IN THE SUPREME COURT OF THE STATE OF NEVADA

YEONHEE LEE, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE DAVID M. JONES, DISTRICT JUDGE, Respondents, and ALBERTO EDUARDO CARIO, Real Party in Interest	Case No. 82831

REAL PARTY IN INTEREST'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Real Party in Interest Alberto Eduardo Cario is a party to this action in his individual capacity. The Real Party in Interest is represented before the district court by Jason R. Maier, Esq., of the law firm Maier Gutierrez & Associates.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a motor vehicle collision on November 24, 2018, when Petitioner Yeonhee Lee caused a T-bone collision with Real Party in Interest Alberto Cario. Mr. Cario filed his Complaint against Ms. Lee on October 10, 2019, and Ms. Lee filed her Answer on November 10, 2019. 1 Petitioner's Appendix (PA) 0094-105. This case was exempted from Nevada's Mandatory Arbitration program on December 12, 2019, and discovery thereafter commenced.

During discovery, Mr. Cario consented to Petitioner's request for him to undergo an ***orthopedic NRCP 35 examination*** with her chosen expert, orthopedic surgeon Mark Rosen, M.D., subject to the parameters in a proposed stipulation and order (SAO).[1] 1 PA LEE0118-124, 0130-131. Petitioner's counsel responded with revisions to the proposed SAO, objecting to the parameters that (1) allowed a nurse observer present at the exam who would not be permitted to interfere, obstruct or participate in the exam, (2) allowed an audio recording of the exam, (3) required Petitioner to disclose Dr. Rosen's written report within thirty days of the exam, and (4) required Dr. Rosen to retain a complete copy of his entire file pertaining to the

[1] Petitioner provides very few facts of the underlying dispute in her Petition and does not even specify the type of examination at issue. **This Court's Order Directing Answer to the Petition states that the subject examination is a psychological exam, but it is actually an orthopedic exam.** This is significant because NRCP 35 does not allow any observer at psychological exams, but does allow certain observers at orthopedic exams. Nev. R. Civ. P. 35(a)(4).

exam. 1 PA LEE0126-128.

Because Petitioner did not agree to these parameters, Petitioner filed a Motion to Compel Rule 35 Exam on September 2, 2020. 1 PA LEE0106-163. Mr. Cario filed an Opposition and Petitioner filed a Reply. 1 PA LEE0164-2 PA LEE0181. On September 17, 2020, the Discovery Commissioner heard the matter, acknowledged the conflict between NRS 52.380 and NRCP 35, found that NRS 52.380 controlled, and approved the exam parameters proposed by Mr. Cario. 2 PA LEE0182-188.

Petitioner filed an Objection to the Discovery Commissioner's Report and Recommendations (DCRR) on October 21, 2020, which Mr. Cario opposed. 3 PA LEE0189-327. The district court issued an order agreeing with the Discovery Commissioner that NRS 52.380 is applicable to NRCP 35 exams and denying Petitioner's objection to the DCRR. 3 PA LEE0328-330. Ms. Lee's Petition followed.

The Petition does not reference any of the disputed parameters of the NRCP 35 exam and is limited solely to the constitutional argument regarding NRCP 35 and NRS 52.380. The district court's order upholding the Discovery Commissioner's Report and Recommendation concerning the parameters about Dr. Rosen's report and file are unrelated to NRS 52.380 and should not be disturbed.

/ / /

ARGUMENT

I. Petitioner Waived Any Constitutionality Argument Because She Failed to Notify the Attorney General Pursuant to NRS 30.130 in the District Court Proceedings

Petitioner's constitutionality argument regarding NRS 52.380 and NRCP 35 is procedurally defective because she failed to provide proper notice to the Nevada Attorney General.

> In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, ***the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard***.

Nev. Rev. Stat. 30.130; *see also Moldon v. Cty. of Clark*, 124 Nev. 507, 516 n.23 (2008) ("NRS 30.130 provides that when declaratory relief is sought as to the validity of a statute, the Attorney General must be served with a copy of the proceedings") (emphasis added).

Moldon is relevant because it shows that NRS 30.130 applies to constitutional challenges of the Nevada Revised Statutes and not only municipalities such as townships. In *Moldon*, the Moldons sought to recover interest earned on a condemnation deposit because the district court clerk placed said interest into Clark County's general fund. *Moldon*, 124 Nev. at 509, 516. The Moldons alleged that doing so violated the Takings Clause under the Fifth and Fourteenth, and this Court

agreed and reversed the district court's order finding the opposite. *Id.* Nevada Revised Statute 30.130 was not directly at issue, but the record indicated that the district court denied the Moldons' application for interest in part because they failed to serve the Nevada Attorney General under NRS 30.130 with notice of their constitutional challenge to NRS 355.210. *Id.* at 516 n.23. This Court concluded this was improper because the Moldons were not challenging the statute; they were seeking to recover interest. *Id.*

There is no question here that Petitioner is challenging the constitutionality of NRS 52.380. However, Petitioner failed to abide by NRS 30.130 in the underlying district court proceedings. She first argued that NRS 52.380 violates the separation of powers doctrine in her Motion to Compel Rule 35 Exam and, at that time, should have notified the Nevada Attorney General that she was challenging the statute. 1 PA LEE0113-114, 0116. She did not. Petitioner next failed to comply with NRS 30.130 when she failed to serve the Nevada Attorney General with her reply brief in support of her motion to compel. 2 PA LEE0181. Petitioner further violated NRS 30.130 when she failed to serve the Nevada Attorney General with a copy of her objection to the DCRR regarding her motion to compel. 3 PA LEE0207.

This Court has not yet addressed the consequences of violating NRS 30.130's mandate to notify the Nevada Attorney General when alleging that a statute, ordinance, or franchise is unconstitutional. Nevada's Rules of Appellate Procedure

and Supreme Court of Nevada case law offer guidance:

> If a party questions the constitutionality of an Act of the Legislature in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity, the questioning party shall give written notice to the clerk of the Supreme Court immediately upon the filing of the docketing statement or as soon as the question is raised in the court. The clerk shall then certify that fact to the Attorney General.

Nev. R. App. P. 44.

Failure to comply with NRAP 44 "is an ***independent basis upon which to summarily reject [a party's] constitutional arguments***." *In re Candelaria*, 126 Nev. 408, 415 (2010) (emphasis added).

The law in Nevada is clear – the procedural requirements must be satisfied in order to challenge the constitutionality of a statute. At the district court level, the party must serve the Nevada Attorney General "with a copy of the proceeding." Nev. Rev. Stat. 30.130. At the appellate level, the party "shall give written notice to the clerk of the Supreme Court immediately upon the filing of the docketing statement or as soon as the question is raised in the court" so that the clerk can certify the fact of the constitutionality challenge to the Nevada Attorney General. Nev. R. App. P. 44. Although Petitioner notified the clerk of the Supreme Court of her constitutionality challenge in compliance with NRAP 44, she failed to comply with NRS 30.130 altogether.

This Court should not condone Petitioner's blatant violations of NRS 30.130. More importantly, allowing the Petition to continue would render NRS 30.130

ineffective. Parties will be able to make constitutional challenges to statutes in district court without notifying the Nevada Attorney General, and if they do not get the outcome they want, file an appeal or petition for writ and then notify the Supreme Court clerk in compliance with NRAP 44. Petitioner here tried to cure her violation of NRS 30.130 by complying with NRAP 44, but allowing her Petition to proceed would mean that NRS 30.130's notice "requirement" is actually a suggestion. This Court should use the consequences for NRAP 44 violations as guidance and summarily reject Petitioner Lee's constitutional argument because it is procedurally defective due to her failure to serve the Nevada Attorney General with her motion, reply, and objection to DCRR in the district court proceedings. *See In re Candelaria*, 126 Nev. at 415.

II. The Legislature Enacted Substantive Rights in NRS 52.380 to Protect Litigants Subject to Adversarial NRCP 35 Exams and These Rights Preempt Their Conflicting Counterparts in NRCP 35

a. *The Separation of Powers Doctrine Permits the Legislature to Enact a Statute that Supersedes NRCP 35 So Long as the Statute Establishes a Substantive Right*

The division of powers between the three separate departments – Legislative, Executive, and Judicial – is fiercely guarded under Nevada law. While the United States Constitution implicitly divides power through its creation of three branches,

"Nevada's Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another." *Comm'n on Ethics v. Hardy*, 125 Nev. 285 (2009) (citing *Sec'y of State v. Nev. State Leg.*, 120 Nev. 456, 466 (2004)).

> The powers of the Government of the State of Nevada shall be divided into three separate departments, – the Legislative, – the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. Art. 3, § 1(1).

This is the "separation of powers doctrine" and it "is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498 (2010) (citing Nev. Const. art. 3, § 1(1)).

Nevada law is clear regarding the interrelation of court rules and legislative statutes. "The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure … in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits." Nev. Rev. Stat. 2.120(2); *State v. Connery*, 99 Nev. 342, 345 (1983). "Such rules ***shall not abridge, enlarge or modify any substantive right*** and shall not be inconsistent with the Constitution of the State of Nevada." *Id.* (emphasis added).

The Supreme Court of Nevada has recognized the division of powers between the Supreme Court versus Legislature, and what these branches are authorized to enact:

> The judiciary has the inherent power to govern its own procedures, and this power includes the right to promulgate rules of appellate procedure as provided by law. [ ] Although such rules may not conflict with the state constitution or "abridge, enlarge or modify any substantive right," NRS 2.120, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature. [ ] We have held that the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. [ ] Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls. [ ]

Connery, 99 Nev. at 345 (internal citations omitted).

Thus, the prohibition on the Legislature's enactment of a statute that conflicts with a pre-existing procedural rule is limited to any "procedural statute." *Connery*, 99 Nev. at 345. The reverse is also true. Where a statute of substantive law is promulgated in conflict with a pre-existing rule of procedure, the statute supersedes the rule and controls. *See Connery*, 99 Nev. at 345 (citing NRS 2.120) ("rules [of procedure] may not conflict with the state constitution or 'abridge, enlarge or modify any substantive right'"). The executive prerogative is given to the judiciary to make its own rules governing its own procedures, however, the Legislature has the ***exclusive*** prerogative to enact statutes governing the substance of the law.

NRCP 35 sets forth the procedure for the exam and NRS 52.380 provides the

examinee with the substantive rights to have an observer of his/her choosing and to record the exam, without conditions placed on them. These substantive rights protect vulnerable litigants in what is an inherently adversarial medical examination. As a result, Nevada's separation of powers doctrine mandates that the statute supersede the rule. *Connery*, 99 Nev. at 345 (court rules cannot "abridge, enlarge or modify any substantive right"). This is explained further in the following sections.

b. Compulsory NRCP 35 Exams are Not Independent; They Are 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." Nev. R. Civ. P. 35(a)(1). Although NRCP 35 exams are commonly referred to as "independent medical exams," that phrase is a misnomer; indeed "these 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).[2] "The defendants' expert is being engaged to advance the interests of the defendants; clearly, the doctor cannot be considered a neutral in the case. *Zabkowicz v. W. Bend Co.*, 585 F. Supp. 635, 636 (E.D. Wis. 1984).

[2] The extrajurisdictional and/or unpublished opinions cited in this section are not offered as binding case law; they are offered as common sense explanations for why a NRCP 35 exam is not independent.

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" that is "more akin to a litigant attending a deposition than a medical patient seeing his doctor." *Davanzo*, 2014 WL 1385729, at *1-2. The *Davanzo* court eloquently described why a FRCP 35 exam is more similar to a deposition:

> Like a litigant compelled to attend a deposition, Davanzo will be going to the doctor's office only because she *has to*. And like a litigant who will be required to give answers at a deposition, Davanzo's likely goal is to complete the chore as quickly as possible. Moreover, like a litigant required to give a deposition, Davanzo will likely be given advice to not volunteer information and to answer only the specific question asked. Finally, just like litigants who do not choose the attorney deposing them, Davanzo similarly will not be selecting the doctor examining her.
>
> Comparing Davanzo to an *actual* medical patient generates additional reasons why the compulsory examination is inherently adversarial. A patient typically selects his or her doctor; Davanzo will not. Patients will often provide an expansive medical history and reveal intimate details about their health in order to obtain the best medical treatment. Litigants, like Davanzo, do not; they generally only provide the specific information asked. A patient seeking medical advice from a doctor expects the information to be confidential; Davanzo understands Carnival will obtain copies of the doctor's report.

Id. (emphasis in original).

Simply put, the defense-selected doctor is not on the examinee's "side." He or she is not examining the examinee to help make diagnoses. The examiner is hired to literally do the opposite, and poke holes in diagnoses made by the examinee's

treating physicians.

As a result, courts often recognize the examination is not independent, but rather "inextricably intertwined with the adversarial process." *Davanzo*, 2014 WL 1385729, at *2 (citing *Zabkowicz*, 585 F. Supp. at 636; *Gensbauer v. May Dept. Stores Co.*, 184 F.R.D. 552, 553 (E.D. Pa.1999)).

c. ***NRS 52.380 Enshrined the Substantive Rights to Record and Have Observed One's Own Medical Exam Because NRCP 35 Places Conditions and Limitations on These Aspects of the Rule***

The inherently adversarial nature of a NRCP 35 exam provides the backdrop for the necessity and eventual enactment of safeguards in NRS 52.380 to protect the examinee and the integrity of the examination.

The differences between NRS 52.380 and NRCP 35 are substantive, as the statute creates substantive rights for the examinee in a NRCP 35 exam. These rights are to have an observer present regardless of the type of exam, to have that observer be the examinee's attorney or the attorney's designated representative, and to record the examination. Under NRCP 35, the examinee has no such rights.

These substantive rights 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 set forth or embodied in the bill before you, Assembly Bill 285," which is now NRS 52.380), *available at* 1 PA LEE0062.

However, despite the subcommittee's recommendations, the final adoption of NRCP 35 modified the recommended 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, and two, 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.[3]

> (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.***

Nev. R. Civ. P. 35(a)(3)-(4) (emphasis added).

Because the revisions to NRCP 35 omitted these crucial safeguards, the 2019

[3] Also prohibited are observers at a "neuropsychological, psychological, or psychiatric examination, [unless] the court orders otherwise for good cause shown," but this limitation does not apply here because this case involves an orthopedic exam. Nev. R. Civ. P. 35(a)(4).

Legislature enshrined those substantive rights in statute and enacted NRS 52.380. *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* (NRCP) – the rules that govern all civil cases."), *available at* 1 PA LEE0062.

NRS 52.380, in contrast to NRCP 35, provides these rights without conditions:

> 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]n attorney of an examinee or party producing the examinee; or [ ] [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***.

Nev. Rev. Stat. 52.380(1)-(3) (emphasis added).

In addition to these substantive rights, the statute includes several procedural rights, including the right for an observer or the examiner to suspend the examination and the ability to seek a protective order. Nev. Rev. Stat. 52.380(4)-(6).

The procedure set forth in NRCP 35 permits an observer at an examination and the recording of an examination. However, these options are conditioned upon a showing of good cause for the recording and exclude the examinee's attorney or

the attorney's employee as the observer. Nev. R. Civ. P. 35(a)(3)-(4). NRS 52.380, by contrast, ***transforms these conditional elements of an examination into substantive rights of the examinee by removing all conditions and limitations***. The examinee is not required to show good cause to record the exam and is not limited to a certain type of observer.[4] Nev. Rev. Stat. 52.380(1)-(3). Under the statute, the examinee has ***the right*** to record the examination, ***the right*** to have an observer present regardless of the type of examination, and ***the right*** to have his attorney or attorney's representative serve as the observer.

As the foregoing demonstrates, the procedures in NRCP 35 and NRS 52.380 are identical (*i.e.*, observer, recording). The difference under the statute is that the examinee has ***the right*** to these elements, rather than having to jump through the hoops defined in the rule. The statute on its face creates substantive rights not contained in the rule. The Legislature exercised its power to enact the statute

[4] Although the type of observer may appear insignificant at first blush, the wording of NRCP 35 makes it so the observer can be only a friend or family member of the examinee (so long as they do not work for the examinee). Although this type of hand-holding can ease the discomfort of an adversarial exam, no other part of litigation provides such support and it is, frankly, useless for purposes of litigation. Having an observer present who understands the nature of the medical exam being performed and can note any inappropriate conduct, questions, or commentary by the examiner actually has a purpose for litigation. Moreover, it is in line with every other type of testing and inspection performed by expert witnesses in litigation, which allows the presence of the opposing attorney(s) ***and*** their expert witnesses present so they can observe the testing/inspection to ensure it is conducted appropriately.

embodying these substantive rights because the Judiciary elected not to include them in the rule. Therefore, NRS 52.380 supersedes NRCP 35 and controls NRCP 35 exams in Nevada.

i. 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 (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, including the examinee's attorney or his/her representative, record the exam, *see* NRS 52.380(3). The statute then provides procedural mechanisms to enforce those substantive rights. *See* Nev. Rev. Stat. 52.380(4), (5), (6) (allowing observer to suspend exam, allowing examiner to suspend exam, and 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 the plainly substantive portions of the statute – NRS 52.380(1)-(3) – create the rights to record and have an observer present, which supersede the conflicting portions of

NRCP 35. Accordingly, because the district court adopted this rationale, this Court should exercise its discretion to affirm the district court's order.

ii. 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 (2015).

Here, the legislative history of Assembly Bill 285, which became NRS 52.380, explicitly states that the statute was enacted to provide a substantive right to record and to have an observer of one's choice in one's own exam. 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 NRCP 35 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. What we have seen is, if there is a dispute in what happens in the examination, most of the time deference is given to the person who is being presented to the judge or jury as an expert witness rather than the victim or plaintiff who was forced to present at that examination. That is the current state of the law…. ***[T]he 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) (emphasis added), *available at* 1 PA LEE0062.

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 NRCP. Our *Nevada Rules of Civil Procedure* involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, 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…. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

Id. (statement of G. Bochanis), *available at* 1 PA LEE0063.

Finally, the legislative history reveals that although members of the

subcommittee 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. *Id.* (statement f G. Galloway), *available at* 1 PA LEE0062. The failure to include substantive protections within NRCP 35 necessitated the proposal, and eventual enactment, of what is now NRS 52.380.

It also bears noting that at the hearing on A.B. 285, it was pointed out that California, Utah, Washington, and Arizona already made audio recording and/or having an observer present at a mental or physical exam a substantive right. 1 PA LEE0062 (statement of A. Brasier). It was further mentioned that injured workers in Nevada have a substantive right to have their attorney or attorney's employee present when the worker is examined by an adversarial doctor because it "levels the playing field." 1 PA LEE 0064 (statement of G. Bochanis). While the examining doctor and examinee's attorney may not like each other, they keep it professional, and there is no reason to believe it would be any different for attorneys present at NRCP 35 exams. *Id.*

This legislative history confirms what the statute's plain text demonstrates: that NRS 52.380 was explicitly enacted to create substantive rights for litigants when they are most vulnerable during discovery – during their own examination by "a defense-selected, defense-paid doctor" in a process "inextricably intertwined" with

the inherently adversarial litigation process. *See Davanzo*, 2014 WL 1385729, at *2. The Legislature considered the effect an observer could have during an NRCP 35 examination, and ultimately allowed a litigant to have an observer, including his/her attorney, present during any type of NRCP 35 exam and to record the exam without showing good cause. 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 the petition.

iii. States that Nevada Courts Often Look to for Guidance Allow Their Equivalent to NRCP 35 Exams to be Observed and Recorded

As stated *supra*, it was acknowledged at the A.B. 285 hearing that having someone present at an examination and audio recording the exam were already substantive rights in California, Utah, Washington, and Arizona. 1 PA LEE0062 (statement by A. Brasier).

California permits the examinee's attorney or attorney's representative as an observer, and that person can record the exam by audio or stenography. CCP 2032.510(a).

Washington allows the examinee to have a representative present to observe the exam, and either the examinee or representative can audio record it. Wash. St.

CR 35(a)(2). A videotape recording can be made upon agreement of the parties or by order of the court. Wash. St. CR 35(a)(3).

Arizona's equivalent to NRCP 35 is straightforward that it conveys a right to the examinee: "the person to be examined has the right to have a representative present during the examination." 16 ARS R. Civ. P. 35(c)(1). It also permits either the party requesting the exam or the examinee to audio- or video-record the examination. 16 ARS R. Civ. P. 35(c)(2)(A).

Utah's rule does not include any language about an observer, but it allows the examinee to record the exam by either audio or video. Utah R. Civ. P. 35(a). Making a video of the exam would resolve most, if not all, of the concerns raised by both the defense and plaintiff bars regarding NRCP 35 versus NRS 52.380 because any abnormal conduct or language by either the examiner or examinee would be observed, heard, and addressed by all parties' attorneys, their experts, and the court.

Attorneys and courts in Nevada often look to these neighboring states for guidance when Nevada has not yet ruled on a particular issue. Mr. Cario asks the Court to do so here, as the law in these states is often similar to Nevada's.

d. Petitioner's Citation to and Reliance on Extrajurisdictional Law is Inapplicable to the Issues Before the Court

Petitioner cites numerous extrajurisdictional cases in alleged support of her argument, but the only similarities between the cited cases and the present case are

allegations that the separation of powers doctrine was violated.

Petitioner cites to multiple cases from Illinois. Pet. at 18. *Zavaleta v. Zavaleta*, 358 N.E.2d 13 (Ill. App. 1976) was a divorce action concerning a dispute about whether the defendant was the father of a child, and struck Illinois's Blood Test Act as an invalid exercise of legislative power because it limited when a court could order blood tests and thereby removed a court's discretion as to their relevance.[5] 358 N.E.2d at 14-16. *Zavaleta* does not concern a dispute about provisions in Illinois's equivalent to NRCP 35 and is not even a personal injury case, and is thus irrelevant. Furthermore, NRS 52.380 does not strip trial courts of any discretion besides the "good cause" required to be shown to record an exam, but that is the entire point of NRS 52.380 establishing a substantive, unconditional right to record.

Petitioner also cites to *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997) and *Kunkel v. Walton*, 689 N.E.2d 1047 (Ill. 1997). Pet. at 18. The courts in both of these cases found that a statutory provision deeming a personal injury plaintiff to have consented to unlimited disclosure of all medical records violated the separation of powers doctrine because it interfered with the court's ability to evaluate

[5] Petitioner also cites *Leigh C.F. v. Linda L.E.*, 1986 WL 18352 (Del. Dec. 31, 1986) in support of her "blood test" argument, but *Leigh C.F.* also does not involve an equivalent Rule 35 exam or even a separation of powers argument, and is thus inapplicable to the present case and issues. 1986 WL 18352.

the relevance of discovery. *Best*, 689 N.E.2d at 1093-94; *Kunkel*, 689 N.E.2d at 1053-54. *Best* and *Kunkel* are irrelevant to the instant case because they have nothing to do with Illinois's equivalent to NRCP 35 and because NRS 52.380 does not attempt to remove any of the courts' ability to assess relevance or impose rulings related to evidence.

While Petitioner likes to cite irrelevant Illinois cases, conveniently omitted by the petition is the fact that Illinois has a ***statute*** that is directly on point to the issues currently before this Court because it allows plaintiffs to have any type of observer at Illinois's equivalent to NRCP 35 exams, including the plaintiff's attorney:

> (d) Whenever the defendant in any litigation in this State has the right to demand a physical or mental examination of the plaintiff pursuant to statute or Supreme Court Rule, relative to the occurrence and extent of injuries or damages for which claim is made, or in connection with the plaintiff's capacity to exercise any right plaintiff has, or would have but for a finding based upon such examination, ***the plaintiff has the right to have his or her attorney, or such other person as the plaintiff may wish, present at such physical or mental examination***.

735 Ill. Comp. Stat. Ann. 5/2-1003 (2016) (emphasis added).

Petitioner also cites *Conaghan v. Riverfield Country Day Sch.*, 2007 OK 60, 163 P.3d 557 (2007) in support of her argument that NRS 52.380 is unconstitutional. Pet. at 18. *Conaghan* involved a claim for worker compensation benefits for an injury that occurred while working at Riverfield Country Day School, and the statute created a rebuttable presumption in favor of a treating physician's opinions when the employer selected the physician to treat an injured employee. 163 P.3d at 560. The

Oklahoma Supreme Court upheld the rebuttable presumption but struck restrictions that attempted "to predetermine the range of the adjudicative facts" because they "impermissibly invade[d] the judiciary's exclusive constitutional prerogative of fact-finding." *Conaghan* is irrelevant to the current debate about NRCP 35 versus NRS 52.380 because it has nothing to do with Oklahoma's equivalent to a NRCP 35 exam or even medical exams in negligence cases. Further, NRS 52.380 does not attempt to predetermine any facts and does not encroach on the judiciary's prerogative to fact-find.

Petitioner also cites *Willeford v. Klepper*, 597 S.W.3d 454 (Tenn. 2020). Pet. at 19. *Willeford* involved a statutory provision that allowed defense counsel to conduct *ex parte* interviews with patients' non-party treating healthcare providers during discovery in a medical malpractice lawsuit. 597 S.W.3d at 457. Interestingly, the Tennessee Supreme Court found that the statute's purpose was properly within the purview of the legislature's authority and did not violate the separation of powers, and "the judiciary should yield if reasonably possible." *Id.* at 470. The problem, however, was that the statute effectively stripped trial courts of their discretion to determine whether non-party treating healthcare providers possessed any information relevant to the lawsuit and grant protective orders if necessary, which "unconstitutionally infringe[d] on issues within the sole prerogative of the judiciary." *Id.* NRS 52.380 does not strip trial courts of any discretion besides the

"good cause" required to be shown to record an exam, but that is the entire point of NRS 52.380 establishing a substantive, unconditional right to record. *Willeford* has nothing to do with Tennessee's equivalent to an NRCP 35 exam or even medical exams in negligence cases, and is similarly irrelevant to the issues before this Court.

Petitioner also cites *Bartlett v. Danti*, 503 A.2d 515 (R.I. 1986), a case in which the district court certified to the Supreme Court of Rhode Island seven questions concerning the constitutionality of certain provisions of the Confidentiality of Health Care Information Act (CHCIA). Pet. at 19; 503 A.2d at 516. The defendant in *Bartlett* attempted to use CHCIA to "suppress" medical records from an industrial accident in which he sustained injuries including diminished vision and loss of foot function. *Id.* The plaintiff argued that defendant's injuries limited his ability to operate an automobile at the time of the collision, among other things, and argue that CHCIA was unconstitutional for a number of reasons, including that it was "an unconstitutional intrusion by the Legislature upon the function of the judiciary." *Id.* The Supreme Court of Rhode Island found that CHCIA violated the separation of powers doctrine by interfering with the subpoena power of the judiciary and "remove[d] from the court's discretion the determination of admissibility of otherwise relevant evidence." *Id.* at 517. *Bartlett* is irrelevant to every aspect of the instant case except that both cases involve allegations that the separation of powers doctrine was violated by a statute.

Petitioner also cites *Broussard v. St. Edward Mercy Health Sys., Inc.*, 2012 Ark. 14, 386 S.W.3d 385 (2012). Pet. at 19. In *Broussard*, the Arkansas Supreme Court held that the requirement in Arkansas Code Annotated section 16–114–206 (Repl. 2006) that proof in medical-malpractice cases must be made by expert testimony by "medical care providers of the same specialty as the defendant" violated the separation of powers doctrine and the courts' inherent authority to protect the integrity of court proceedings and litigants' rights. 2012 Ark. at 1. Like *Bartlett*, *Broussard* is irrelevant to every aspect of the instant case except that both cases involve allegations that the separation of powers doctrine was violated by a statute.

Contrary to Petitioner's apparent position, not every case opinion where a statute was found to infringe on the judiciary's right to govern court proceedings is applicable to the instant case and circumstances.

e. The Nevada Case Whitlock v. Salmon Supports Mr. Cario's Position, Not Petitioner's

The Petition concludes with an argument that *Whitlock v. Salmon*, 104 Nev. 24 (1988) supports her position. Pet. at 21-22. To the contrary, *Whitlock* supports Mr. Cario's position.

In *Whitlock*, the Nevada Supreme Court addressed a separation of powers conflict between NRCP 47(a) (1966) and NRS 16.030(6). 104 Nev. 24. At that

time, NRCP 47(a) gave the trial judge discretion to prohibit attorneys from conducting *voir dire*: "the court shall conduct the examination of prospective jurors and may permit such supplemental examination by counsel as it deems proper." *Id.* at 26. NRS 16.030, in contrast, affected the judicial discretion by vesting in the attorney the absolute right to conduct *voir dire*: "The judge shall conduct the initial examination of prospective jurors and ***the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted***." Nev. Rev. Stat. 16.030(6).

Although there was a clear conflict between the rule and the statute, and although the statute clearly affected the court's procedure, the Nevada Supreme Court upheld the statute, stating that "[t]he Legislature thus saw fit to enthrone the historical practice selectively enjoyed by counsel in most trial proceedings, in a substantive enactment that vouchsafes the right to all counsel in every department of our district courts," and that "the statute confers a substantive right to reasonable participation in *voir dire* by counsel, and this court will not attempt to abridge or modify a substantive right." *Whitlock*, 104 Nev. at 26. The process of *voir dire* exists solely within context of court procedure, but the Nevada Supreme Court found that the Legislature intended to confer the right to attorney-conducted *voir dire* as a substantive right, and thus upheld the statute.

This Court in *Whitlock* thereby recognized that the Legislature can create

substantive rights that affect the procedure of the court's process and that sometimes those rights only exist within the context of court procedure.

CONCLUSION

Because the substantive rights conferred by NRS 52.380 preempt the conflicting provisions of NRCP 35, Mr. Cario can audio-record and have an observer of his choice present at his NRCP 35 orthopedic exam, including his attorney or attorney's representative.

DATED this 26th day of July, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answering 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 the applicable Rules of Appellate Procedure, and in particular NRAP 21(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman. I further certify that this brief complies with the page limitations of NRAP 21(d) because it does not exceed 7,000 words or 650 lines of text, as this brief contains 6,689 words and 607 lines of text.

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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 26th day of July, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of July, 2021, this document was electronically filed with the Nevada Supreme Court, thus electronic service of the foregoing **REAL PARTY IN INTEREST'S ANSWERING BRIEF** shall be made in accordance with the Master Service List as follows:

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