Nevada Constitution.

The following state courts have found that medical discovery/evidence statutes violated the separation of powers because they interfered with the judiciary's powers to regulate court procedure:

- In Illinois, a blood test statute limited when a court may order a party to undergo a blood test and limited the admissibility of the results. An Illinois appellate court held "that insofar as the Blood Test Act infringes on the power of the court to order blood tests for discovery purposes, it is an invalid exercise of legislative power." *Zavaleta v. Zavaleta*, 358 N.E.2d 13, 15–16, 43 Ill.App.3d 1017, 1020 (Ill. App. 1976); *see also Leigh C.F. v. Linda L.E.*, 520 A.2d 669, 1986 WL 18352, at *3 (Del. 1986) ("The rules authorizing courts to order blood tests for purposes of paternity determinations are 'procedural' because such rules relate exclusively to the obtaining of evidence").

- The Illinois Supreme Court issued related opinions finding unconstitutional a statute that required broad disclosure of medical records because it conflicted with other discovery rules, curtailed the trial court's authority to enforce compliance with such disclosure, and expanded the scope of potentially relevant discovery. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1091–95, 179 Ill.2d 367, 438–48 (1997); *Kunkel v. Walton*, 689 N.E.2d 1047, 1053–54, 179 Ill.2d 519, 531–34 (1997).

- The Oklahoma Supreme Court ruled that a statute limiting when a court may consider medical examination evidence would "impermissibly invade the judiciary's exclusive constitutional prerogative of fact-finding." *Conaghan v. Riverfield Country Day Sch.*, 163 P.3d 557, 564–65, 2007 OK 60, ¶¶ 19-22 (2007).

- The Tennessee Supreme Court found that a statute narrowing the circumstances in which the court can limit a defendant's request for non-party physician discovery impermissibly "removes trial courts' control and discretion over a key aspect of discovery." *Willeford v. Klepper*, 597 S.W.3d 454, 470 (Tenn. 2020).

- The Rhode Island Supreme Court found unconstitutional a statute that permitted a party to unilaterally block the production of confidential medical records, regardless of their relevance, thereby stripping the trial court "of all authority to require production of medical information." *Bartlett v. Danti*, 503 A.2d 515, 517–18 (R.I. 1986).

- The Arkansas Supreme Court found that a statute establishing requirements for medical expert witnesses interfered with "the inherent authority of common-law courts." *Broussard v. St. Edward Mercy Health System, Inc*., 386 S.W.3d 385, 389, 2012 Ark. 14, *6–*7 (2012).

These decisions demonstrate that the regulation of discovery relating to medical issues and evidence is a matter of inherent judicial authority. Statutes such as NRS 52.380 that intrude upon that authority are unconstitutional.

C. NRS 52.380 does not Confer Substantive Rights.

Citing to legislative history, proponents of NRS 52.380 have contended that by allowing examinee's counsel to observe the examination and to suspend it under certain circumstances, and by permitting the examinee to record the examination without a showing of good cause, the statute has conferred substantive rights on the examinee and is therefore constitutional. App. at 00060, 63, 65, 67; 00081, 84. To date, proponents have been vague about the nature and derivation of these claimed

rights, asserting in only the most general fashion that they involve the "fundamental" right to liberty and to control one's body. *Id*.

The legislative history reveals, however, that only the proponents of NRS 52.380 ever asserted that the provision confers substantive rights, in self-serving testimony transparently offered in anticipation of a subsequent constitutional challenge. App. at 00060-80; 00081-90. There is no indication that any legislator gave much thought to the issue and certainly no evidence that the Legislature ever came to a firm conclusion about it.[1]

Moreover, the substantive rights argument does not withstand scrutiny. Specifically, to the extent a person's interest in liberty or in controlling their own body is implicated by NRCP 35, it is primarily because of the examination itself, not because of subsidiary matters relating to the circumstances under which the examination is conducted. But as the discussion above conclusively demonstrates, NRCP 35 regulates procedural matters and unquestionably falls within the Court's core rule-making authority. Not even the proponents of NRS 52.380 appear to contend otherwise. If the authority to order a medical examination relates to

[1] Even if the Legislature had made a clear statement on the matter, although the Court no doubt would have considered that statement, it obviously could not be the final word, or the Court would be in no position to protect its rule-making authority.

procedure, so too does the authority to determine who may attend the examination, when it may be suspended, and when it may be recorded. NRS 52.380, like the Rule it was intended to nullify, regulates procedure and is, therefore, an unconstitutional infringement on this Court's rule-making authority.

The opinion in *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (Nev. 1988) supports this conclusion. In *Whitlock*, this Court upheld a statute allowing counsel to participate in the jury *voir dire* process. The Court concluded that "[a]lthough the statute does implicate trial procedure, it does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule." *Id*. 104 Nev. at 26, 752 P.2d at 211. Of course, NRS 52.380 very much does attempt to abrogate an existing court rule. Indeed, the legislative history confirms that the statute's proponents intended exactly that. Unlike in *Whitlock*, there is no reasonable way to interpret NRS 52.380 "as an acceptable solidification of the basic intendment of NRCP [35]." *Id*., 104 Nev. at 26, 752 P.2d at 212.

The Court in *Whitlock* did state that the *voir dire* statute conferred "a substantive right to reasonable participation in *voir dire* by counsel." *Id*., 104 Nev. at 26, 752 P.2d at 211. The Court did not explain in detail the basis for this assertion, except to note that, during the legislature's consideration of the bill, the language of the statute was changed from stating that attorneys "*may* conduct supplemental [voir dire] examinations" to attorneys "*are entitled to* conduct supplemental

examinations." The Court concluded that this change of language evinced a clear legislative intent to confer a substantive right. *Id*. 104 Nev. at 26, 752 P.2d at 211, n. 3. In contrast, NRS 52.380 states that observers "may" attend the examination, "may" record the examination, and "may" suspend the examination under certain circumstances. The Court's analysis in *Whitlock*, then, supports the conclusion that NRS 52.380 does not confer any substantive rights.

V. CONCLUSION

For the foregoing reasons, the Court should grant this Petition and issue a writ mandating that the district court comply with NRCP 35 and/or prohibiting the district court from following NRS 52.380, which is unconstitutional.

DATED: April 30, 2021 **DUANE MORRIS LLP**

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DECLARATION OF TYSON E. HAFEN, ESQ.

I, Tyson E. Hafen, declare as follows:

1. I am counsel for the Petitioner Yeonhee Lee.

2. I verify that I have read the foregoing Petition for Writ of Mandamus and/or Prohibition and that the same is true to my knowledge, except for those matter stated on information and belief, and as to those matters, I believe them to be true.

3. I, rather than Petitioner, make this verification because the relevant facts are largely procedural and thus within my knowledge as Petitioner's attorney.

4. This verification is made pursuant to NRS 15.010, NRS 34.170, and NRS 34.330.

DATED: April 30, 2021

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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 answering brief has been prepared in proportionally spaced typeface using Microsoft Word with 14-point font size in Times New Roman type style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), the brief contains 6,319 words.

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

4. 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.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION** was submitted for filing via the Court's eFlex electronic filing system, and electronic notification will be sent to the following:

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